



EMPLOYMENT TRIBUNALS

Claimant: Mrs P Haddock

Respondent: The University of Chester

Heard at: Liverpool (by CVP)

On: 11-18 January 2021

Before: Employment Judge Buzzard
Mr A Murphy (CVP)
Mrs J E Williams (CVP)

REPRESENTATION:

Claimant: Mr Foden of Counsel

Respondent: Mr Smith of Counsel

JUDGMENT having been sent to the parties on 15 February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Issues

- 1.1. The only claims that were pursued in the final hearing of the claimant's claims were all brought under the Equality Act 2010. All the claims related to the protected characteristic of disability.
- 1.2. The claims pursued were as follows:
 - 1.2.1. Direct disability discrimination under section 13 Equality Act 2010;
 - 1.2.2. Discrimination arising from disability under section 15 of the Equality Act 2010; and
 - 1.2.3. Victimisation under section 27 of the Equality Act 2010.

1.3. The respondent conceded, as part of the case management process, that the claimant was a disabled person at the relevant times. This concession extended to the following health conditions only:

1.3.1. Hypothyroidism; and

1.3.2. Anxiety/depression.

1.4. Although the claimant has at times referred to other health issues, it was confirmed at the outset of the hearing that no other health conditions are relied on as amounting to a disability for the purposes of any claim pursued.

2. Alleged Discriminatory Acts

2.1. At the outset of the hearing the alleged discriminatory acts the claimant's claims rely on were discussed. These had been set out in full in at a case management hearing before EJ Horne in October 2020. They were subsequently recorded in EJ Horne's note to the parties following that hearing.

2.2. There were six alleged discriminatory acts identified.

2.3. At this hearing the claimant confirmed that only two of the six acts of discrimination set out before EJ Horne were now relied on. The claimant's claims that the other identified acts were in any way discriminatory were withdrawn.

2.4. The only remaining alleged discriminatory acts were as follows:

2.4.1. an alleged failure to investigate the claimants allegations of bullying, harassment and discrimination made on 4 June 2019; and

2.4.2. the claimant's dismissal.

3. These acts were all relied on as less favourable treatment for the direct discrimination claim, detriments for the victimisation claim and unfavourable treatment for the s15 claim.

4. The Protected Act for the claimant's Victimisation claim

4.1. The claimant confirmed to the Tribunal in the course of her evidence that a single protected act was relied on in her victimisation claims. This position was re-affirmed by the claimant's representative in submissions.

4.2. The details of the single alleged protected act relied on by the claimant were as follows:

- 4.2.1. The date the claimant did the protected act was 4 June 2019;
- 4.2.2. The protected act was done in a meeting between the claimant and a Mr Lee Border;
- 4.2.3. The protected act took the form of a reporting of an act of harassment the claimant had witnessed a colleague being subjected to. Specifically the claimant alleges she reported that she had overheard comments made about that colleague, referred to as Emma, speculating that Emma was “*bipolar*”, and that this had “*freaked them out*”, or words to that effect. For ease this is referred to in these reasons as the ‘*Emma Incident*’.
- 4.2.4. The Emma Incident occurred in early 2018. The claimant’s position is that this was not the first time she had reported this incident, but no earlier report of the incident is relied on as a protected act for the purposes of her claim.
- 4.3. The respondent’s position is that this protected act did not occur as alleged or at all.
- 4.4. The claimant conceded via her representative, and also in her evidence, that the other alleged references to bullying she made in the meeting of 4 June 2019 were not matters that related in any way to the claimant’s protected characteristic of disability, or indeed to any protected characteristic. As a result it was conceded that these were not matters that could fall within the remit of the Equality Act 2010, which meant that they could not be any part of a protected act for a claim of victimisation under that Act.

5. Withdrawn Claims

- 5.1. There were a significant number of claims the claimant had identified in advance of the final hearing that were withdrawn. Some of these were withdrawn as part of the case management process prior to this hearing, and some of them at this hearing.
- 5.2. The following claims were dismissed following withdrawal by the claimant:
 - 5.2.1. a claim for unfair dismissal;
 - 5.2.2. a claim for breach of contract;
 - 5.2.3. a claim of either detriment or dismissal in relation to making a protected disclosure, colloquially known as a whistleblowing claim;

- 5.2.4. a claim of discrimination by failure to make reasonable adjustments;
- 5.2.5. a claim of indirect disability discrimination;
- 5.2.6. any claim of harassment, specifically disability related harassment.

6. The Relevant Law

- 6.1. Part 5 of the Equality Act 2010 applies to employees prohibits discrimination against employees in the workplace. Section 39 states:

“39 Employees and applicants

.....

(2) An employer (A) must not discriminate against an employee of A's (B)—

- (a) as to B's terms of employment;*
- (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
- (c) by dismissing B;*
- (d) by subjecting B to any other detriment.*

- 6.2. This prohibits discrimination by dismissal or by subjecting an employee to any detriment.
- 6.3. The right to make a claim in an Employment Tribunal in relation to a breach of these provisions of Part 5 comes from Chapter 3 of Part 8 of the Equality Act 2010. Specifically, s120 states:

“120(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work);.....”

- 6.4. Under this a Tribunal has the jurisdiction to determine if prohibited discrimination or victimisation has occurred.
- 6.5. The definition of discrimination comes from Part 2 of the Equality Act. This firstly creates the concept of protected characteristics, the relevant one here being disability – which is accepted.

6.6. Part 2 Chapter 2 goes on to define what discrimination and victimisation are. There is more than one form of discrimination relevant to the claimant's claims. The relevant law as it applies to each is noted below.

6.7. Direct Discrimination

6.7.1. Direct Discrimination is defined by s13 of the Equality Act as when:

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.

6.7.2. Direct discrimination therefore normally requires the claimant to identify a comparator. It is clear from the wording of the section, '*or would treat others*' that a hypothetical comparator can be used.

6.7.3. The concept of "less favourable treatment" is inherently a comparative process, without comparison it is not possible to determine if the treatment is less favourable.

6.7.4. A submission was made on behalf of the claimant regarding the need for a comparator, actual or hypothetical, in a claim of direct discrimination. In recent years the higher courts have emphasised that in cases where there is no actual comparator, or where there is a dispute about whether a comparator is an appropriate comparator, tribunals should focus on why the claimant was treated in the way that he or she was treated. Was it because of a protected characteristic? The point has been made, among others, by Lord Nicholls in **Shamoon v Chief Constable of the RUC** [2003] IRLR 285 (at paragraph 11), Mummery LJ in **Aylott v Stockton on Tees BC** [2010] IRLR 94 (at paragraph 41 – "*There is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others?*") and **Underhill J in Cordell v FCO** [2012] ICR 280 (at paragraph 18).

6.7.5. If a Tribunal is satisfied that a protected characteristic was one of the reasons for that less favourable treatment, that will be sufficient to establish direct discrimination. The protected characteristic does not have to be the sole reason for the less favourable treatment. It does not have to be the principal, or even one of the principal reasons. It is enough that it is a contributing cause in the sense of a "*significant influence*" – Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572, at 576.

6.7.6. Less favourable treatment is not defined in the Equality Act 2010. Judicial guidance from decided cases makes it clear that the question of

whether treatment is capable of amounting to less favourable treatment is a question for a Tribunal to decide, not the claimant. The EAT in **Burrett v West Birmingham Health Authority**[1994] IRLR 7 made it clear that the mere fact that a claimant thinks they are being treated less favourably does not mean that they are. However the House of Lords in **R v Birmingham City Council ex parte Equal Opportunities Commission**[1989] AC 1155, gave guidance that the test for less favourable treatment must not be onerous. Whilst not determined by the claimant, the Tribunal must not disregard the perception of the claimant.

- 6.7.7. In summary, the determination of whether treatment is less favourable is for the Tribunal to make, taking into account the perceptions of the claimant.
- 6.7.8. Establishing less favourable treatment is not however sufficient: for the claim of direct discrimination to be made out the conduct complained of must be also be '*because of* the claimant's disability. This is a question of fact to be determined by application of the reversed burden of proof as set out below.

6.8. *Discrimination Arising from Disability*

- 6.8.1. Discrimination arising from disability is defined by s15 of the Equality Act which states:

15(1) A person (A) discriminates against another (B) if, A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

- 6.8.2. The claimant has to show that she was treated unfavourably. It is clear that dismissal is unfavourable, and this was accepted by the respondent.
- 6.8.3. The respondent did not accept that the second alleged act of unfavourable treatment either occurred as alleged by the claimant, or if it did occur it was not accepted that it was unfavourable. The second act was the alleged failure to investigate the claimants allegations of bullying, harassment and discrimination made on 4 June 2019.
- 6.8.4. The question of whether this second act occurred, and if it did whether it was unfavourable is one of fact for the Tribunal to determine.
- 6.8.5. Establishing unfavourable treatment is not however sufficient. For a claim of discrimination to be made out, the unfavourable treatment must be

'because of something arising as a consequence of the claimant's disability.

- 6.8.6. There was an argument from the respondent that any treatment found to be unfavourable and to be because of something arising in consequence of the claimant's disability was justified and thus not unlawful. The Tribunal did not progress to consider that argument, given it was found that the claimant had failed to establish any discrimination to which this justification defence would apply to in any event.

7. Victimisation

- 7.1. The definition of victimisation appears in section 27 Equality Act 2010:

27(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.*

- 7.2. From this it is clear that any claim of victimisation must identify a protected act that has been done by the claimant. Without that element, no claim of victimisation can succeed.

- 7.3. The Equality Act 2010 defines what a protected act is. This definition is set out in s27(2), which states:

27(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 another person has contravened the Act.*

- 7.4. From this it can be seen that it is an essential ingredient of any protected act that it relates in some way to the Equality Act 2010.

8. The Burden of Proof

8.1. Considering the claimant's claims are all under the Equality Act 2010, the burden of proof is determined by s136 of that Act. The relevant parts of this section state:

(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.*

8.2. This in effect reverses the traditional burden of proof so that the claimant does not have to prove discrimination has occurred which can be very difficult. Section 136(1) expressly provides that this reversal of the burden applies to '*any proceedings relating to a contravention of this [Equality] Act*'. Accordingly it applies to both the claimant's discrimination and her victimisation claims.

8.3. This is commonly referred to as the reversed burden of proof, and has two stages.

8.3.1. Firstly, has the claimant proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination? This is more than simply showing the respondent could have committed an act of discrimination.

8.3.2. If the claimant passes the first stage then the respondent has to show that they have not discriminated against the claimant. This is often by explanation of the reason for the conduct alleged to be discriminatory, and that the reason is not connected to the relevant protected characteristic. If the respondent fails to establish this then the Tribunal must find in favour of the claimant. With reference to the respondent's explanation, the Tribunal can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case.

8.3.3. It is not necessary for the Tribunal to approach these two elements of the burden of proof as distinct stages. The court of Appeal in **Madarassy v Nomura International plc** [2007] EWCA Civ 33 gave useful guidance that despite the two stages of the test all evidence should be heard at once before a two stage analysis of that is applied.

8.3.4. The burden of proof does not shift to the employer simply when the claimant establishes a difference in protected characteristic and a difference in treatment without more. Those bare facts only indicate the possibility of discrimination. They are not sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. A tribunal is not entitled to draw an inference of discrimination from the mere fact that that the employer has treated an employee unreasonably and that the employee in question has a protected characteristic – **Glasgow City Council v Zafar** [1998] IRLR 36. However, discrimination may be inferred if there is no explanation for the treatment. That is not an inference from the treatment itself but from the absence of any explanation for it (**Bahl v The Law Society** [2004] IRLR 810).

9. The Evidence

9.1. The tribunal heard from the claimant on her own behalf. The claimant had produced three witness statements. The first of these was related to the issue of disability, prepared for an earlier preliminary hearing to determine that issue.

9.2. For the R the ET heard from the following witnesses:

9.2.1. Adrian Lee the respondent's in-house lawyer and University Secretary at the respondent at the relevant time;

9.2.2. Brian Fitzpatrick the Pro Vice Chancellor of the respondent at the relevant time;

9.2.3. Henry Blackman the acting director of learning and information services for the respondent at the relevant time, and Michelle Turner's line manager;

9.2.4. Lee Border a customer services manager with the respondent and the claimant's manager; and

9.2.5. Michelle Turner an Assistant Director with the respondent and Mr Border's manager.

9.3. In addition to this the Tribunal were presented with a significant agreed bundle of documentary evidence.

10. Late Disclosures

10.1. There were a number of late disclosures of evidence in this case.

- 10.2. The respondent disclosed, at the outset of the hearing, a copy of the respondent's Dignity and Respect Policy, which it was stated had been omitted from the hearing bundle in error. There was no dispute about the accuracy or reliability of that copy of the policy. It was accepted by all parties and the Tribunal as evidence, and was referred to at times during the hearing.
- 10.3. The claimant disclosed, part way through her evidence, copies of an alleged contemporaneous diary which she referred to in support of the oral evidence she was giving in response to cross examination. After some delay, these diary entries were produced. Two versions of the diary were produced. Whilst these were similar there were additions to the second version. The additions were not relied on by the claimant as being contemporaneous. No explanation for the late disclosure of these documents was provided by the claimant. The claimant did state in her evidence that at least one version of this document had been sent to her solicitors in recent weeks, specifically during December 2020. The Tribunal permitted the inclusion of these late disclosures as part of the documentary evidence.

11. Scope of the Evidence

- 11.1. The scope of the documentary evidence and the coverage of the various witness statements went significantly beyond the issues that remained in dispute. This appeared to be a consequence of the fact that significant concessions and the withdrawal of allegations had occurred at the start of, and then during, the hearing.
- 11.2. The Tribunal made no finding of fact in relation to any part of the evidence that the Tribunal did not find was relevant to the claims remaining in dispute.

12. Background

- 12.1. The following background facts were not in dispute between the parties.
- 12.2. The claimant had been previously employed by the respondent between 2014 and 2016 under a fixed term contract. Her role at that time was the delivery of IT training to staff and students as well as IT support more generally. The claimant's fixed term contract expired and it was not extended or renewed. Her first period of employment ended in 2016.
- 12.3. The claimant was re-employed by the respondent from 17 July 2017 as a Customer Service Assistant working in a team of around six persons. The team the claimant worked in was newly formed, or was being newly formed, for that purpose.

- 12.4. The claimant's manager was Mr Border. The head of the team the claimant worked for was Ms Harper. Ms Harper did not start working for the team until shortly after the claimant.
- 12.5. The claimant was dismissed by the respondent on 10 July 2019. This was just short of her having reached two years' continuous service, which if reached would have afforded her the right not to be unfairly dismissed.
- 12.6. The respondent admits that the claimant was dismissed without anything that could be described as a fair disciplinary, or other, process. The respondent paid the claimant an additional month's pay following her dismissal. The claimant was informed that this was to represent the time that the respondent believed a fair process would be likely have taken to conclude.
- 12.7. The respondent was very clear when dismissing the claimant in stating that the timing of the claimant's dismissal was specifically intended to avoid her reaching two years' service and gaining the right not to be unfairly dismissed.

13. Findings

- 13.1. All the factual findings made by the Tribunal were unanimous. For ease of reading, those findings are grouped by reference to the claims and issues they were found to relate to, rather than as a single chronological sequence.

14. *Did the claimant do the protected act as alleged in her victimisation claim?*

- 14.1. There was a fundamental dispute between the parties as to whether or not the claimant had indeed done the protected act she relied on. The details of that alleged protected act are set out in full at paragraph 4.2 above.
- 14.2. In the context of this case the claimant first referred to the Emma Incident whilst under cross examination. At that point she asserted that she had specifically mentioned the Emma Incident at her meeting with Lee Border on 4 June 2019.
- 14.3. Mr Border for the respondent was consistent and clear that the claimant had made no mention of the Emma Incident at the meeting he had had on 4 June 2019 with the claimant. The notes taken in the meeting of 4 June 2019 were before the Tribunal. These notes do include any specific reference to the Emma Incident.

- 14.4. The Emma Incident is not identified in any of the claimant's three witness statements as having been raised on 4 June 2019 in the meeting with Mr Border. It was similarly not identified during the case management hearing, in the note following that, nor in the List of Issues as having been raised at that meeting. It was not referred to by the claimant in her appeal against her dismissal or her post-dismissal grievance.
- 14.5. The Emma Incident is not recorded in the claimant's own diary entry for 4 June 2019; referring specifically to the entry she stated in cross examination she had actually made on 4 June 2019. It was also not mentioned in the diary entry for 4 June 2019 in a, second, amended version of her diary entries, that the claimant produced. There was no explanation before this Tribunal, either in evidence or in submissions, as to why the diary entry claimed to have been made on 4 June 2019 did not refer to the Emma Incident.
- 14.6. The claimant in her statement says that she was, "*singled out for dismissal because I had raised an informal complaint about bullying and harassment and because the respondent feared that the complaint would extend to other employees*". This clearly suggests that the claimant, when drafting her own witness statement, believed that she was dismissed because she had made a complaint of bullying on 4 June 2019. The respondent does not dispute that the claimant made reference to other, not discriminatory, bullying concerns at the meeting of 4 June 2019. These other undisputed allegations of bullying are not suggested by the claimant to relate to a protected characteristic as defined in the Equality Act 2010.
- 14.7. Both parties made submissions regarding the reliability of the witness evidence that the other side had presented regarding whether the claimant had done the claimant protected act.
- 14.8. The claimant submitted her evidence should be preferred. The submission was not, however, as far as the Tribunal could see, supported by reference to the actual evidence or any significant or specific reference to the actual evidence presented.
- 14.9. The respondent submitted via counsel that the claimant's evidence had been manipulative and deliberately dishonest. This or equivalent words were put to the claimant at a number of points during her cross examination, and on each occasion the claimant denied that to be the case.
- 14.10. The respondent's representative in submissions referred the Tribunal to a number of points within the evidence we had heard relied on as supporting his submission that the claimant's evidence lacked honesty and the

respondent's evidence regarding the alleged protected act should be preferred.

- 14.11. The respondent's submission was that the claimant's claim that she referred to the Emma Incident at the 4 June 2019 meeting with Lee Border did not appear until it became apparent to the claimant, partway through her cross examination, that the non-discriminatory bullying she had previously referred to as being raised in that meeting could not amount to a protected act.
- 14.12. The claimant disclosed two diary documents, for the first time, during her cross examination. These diary documents were produced several hours after adjourning in the early afternoon to allow them to be located. The fact that the claimant had produced two versions of her alleged diary entries, and had only done so partway through her cross examination, was argued by the respondent to be relevant to an assessment of the reliability of the claimant's evidence.
- 14.13. The second version, which the claimant stated in evidence was that version she said she had sent to solicitors in December 2020 (a few weeks prior to this hearing), was materially different to the version that she stated in her evidence had been created contemporaneously. The claimant had made several additions to the document, including labelling events as discriminatory, in the amended diary entries.
- 14.14. The respondent's submission was that making such changes to what is asserted to be a contemporaneous note is indicative of a desire to manipulate evidence.
- 14.15. In addition to the changes made to the dated diary entries, the claimant had added to both versions of the diary document a section in italics at the start of the document, prior to then sequential dated entries. The claimant's evidence was that this was done as part of preparation for attending a meeting with the respondent to discuss her concerns. These italicised notes do refer to the Emma Incident.
- 14.16. There was, however, no evidence that the claimant had brought this note to the 4 June 2019 meeting where the alleged protected act was done.
- 14.17. The claimant's evidence was that she printed these out on A4 paper and then took them to a later meeting on 11 June 2019, with Mr Border and Michelle Turner. The respondent's witnesses disputed that the claimant had taken any typed and printed note to the 11 June 2019 meeting. The evidence from both Mr Border and Michelle Turner was that the claimant had appeared at the 11 June 2019 meeting with a handwritten note, not a

typed note. This was stated by them to have been written on A5 paper, which appeared to have been torn from a spiral pad.

14.18. There was no explanation before this Tribunal, either in evidence or in submissions, as to why the italicised notes were typed at the start of the diary document, out of sequence with the other dated entries in that document, and without any reference being given in the document to the date upon which they had been typed.

14.19. Stepping back and taking this evidence as a whole, the Tribunal unanimously do not find that the claimant's evidence that she made reference to the Emma Incident at the meeting on 4 June 2019 has any credibility. It contradicts every piece of written evidence before the Tribunal, apart from a typed undated alleged pre-meeting note, a note which the claimant did not disclose until part way through her cross examination. This is a note the claimant accepts she did not take to the 4 June 2019 meeting in any event. If, as the claimant asserts, a central part of her perception as to why she was dismissed is that she referred to the Emma Incident in the 4 June 2019 meeting, it is difficult to explain why it was not mentioned by her in any of her statements, in her written grievance, in her appeal against her dismissal, in the notes of any of the meetings she attended, in her diary entries made on 4 June 2019, in her claim form to this Tribunal, or in the case management discussion before Employment Judge Horne where the basis of her claims were fully explored.

14.20. The Tribunal finds itself unable to find any basis to disagree with the submission of the respondent regarding the weight that should be given to the claimant's oral evidence on this point.

14.21. For this reason, the conclusion of the Tribunal is that the claimant did not refer to the Emma Incident on 4 June 2019. Whilst it is clear, and accepted, that she complained of other alleged non-discriminatory bullying and the fairness of her rate of pay, she has conceded through her representative that these are not matters that are able to form the basis of a protected act for the purposes of a victimisation claim. They do not relate to the Equality Act 2010.

14.22. Accordingly, given the protected act she relies on is found not to have occurred, the claimant's claim of victimisation must fail and is dismissed.

15. *Did the respondent fail to investigate the claimant's complaints of bullying and harassment?*

15.1. Despite the extensive evidence the Tribunal heard from the respondent on this point, the determinative evidence in the view of the Tribunal can be

seen entirely within the claimant's own sworn testimony. Specifically, the claimant confirmed, in answers to questions put during her cross examination, that she had agreed to, and then participated in, a successful informal route to address the concerns she had raised.

- 15.2. This informal route resulted in a mediation process which the claimant confirmed, in her own words, resulted in her successfully getting the “*apology she wanted*”. When she was then asked, quite properly by the respondent’s representative, what additional investigation she believed the respondent should then have undertaken, she was clear that all she expected was a follow-up meeting to explain what had happened. She did not suggest that she expected further investigation. Given this, it is difficult to understand the basis upon which the claimant claims that it is in any way discriminatory for the respondent not then to have done further investigation.
- 15.3. It is accepted by the respondent that no follow-up meeting occurred.
- 15.4. Had the claimant been pursuing a claim for unfair dismissal, which she could not do because she lacked the continuous service so to do, the question of whether a fair procedure or investigation was undertaken may well have been central. This is not, however, a claim for unfair dismissal.
- 15.5. The respondent’s witnesses who were asked, were all clear and remarkably consistent when asked, somewhat repetitively, why no investigation was done. They each stated that the claimant’s concerns were addressed using the informal route, and accordingly no formal investigation was appropriate.
- 15.6. The notes of the 4 June 2019 meeting record that the claimant had not wanted to pursue a formal complaint. Mr Border in his evidence stated it was his belief that it was appropriate to accede to the claimant’s wishes in that regard. This evidence was supported by Michelle Turner.
- 15.7. The Tribunal was referred to the respondent’s Dignity and Respect Policy. It was put to a number of the respondent’s witnesses that this should have been applied. It was argued in submissions for the claimant that this should have been applied. This was in the context of a clear inference that it had not been applied, that inference flowing from the fact that there was no formal investigation.
- 15.8. Having read the policy, the Tribunal cannot find the inference that it was not applied can be credibly supported by the facts. That policy states, “*many issues of alleged bullying and harassment can be resolved informally*”. It goes on to discuss mediation as an approach to resolution of issues. Accordingly, following an informal approach and using mediation as part of that approach is an application of the policy. The policy goes on, at

paragraph 7.1, to make it clear that people are actually expected to try to resolve concerns informally, and if informal resolution is not successful a formal complaint can be made.

15.9. The policy further states at paragraph 7.4, “A *formal complaint of harassment should be made in writing by either letter or by using the form provided in Appendix 2*”. It goes on to say that, “*Any complaint should contain as much detail as possible to aid a subsequent investigation*”. The Tribunal were not directed to any formal written letter of complaint, or any completed form (from an appendix or otherwise) that the claimant claimed she had submitted. Nothing in the evidence before the Tribunal suggests that the claimant had ever complained that the informal solution applied had not addressed her concerns, or that she wished to pursue her concerns further to a formal complaint.

15.10. Taking the above into account, the Tribunal do not accept there is evidence from which it could be concluded that the fact that there was no formal investigation was in any way related to the claimant’s disability.

15.11. The reason why there was no formal investigation is clear, logical, obvious and absolutely apparent: and it was in no way connected even tenuously with anything to do with or arising from the claimant's health. It was entirely a consequence of the fact that the informal route to resolution was chosen by the claimant, the informal route was then applied including a mediation, the claimant got the apology she wanted as a result of that mediation, and then did not seek to raise any further or formal complaint that that informal process had failed to address her concerns.

15.12. Accordingly, the fact that there was not a formal investigation is found not to be tainted by discrimination in any way. The claimant’s claims that seek to rely on this omission as either unfavourable treatment, less favourable treatment, or if there had been a protected act a detriment, are accordingly found to be unsustainable.

16. Was the claimant’s dismissal discriminatory?

16.1. The claimant also claims that her dismissal was an act of unfavourable treatment and/or less favourable treatment.

16.2. The claimant also argued that her dismissal was a detriment for the purposes of her victimisation claim. Whilst the determination of whether it amounted to a detriment for the purposes of victimisation was not relevant, given the finding there was no protected act, the findings regarding the reason for the claimant’s dismissal would have applied equally to that issue.

16.3. The claimant appeared to try to assert alternative versions of the facts in relation to her dismissal, depending on which claim she was, at any one time, being asked about. The respondent's position is that the claimant was dismissed because of the ongoing disruption and breakdown of trust in the team.

16.4. The conflicting factual account from the claimant's evidence was as follows:

16.4.1. There was no disruption in the team;

16.4.2. There was disruption, but the claimant did not cause it; and

16.4.3. There was disruption which was caused by the claimant, albeit as a consequence of her disability.

16.5. These three factual assertions are mutually exclusive, i.e. they cannot all be correct. It is difficult to see how any two of these could be factually correct. The relevant material evidence and findings regarding these assertions is discussed below.

16.6. *There was no disruption in the team*

16.6.1. The claimant stated that she had not behaved in any way that could have, or indeed had, caused any disruption to the team. At the case management hearing before Employment Judge Horne the claimant was recorded as follows by Judge Horne in a note:

"At today's hearing I asked both the claimant and her counsel to clarify whether the claimant would seek to argue that the decision to dismiss her was motivated by anything such as any behaviour on her part that had arisen in consequence of her disability. Her answer, which was emphatically 'no', was adopted by her counsel. It is the claimant's case that she was not dismissed because of any genuine belief about the way she behaved, but that allegations of behaviour were used as a pretext to dismiss her because of her disability itself. It was on this basis that the claimant asserted that she was subject to direct discrimination."

16.6.2. At points in her oral evidence the claimant affirmed her position that there was no disruption, and that she had not behaved in a way that could have caused any disruption.

16.6.3. During the cross examination of the claimant the Tribunal noted that the claimant's own evidence about the level to which there had been a breakdown of trust between her and the respondent shifted and moved. Her initial evidence was that there was no breakdown of trust at all. When a number of points where significant evidence of tensions and

breakdowns was highlighted, the claimant shifted her evidence to saying that she meant by that that there was no breakdown of trust “*at the end of her employment*”, because by then there had been changes to the constitution of the team. This may or may not be correct, but such an assertion implicitly accepts, undeniably, that prior to the end of her employment there had been problems with the team and a breakdown.

16.6.4. The claimant is also noted as having stated in answer to a question put in cross examination that she did not believe that relationships were “*beyond repair*”. Again, this is not a statement which can in any way be reconciled with an assertion that there were no problems with relationships. Relationships without problems are never in a situation where you have to describe them as not being “*beyond repair*”.

16.6.5. The claimant has also suggested that if an investigation had been done by the respondent they would have discovered that the discord in the team was not actually her fault. This must logically amount to an implicit acceptance that there was discord, otherwise her position would have been that an investigation would have determined that there was no discord at all, not that it was not her fault.

16.7. *There was disruption, but the claimant did not cause it*

16.7.1. At times during the cross examination the claimant appeared to acknowledge that there was disruption, but sought to blame others for that disruption. The claimant stated that there had been disagreement and confrontation but that that was not a breakdown of relationships.

16.7.2. The Tribunal struggled to understand how “*disagreement and confrontation*” does not fit within any sensible definition and description of “*disruption*”.

16.7.3. The claimant confirmed, openly, that she had sought to establish that she was working harder than other members of her team, and that she should be given a pay rise as a result. The claimant made written and oral requests of the respondent for information from the respondent to support her contention in this regard. The claimant’s written requests for information seeking to establish she worked harder than her colleagues were in evidence before the Tribunal.

16.7.4. It was put to the claimant that seeking to establish that she worked harder than colleagues and therefore should get a pay rise when they did not would inevitably cause tension within her team. The claimant’s response was that she could see no reason why that would be the case. She did not agree it would be likely to cause tension. To the Tribunal this

appears to show a significant lack of insight from the claimant about the impact her actions would be likely to have on colleagues.

16.7.5. Such a lack of insight suggests it is possible the claimant was genuinely unaware that she was the cause of the disruption in the team.

16.8. *There was disruption which was caused by the claimant, albeit as a consequence of her disability*

16.8.1. At points in her evidence the claimant stated regarding her disability;

“The depression and anxiety that I suffer from causes me to have disproportionately emotional responses to aspects of my working environment.”

and;

“My disability would often cause me to suffer with extreme lethargy and anxiety during work hours, therefore if at times I may have appeared to work colleagues to be unresponsive to whatever they were telling me it was certainly not being rude to them or anything of that nature. I will have been plagued by lethargy and anxiety, hence my response may have been perceived by others in a manner that was not how I had intended.”

16.8.2. This evidence appeared to be relied upon in the claimant’s submission that her disability had in fact caused behaviours that had been misunderstood by her colleagues. The submission made was that this had resulted in the respondent’s perception which then the reason for her dismissal. This is contradictory to her assertions in evidence that there were no such behaviours.

16.8.3. A number of questions were put to the claimant regarding the impact her disability would have upon her behaviours. The claimant was very clear in her responses: she did not accept that her behaviours would make her rude or would make her disruptive. At most the claimant asserted that her disability might make her unresponsive and withdrawn.

16.9. The evidence from the respondent was consistent, clear and surprisingly frank. The claimant was approaching two years’ service and had been identified as being a cause of disruption in her team.

16.10. Stepping back and taking the evidence as a whole there is clear evidence that there was ongoing tension in the team the claimant worked in. There is nothing in the evidence that creates any significant doubt over the

respondent's evidence that the claimant was dismissed as a result of this tension, and that this was done in haste prior to the claimant achieving two years' service, on the basis that after that point the respondent would then become obliged to adopt a much more difficult and lengthy process to establish a fair dismissal.

16.11. The claimant has stated emphatically that she believes she was dismissed because she was disabled. She stated emphatically that she believes she was dismissed because she raised the Emma Incident on 4 June 2019.

16.12. The claimant's evidence is internally contradictory as to fact. Whilst litigants can clearly make alternative submissions as to law, alternative evidence of fact by the claimant herself are difficult to find credible.

16.13. The respondent's witnesses' evidence appears logical, consistent (not only internally for each witness but also between witnesses) and consistent with all the contemporaneous documentation presented. This is with the notable exception of the late disclosed diary of entries which the claimant produced partway through her cross examination.

16.14. For these reasons, the evidence of the respondent's witnesses is preferred by this Tribunal and accepted as an honest and reliable explanation of the reason for the claimant's dismissal. The claimant was not dismissed for a reason that was in any way connected either to her disability or to behaviours as a consequence of her disability.

16.15. Even if the Tribunal disregarded the claimant's own evidence and assertion that there were no disruptive behaviours from her, and accepted there were disruptive behaviours, the evidence would not support a finding that these behaviours were symptoms of her disability. On her own account her disability would make her withdrawn or unresponsive, something that does not correlate with the described disruptive behaviours, such as seeking to prove her perception that she worked harder than her colleagues. Such behaviours appear to be aspects of the claimant's personality.

17. Conclusions

17.1. The claimant did not do the protected act she relies on, so her claim of victimisation under the equality Act 2010 cannot succeed and is dismissed.

17.2. The lack of a formal investigation by the respondent into allegations of non-discriminatory bullying raised by the claimant was entirely a result of an informal approach to address those concerns being chosen by the claimant and successfully applied. It was in no sense connected with the claimant's disability or anything that arose from that.

17.3. The claimant was dismissed in response to the disruption she caused, by conduct that was not shown to be related in any way to her disability. The fact this dismissal was done without process was a result of the respondent's desire to act before the claimant reached two years' continuous service, and is not related in any way to her disability.

Employment Judge Buzzard

Date: 11 February 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
15 February 2021

FOR THE TRIBUNAL OFFICE

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