



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Ms S Hurst

and

Respondent
Department for
International Trade

Heard at Reading on: 4, 5, 6, 7, 8 January 2021 (hearing)
14, 15 January 2021 (in chambers)

All conducted by CVP remote video
link

Appearances:

For the Claimant In person
For the Respondent Mr C Khan, counsel

Employment Judge Vowles
Members Ms A Brown
Ms H Edwards

RESERVED UNANIMOUS JUDGMENT

Evidence

1. The hearing was conducted by CVP video link. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Direct Disability Discrimination – section 13 Equality Act 2010

2. The Claimant was not subjected to disability (by perception) discrimination. This complaint fails and is dismissed.

Direct Sex Discrimination – section 13 Equality Act 2010

3. The Claimant was not subjected to sex discrimination. This complaint fails and is dismissed.

Direct Age Discrimination – section 13 Equality Act 2010

4. The Claimant was not subjected to age discrimination. This complaint fails and is dismissed.

Reasons

5. This decision was reserved and written reasons are attached.

Public Access to Employment Tribunal Judgments

6. The parties are informed that all judgments and reasons for judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant and the Respondent.

REASONS

Submissions and Claims

1. On 7 August 2019 the Claimant presented complaints of Unfair Dismissal, Direct Disability Discrimination, Direct Sex Discrimination and Direct Age Discrimination to the Tribunal.
2. The complaint of Unfair Dismissal was dismissed because the Claimant did not have the necessary 2 years qualifying employment.
3. On 24 September 2019 the Respondent responded and all claims were resisted.
4. The complaints were clarified at a case management preliminary hearing held on 13 February 2020 and set out in a case management order.

Evidence

5. The Tribunal heard evidence on oath from the Claimant Ms Sarah Hurst (Investigator), Dr Joanna Almond (friend) and Mr Jonathan Manley (friend and colleague).
6. The Tribunal also heard evidence on oath on behalf of the Respondent from Mr Thomas Westlake (Lead Investigator and Line Manager), Mr Joshua Smith (Lead Investigator and Line Manager), Ms Nora Holford (Head of Investigations) and Ms Sarah Milum (Joint Chief Investigator and dismissing officer).
7. The Tribunal considered a bundle of documents containing 1040 pages.
8. Both parties presented written and oral closing submissions.

Findings of Fact

9. The Claimant was employed as an Investigator at the Trade Remedies Investigations Directorate (TRID) which was part of the Department for International Trade.
10. The TRID was set up in late 2018 as a result of the Brexit process. The TRID was a case team of HEO/SEO Investigators preparing for undertaking transition reviews of EU anti-dumping and countervailing measures for UK specific industries. This included researching of EU case history, strategising for TRID's first cases, creating operational policy and managing key external and internal relationships such as analyst and legal teams.
11. The Claimant joined TRID on 1 October 2018 as did the other members of the TRID Team. The Claimant was employed from 1 October 2018 until her dismissal on 26 June 2019.
12. During her employment the Claimant's line managers were as follows:
 - October 2018 – January 2019 - Mr S Bartlett - Head of HR.
 - January 2019 – March 2019 – Mr T Westlake, Lead Investigator.
 - March 2019 – June 2019 – Mr J Smith, Lead Investigator.
13. Ms Holford was the next line of management being the line manager of both Mr Westlake and Mr Smith.
14. It was agreed by all concerned that the first five months of the Claimant's employment went well. However, Mr Westlake said that the Claimant had a direct communication style and he had received formal comments from colleagues regarding her communication style.
15. There was a nine month probation period for all new starters in TRID. The probation policy required that there should be a minimum of three probation review meetings at two months, five months, and eight months as well as regular informal meetings.
16. On 13 March 2019 Mr Westlake conducted the Claimant's five month review meeting. Review meetings were recorded in writing and Mr Westlake commented upon the Claimant's communication style. The probation review form included:

“We discussed at length some concerns that opinions presented in group discussions may be misconstrued as overly direct. It is important the objective of working productively and remaining approachable is achieved and we spoke about using a combination of open and closed questions/statements, rather than just closed questions/statements. This is true in situations internal to the TRA and with external stakeholders.”
17. In his evidence Mr Westlake said that the comments at the five month probation review meeting came after six to eight weeks of observing the

Claimant's conduct in group situations and he could see a pattern emerging, which is why he raised it with her directly.

18. The following day, 14 March 2019, there was an incident where the Claimant had asked a lawyer in the legal team a question arising from documents. The lawyer was upset about the way in which the Claimant had approached and asked the question in a direct way. This resulted in a complaint dated 15 March 2019 from Ms Clare Brodie (Chief Legal) to Ms Milum and Mr Kirkpatrick (TRID Joint Chief Investigators) which included the following:

"Lawyers mentioned this morning that an Investigator has apparently taken a screen shot of some of our legal advice highlighting the outstanding legal question about our powers during the IP, and (inappropriately in my view) started asking A to contradict this advice then discussed and gossiped with other investigators that there is a significant legal issue we are keeping from them... But it's completely inappropriate and a breach of security to take screen shots of legal advice and approach members of my team in that way. If they have a question, they should raise it through their management chain. They should not buttonhole my lawyers. They should not circulate and gossip about sensitive legal advice. I would be grateful for your confirmation that the screenshot of advice has been found and deleted, and that they are made aware this is unacceptable behaviour, and such advice absolutely should not be circulated outside TRID."

19. Mr Westlake was made aware of the incident after discussion with Ms Holford they agreed that the Claimant should be subject to an additional review at the seven-month point.
20. Mr Westlake and Ms Milum spoke to the Claimant about the incident. Mr Westlake recorded the discussion in the Claimant's probation review form as follows:

"Date of discussion: 18th March

Comments on achievement of objectives:

Use this space to comment on achievement of objectives including areas of exceptional performance. You must comment on objectives that were not met.

On Thursday 14 March, an incident occurred which was escalated to TRID senior management and SLT.

A comment from General Counsel in a policy document raised an issue surrounding legal concerns of Transition Reviews during an implementation period. Although the legal point you identified was valid and warranted further clarification, the communication style you employed to address this was not of a manner conducive to the values of TRID or the civil service.

Speculation surrounding this issue quickly spread to policy, legal department and your line manager. You proceeded to address the legal

team in an overly direct and an abrupt manner, in an open environment, to a point which appeared to undermine the skills and knowledge of the lawyers. This is not in line with your objective of developing positive interactions with colleagues. This is of further concern as this issue was raised with you at your Five Month Probation Review just one day previous.

Colleagues have also raised concerns of an informal basis regarding your approachability and communication skills. This was also highlighted at your Five Month Review.

Furthermore, an event prior to your Two Month Review, linked to working in accordance with Civil Service values resulted in an official complaint and required HR intervention and additional Equality and Diversity Training.

At present, you are not currently meeting the following objectives at the required standards for Performance and Conduct:

- 1. Conduct work in manner in accordance with Civil Service values*
- 2. Complete reasonable and relevant tasks set by manager or project leader. Demonstrate appropriate attitude when carrying out tasks and operation to appropriate deadlines.*

As a result, your probation period will now include an additional Seven Month Review to address these concerns. Weekly informal meetings with your line manager will continue.

In order to pass probation in your current role, the above objectives must be met. Development in communication can be achieved through coaching with your line manager at weekly meetings, refreshers of civil service online training and direct informal feedback (if such concerns regarding approachability and communication skills arise again)."

21. Additionally, Ms Milum sent an email to Ms Brody confirming that she had followed up the incident with the Claimant and the email included the following:

"I followed up the incident involving the interaction between Sarah H and 'A' on Thursday.

Sarah received a copy of the latest statutory guidance complete with comments from Richard in our policy team and she is working on drafting operation guidance on transition reviews. Included within the comments was a comment which on the face of it does suggest that we cannot do transition reviews. Sarah took a screen print of the relevant section – a copy of which is attached.

It appears that she then started to ask around the floor as to whether this was true showing the screen print of the relevant section on her computer

for ease of reference. That included challenging 'A; as to whether it was right or not.

In what I can only describe as a difficult conversation I have made clear that the way in which she went about dealing with her concern was not appropriate and discussed with various ways in which she could have handled in differently. I am not sure how much that I said landed but I did make things clear including a clear instruction that we had processes for seeking legal advice in writing and that these must be followed. Clare I know that you reissued the guidance on getting advice as we spoke.

I also met with Sarah's report and countersigning officers to fill them in what had occurred and the conversation including my conversation. This type of reaction is not new and other examples have featured in performance reviews to date. Her line manager will be taking the latest incident forward against that background and giving clear support and guidance on the changes what required in order for probation to be successfully concluded."

22. The Claimant gave her own account on 26 March 2019 to Mr Westlake and Ms Holford as follows:

"Here is my account of my interactions regarding the status of transition reviews during the implementation period, for the record.

I was asked to write part of the manual chapter on transition reviews and Richard and Tom sent me some relevant guidance and other materials. Some of the guidance contained comments from TRID staff. For clarification I made a screenshot of a comment by Clare Brodie that said that would not have competence to conduct transition reviews during the implementation period, which is some that I and other investigators have also long been concerned about.

I asked Richard about this and he told me that indeed we would not be conducting transition reviews during the implementation period. I was rather shocked by this news and asked 'A' about it. She said that would be able to conduct transition reviews. I suggested that she should with Clare because they seemed to have conflicting views. I subsequently solicited advice from Toby, who agreed that we would not be able to conduct transition reviews during the implementation period. He then checked with the policy team and came back and told me that we would start transition reviews in January 2020 – yet another scenario. The following day I asked Geoff the same question and he assured me that this would be addressed at the stand-up later in the day as it was a very important question.

Following a full and useful discussion with Sarah Milum about these events, I was informed by Tom that I needed to have a seven month probation review because of my poor communication skills.

I remain baffled."

23. In her evidence the Claimant said that it was at this point that everything changed, and that Mr Westlake handed her the seven-month probation review in early March 2019 on the basis of the incident involving the lawyer. She said from then on her managers made her life “*a living hell*”, that she was subjected to “*punitive measures*” and that she was subject to treatment on “*discriminatory and false grounds*”.
24. On 28 March 2019 a meeting was held with the Claimant, attended by Mr Westlake, Mr Bartlett (HR) and Mr David Birch (support for the Claimant). The purpose of the meeting was to talk about the incident that had occurred on 14 March 2019. The note of the meeting records that the incident was discussed (it is documented in the correspondence above). There was also discussion about the following matters:

“In addition to this incident colleagues had also raised concerns on an informal basis in general me regarding Sarah’s approachability and communication skills and style which I highlighted during her five-month probation review on 13 March...”

Tom introduced the meeting and the comments as described above. Sarah indicated that she did not wish to comment during the meeting. Although interjecting at several points of feedback during all points of the meeting, Sarah did not wish to discuss any matters further – despite being offered several opportunities to do so as a result of, and in addition to, her interjections. Some of the comments made by Sarah were inappropriate, in terms of being rude, and of a sarcastic nature...

Because of the issues above it was confirmed to Sarah that at present she is not meeting the following objectives at the required standards for performance and conduct.

- a. Conduct work in a manner in accordance with Civil Service values.*
- b. Complete reasonable and relevant tasks set by manager or project leader, demonstrate appropriate attitude when carrying out tasks and operation to appropriate deadlines.*

Support was offered to help Sarah improve in the areas highlighted. This included:

- Line manager support and coaching*
- Civil Service-Learning activities signposting to appropriate courses and materials*
- Acknowledging, seeking out and taking on board feedback line manager and others.*

At this point Sarah decided to leave the meeting as she disagreed with the above points where of concern and did not believe she required a review at the seven-month stage.”

25. On 29 March 2019, at the Claimant’s request, Mr Westlake was replaced as the Claimant’s Line Manager by Mr Smith. Ms Holford recorded in her e-mail of 29 March 2019 – *“Just to emphasise, this change is in response to Sarah’s behaviour and refusal to engage with Tom”*.
26. Between 4 April 2019 and 1 May 2019, Mr Smith and the Claimant held weekly meetings.
27. On 2 April 2019 Mr Jones explained to the Claimant that he wanted to help her develop the necessary skills in the areas of interpersonal relations but there would still be a seven-month probation review to track her progress.
28. On 30 April 2019 (wrongly recorded as 1 May 2019) Mr Smith held the seven-month review meeting with the Claimant. The review form recorded the following:

“I had mentioned to Sarah that we are working on developing her behavioural conduct in group situations and we chat about such behavioural dynamics during our weekly chats. Previously it has been reported that her opinions presented in group discussions may be misconstrued as being overly direct and this has been observed by some parties in dealings with the legal team, team meetings, desk interactions, etc.

We have agreed that going forward she will provide feedback to me weekly any challenges she faces before necessarily bringing it in front of wider group situations.

She understands this and her behaviour in this area in recent times has shown improvement but it is still a work in progress”.

29. The report recorded that the Claimant was on track to meet the required standards at the end of the probation period in terms of attendance, performance, and conduct. Mr Smith told the Claimant that she had passed her seven-month review but that this would need to be approved by Ms Holford who was the counter signing officer. He then e-mailed the probation review form, with all the boxes for the required standards ticked, to Ms Holford. She then had a meeting with Mr Smith and explained that she still had significant concerns about the Claimant’s behaviour.
30. Ms Holford arranged a further review meeting with the Claimant for 8 May 2019. She also spoke to a member of TRID’s HR team about whether the Claimant’s behaviour might be as a result of her being on the autism spectrum. She had a meeting with Mr Bartlett and Mr Smith and they discussed whether they would be able to discuss with the Claimant the possibility that she might be on the autism spectrum. They took the view that if they considered the Claimant may have a disability then they would

need to raise that with her and they discussed the possibility of it being done in a formal meeting, a possible formal extension of probation and an Occupational Health referral.

31. There was no formal written record made of the meeting with the Claimant on 8 May 2019 but Ms Holford's speaking notes were included in the document bundle. The speaking notes included the following:

"Intro

- *We are calling this meeting today to discuss your informal 7-month probation review.*
- *You have continued to show strong development in performance and your attendance has been fine.*
- *In short, you have demonstrated in some areas that you are a high performer. We see a future for you within this organisation.*
- *We want to put you at ease: you are not being dismissed today!*
- *Challenges in behaviour remain, and we want to work with you together to ensure you develop into a fine civil servant.*
- *Please let us speak and then you will have ample time to respond.*

Extended probation Form/Process and Spectrum Issue

- *As you are well aware, there were behavioural issues highlighted at the March 2019 meeting that included abrupt and confrontational behaviour.*
- *It has not just been limited to interactions with Tom, but also interactions since in team meetings, conversations with Nora and others etc.*
- *It is relatively easy to dismiss an employee during probation. This is not what we are looking to do. We are investing in you.*
- *We are, however, considering instigating the process formally extending your probation so that we can work together to further development your conduct and behaviour*
- *Both Josh and I have worked and/or lived with people that displayed similar behaviour and faced similar challenges in group situations. These people have often been on the autistic spectrum. Do you think you may be?*
- *Going forward, we would like to work with you in these months of extended probation to continue to monitor progress, meet frequently as Josh have been doing, and have you meet some civil service experts on behaviour if you are willing.*

- *A lot of civil servants from time to time in their professional lives receive such guidance on a number of different issues and adjustments are often made.*
 - *If you acknowledge that you will continue to work on improving your conduct, accept entering the formal process to look at possibly extending your probation, and are open to talking with such behaviour experts within the civil service, we believe you will likely have a long-term role within this organisation.*
32. In her evidence, Ms Holford said that she tried to explore the possibility that the Claimant might be on the autism spectrum because she wanted to help her. She said that if she had a declared disability they could support her and ensure that her strengths were used within the role. For example, adapting her role or changing support mechanisms if advised to do so by Occupational Health and HR, working with the Claimant. She said the Claimant was not willing to engage in this conversation and denied having any issues and made it clear she felt it was an insult.
33. Mr Smith, who was also at the meeting, said that:
- “The meeting went ahead as planned but the Claimant was aggressive when Nora was in the room and refused to engage with constructive feedback. She kept saying that she was being falsely accused regarding matters and that there was no issue with her communication style. I recall that at one point she responded aggressively to Nora just saying “whatever” and as Nora left the room she asked Nora if she had autism.”*
34. On 8 May 2019, the Claimant raised a complaint to Mr Bartlett as follows:
- “I wish to make a bullying complaint about Norah. She has created immense stress in my life continuously for the past couple of month and now again puts me under pressure, speaking to me aggressively, telling me my behaviour is all wrong and asking if I have Asperger’s. I have never in my life experienced such aggression from a manager. “*
35. An Occupational Health referral was made to address stress and anxiety at work but there was no mention of the autism issue because the Claimant had made clear that she did not wish that matter to be pursued.
36. On 17 May 2019 the Claimant sent a circular to all members of the TRID staff asking for feedback on her personal performance.
37. On 20 May 2019 the Claimant repeated her complaint about bullying by Ms Holford. It was expressed to be *“a formal complaint against Nora Holford”*. She complained that the seven-month probation report produced by Mr Smith had been overturned by Ms Holford as she had been bullied by her.
38. On the same date, 20 May 2019, Ms Milum took over from Ms Holford as the Claimant’s countersigning officer in respect of her probation.

39. On 22 May 2019 the Claimant approached Ms Milum and said that she wanted to stop the review performance process, that she was being bullied and that she wanted to work from home.
40. On 23 May 2019, with the Claimant's agreement, Ms Milum visited the Claimant at her home accompanied by Ms Deborah Kay (HR). The visit took place because Ms Milum was concerned for the Claimant's welfare and the Claimant had told her that she could not cope and did not want to attend work. The Claimant agreed to undertake an Occupational Health Assessment and to visit her GP.
41. On 24 May 2019 the Claimant submitted a certificate from her GP stating that she was fit for work
42. The Occupational Health report dated 4 June 2019 confirmed that the Claimant had no underlying medical conditions and that she was fit for work. It was confirmed that the Claimant's ill health was solely work related and a stress risk assessment was recommended.
43. On the same date, 4 June 2019, Mr Smith at the Claimant's request, sent her a list of issues to be discussed at the eight-month review meeting which eventually took place on 19 June 2019. The list of issues included a record of the Claimant's "*many positive attributes*" but also referred to her "*delivery style that can be interpreted as being very direct, including a very intensive questioning style.*" Examples of her conduct were mentioned as follows:
 - 14 March 2019 – the incident involving the lawyer.
 - 20 May 2019 – sending the feedback request to all members of TRID.
 - 13 May 2019 – Peppered the facilitator with questions that came across as aggressive to some audience members, repeatedly asked the same question, very direct including of very intensive questioning style.
 - 16 April 2019 – In a group meeting proceeded to dominate the conversation. The next day approaching Ms Holford at her desk about staff leaving and communication thereof.
 - 30 April 2019 – Seven-month review meeting – Meeting on 8 May 2019 – your response was unconstructive and perceived as aggressive making a detailed conversation impossible.
44. The list of issues concluded:

"In summary, you appear to have the ability to interact and carry out your job duties in group and one on one situations and to positively interact and communicate with others but this has not yet been demonstrated in a sustained consistent manner."

45. On 5 June 2019 the Claimant presented a detailed response to Mr Smith's list of issues. She responded in detail to all of the examples given by Mr Smith and rejected each one and said that the criticism was very unfair.
46. On 19 June 2019 the eight-month probation review meeting was held attended by the Claimant, Mr Smith, Ms Tracy Callaghan (the Claimant's companion) and Ms Deborah Kay (note taker). During the course of the meeting, which lasted only 10 minutes, the Claimant said that all the allegations against her were fake and false and that all the outcomes had been decided in advance. She said that she wished to get the meeting over as quickly as possible and would not be discussing anything. She referred to the process as a fraudulent process and a parade of lies. She accused Mr Smith of being sexist and finally said "*this was a pattern of bullshit*" at which point Ms Kay decided to stop the meeting and the Claimant is reported as saying, "*Good I'm done with you*".
47. On 19 June 2019, the Claimant was formally suspended from work by Ms Milum in a letter which included the following:
- "I am writing to confirm our conversation earlier today that you are being suspended from duty until further notice. Your behaviour at the formal - performance probation meeting this morning confirmed to me that there has been a serious breakdown in the relationship between you and the department."*
48. On the same date, 19 June 2019, Mr Smith wrote to Ms Milum as follows:
- "My recommendation is for dismissal based on the lack of engagement/constructive discussion in today's meeting (and such behaviour being repeated throughout probation)."*
49. On 26 June 2019, Mr Kirkpatrick produced the outcome of his investigation into the Claimant's grievance. The Claimant's allegations were not upheld.
50. On the same date, 26 June 2019, Ms Milum sent a letter to the Claimant confirming that her employment was to be terminated with five weeks pay in lieu of notice. Her last day of service was to be regarded as 26 June 2019. The letter included the following:
- "I am writing to confirm the outcome of the formal performance meeting held on 19 June 2019. The meeting gave you an opportunity to discuss all aspects of your performance: the areas where it felt that you were meeting the requirements and provide examples of this; and also where it was considered that the required standards had not yet been demonstrated in a consistent way, with examples, and consider what this meant in terms of your probation period.*
- The details of what would be covered in the meeting were sent to you on 4 June 2019 as you requested.*

I have considered the information and evidence presented to Josh and your behaviour in the meeting itself. It was concluded that your performance has not met the required standards. This is because you have been unable to consistently demonstrate that you are able to meet the required standards of performance and behaviour in your interactions with colleagues.

We considered whether there were any other factors affecting you hence our request for your GP to confirm fitness for work. We also requested, and you agreed, to a referral to Occupational health. The Occupational Health reported confirmed that you were fit to continue with your current role but that you had reported some work-related stress. On OH advice you completed a Stress Risk Assessment and as per your request, this was not completed with your line manager but with another colleague. It was agreed with you that the Stress Risk Assessment would be reviewed after the formal meeting of 19 June 2019 at a mutually convenient date.

Additionally, in order to support you, upon your request, your line manager was changed following the 5 month probation review.

The Employee Assistance Programme (EAP) has been made aware to you on several occasions and I hope that you have taken advantage of their assistance.

After considering all the information and evidence, you have failed to meet the required standards expected of you in your current grade and your employment will be terminated.

You are entitled to five weeks' notice but you are not required to work your notice period. You will receive payment in lieu of notice. Your last day of service will be regarded as 26 June 2019."

51. The Claimant presented an appeal. An appeal hearing was held on 23 July 2019 chaired by Pat Cauthery. The appeal was not upheld and on 29 July 2019 the outcome of the appeal was confirmed in a letter to the Claimant which included the following:

"It is clear that you do not accept that the concerns expressed about your performance are valid. I note that your line management speak very positively about the quality of your output and your work ethic but felt that the way you engaged with others both within TRID and on occasion outside the organisation from time to time did not meet the standards required. In particular this concern revolved around a very direct style that could be perceived by others as being abrasive or abrupt, and not using the correct channels to engage with others. This led them to the view that in order for your performance in the round to be considered to have met the required standards, you needed to take account of feedback on how to improve in this area, and to do so consistently.

As a result of you not accepting these concerns and this feedback, I observe that you did not engage with your line management following the 8

May 2019 meeting, and in particular at the formal performance meeting on 19 June 2019. Because you did not engage with the issues raised at these meetings, I find that it was very difficult for your management to come to any other decision than the one that they did. Plainly, an extension to probation for an employee who refutes the performance concerns of management is not likely to be a credible alternative.

I have therefore not been able to hold your appeal and, therefore, the original decision to terminate your employment with effect from 26 June 2019 taken by the decision manager stands.”

52. Those are the background facts.

Relevant Law

Direct Disability (by Perception) Discrimination – section 13 Equality Act 2010

53. Section 13

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

54. The protected characteristic in this case is perceived disability by reason of autism.

55. In the decision of the Court of Appeal in the leading case of Madarassy v Nomura International Plc [2007] the court said:

“The Court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the Respondent could have committed an unlawful act of discrimination. They are facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not without more sufficient material from which a Tribunal could conclude that on the balance of possibilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination, a difference in status, a difference in treatment and the reason for the differential treatment.”

Claims and decisions

56. The claims and issues to be determined by the Tribunal were set out in the case management order made at the preliminary hearing on 13 February 2020 as follows: (in **bold**).

Direct Disability Discrimination

57. **Disability**

- (i) **The Claimant does not contend that she is a disabled person in accordance with the Equality Act 2010. The Claimant brings her claim on the basis that she was perceived as disabled.**
- (ii) **Did the Respondent's employee's Nora Holford, Josh Smith, and Sarah Milum believe that the Claimant was disabled within the meaning of s.6 (1) of the Equality Act 2010? (ie that she had a physical or mental impairment which has a substantial and long term adverse effect on the Claimant's ability to carry out normal day to day activities.**

58. The leading case on perception of disability is Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061.

“35. The starting point for the issues raised by these grounds is that it was common ground before us that in a claim of perceived disability discrimination the putative discriminator must believe that all the elements in the statutory definition of disability are present – though it is not necessary that he or she should attach the label “disability” to them. As Judge Richardson put it succinctly at para 51 of his judgment:

The answer will not depend on whether the putative discriminator A perceives B to be disabled as a matter of law; In other words, it will not depend on A's knowledge of disability law. It will depend on whether A perceived B to have an impairment with the features which are set out in the legislation.

That distinction between knowing the facts that constitute the disability and knowing that they amount to a disability within the meaning of the Act had already been drawn, albeit in a different context, by Lady Hale in her speech in Malcolm: see para 86 (P.1430F-G). Again, although it was common ground that this was the right approach, I should say that I agree that it is correct. In a case of perception discrimination what is perceived, must, as a simple matter of logic, have all the features of the protected characteristic as defined in the statute.”

59. The definition of disability in s.6(1) Equality Act 2010 is as follows:

6. *Disability*

- (1) *A person (P) has a disability if –*
 - (a) *P has a physical or mental impairment, and*

- (b) *The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.*

Schedule 1 Para 2 – Long term effects

- (1) *The effect of an impairment is long term if-*

- (a) *It has lasted for at least 12 months,*
(b) *It is likely to last for at least 12 months, or*
(c) *It is likely to last for the rest of the life of the person affected.*

60. The Tribunal was satisfied that Ms Holford, Mr Smith, and Ms Milum did believe that the Claimant was disabled within the meaning of section 6 of the Act. Prior to the seven month review meeting on 8 May 2019, attended by the Claimant, Ms Holford and Mr Smith, Ms Holford had discussed at a high level in the Respondent's organisation whether the Claimant's communication style may be as a result of her being on the autism spectrum. Ms Holford took HR advice which was extensive and detailed.
61. Ms Holford discussed the matter extensively with Mr Smith and he submitted a formal query to the Civil Service HR Case Work Team (supplied by the Ministry of Justice) about the matter. There was then a meeting held between Ms Holford, Mr Smith and Mr Bartlett where they discussed whether they could discuss with the Claimant the possibility that she might be on the autism spectrum. In his evidence Mr Smith said:
- "During my chat with Nora a point was made about whether the Claimant might be on the autism spectrum. This was not a new comment in terms of the Claimant's behaviour. Senior people within the organisation had watched what had happened between the Claimant and Tom, such that their relationship broke down and other members of the Senior Leadership Team had also experienced the Claimant's behaviour in meetings. A few people had discreetly raised the question of whether the Claimant might be on the autism spectrum, because of difficulties with communication that she seemed to have. We decided to raise the issue in order to explore ways to support the Claimant if she wanted to look into this. Having seen the Claimant's claim to the employment Tribunal, I deny that this was in any way discriminatory."*
62. It is clear that there was a perception as high as the Senior Leadership Team that the Claimant was a disabled person by reason of autism which is a long term, indeed life long, condition. It was perceived that this condition had a substantial adverse effect on the Claimant's ability to communicate effectively and reasonably and therefore an adverse effect on her ability to carry out normal day to day activities. Communication difficulties is a well-known symptom of autism.
63. The Tribunal concluded that the test in Coffey was satisfied.

(iii) has the Claimant established facts from which the Tribunal could decide, in the absence of any other explanation, on the balance of probabilities that the Respondent treated her less favourably than a non-disabled comparator of the same age and sex as follows:

a. **Nora Holford overturning the decision that the Claimant had passed her seven-month review and threatening the Claimant with an extension of probation beyond nine months**

64. The Tribunal concluded that there were plausible non-discriminatory reasons for Ms Holford's decision to overturn Mr Smith's assessment of the Claimant at the seven-month probation review stage.
65. Ms Holford raised the issue of autism only once at the meeting on 8 May 2019. The suggestion was immediately and strongly rejected by the Claimant and it was never raised by Ms Holford or anyone else thereafter. Ms Holford gave an explanation of reasons for overturning the decision. In her evidence she said:

"I always have to approve the contents of a probation review before it is finalised and the document produced following the discussion between Josh and the Claimant was a draft document which was always subject to my comment and review.

As such Josh and I had a chat and we both agreed that the Claimant's conduct wasn't such that she could go off site to meet stakeholders. As such as conduct wasn't reaching the required standard and that concern should be articulated to the Claimant in a review meeting. We agreed that a further review meeting should be held and one was subsequently arranged for 8 May 2019....

On Wednesday 8 May 2019 Josh and I held a further probation review meeting with the Claimant. We had prepared a script before this meeting which we tried to follow but the Claimant was argumentative and would not listen to what we were trying to say to her. I recorded in my notes when Josh and I raised examples of poor behaviour towards others, she did not accept any of the examples."

66. Ms Holford's contemporaneous notes of the meeting (page 183) are consistent with her evidence given to the Tribunal. The views of Ms Holford and Mr Smith were reinforced by the Claimant's conduct during the meeting on 8 May 2019.
67. The Tribunal concluded that the Claimant had not shown any causal link between Ms Holford's decision and the perceived disability. Mr Smith and Ms Holford had provided plausible non-discriminatory reasons for the

decision regarding the seven-month review. There was no less favourable treatment. A non-disabled person would have been treated no differently.

b. Josh Smith making unwarranted criticisms in justifying the 7 month performance review.

68. The seven-month review was in fact proposed by Mr Westlake, but it was conducted by Mr Smith. Mr Smith was satisfied on reasonable grounds that the seven-month probation review was necessary, and it was conducted on 30 April 2019. The relevant extract containing his criticism of the Claimant is quoted above. It was criticism, it was not “unwarranted”. The Claimant’s communication style was continuing to cause concern and it was reasonable and proper for him to record that in the review report.
69. The Tribunal concluded that there was no causal link with the perceived disability and there were plausible non-discriminatory reasons for Mr Smith’s criticism.
70. The Respondent pointed out, and the Tribunal accepted, that Mr Smith’s criticism was corroborated by some of the Claimant’s peers when she requested their feedback on her performance,

c. Nora Holford and Josh Smith seeking the Claimant’s agreement that she had Asperger’s syndrome.

71. The Tribunal found that although Mr Smith and Ms Holford did not seek the Claimant’s agreement, they did raise possibility of autism at the meeting on 8 May 2019. This had a reasonable and proper cause. The Respondent’s probation policy contained the following:

“40 If the employee has, or is likely to have a disability (as defined under the Equality Act 2010) that may have an impact on their conduct, attendance and/or performance, the manager should discuss with the employee what reasonable adjustments could be made. They may wish to consider suspending probation if the employee is temporarily unable to work in the substantive role to which they were hired or is away from work whilst awaiting reasonable adjustments.”

72. Ms Holford was clear in her evidence, which the Tribunal accepted, that her motive in raising the issue was because of concern for the Claimant’s welfare and that the matter should be explored because if the Claimant had a disability then reasonable adjustments could be considered to support her in the workplace. ACAS guidance encourages employers to hold an informal discussion with an employee if a disability is suspected. This was not less favourable treatment. Ms Holford took considerable steps to prepare for the meeting including consultation with the Senior Leadership Team, HR and the legal department. She drafted a script in preparation for the meeting. When the Claimant strongly rejected the suggestion, it was not pursued any further.

73. There were plausible non-discriminatory reasons for raising the issue of autism with the Claimant at the meeting on 8 May 2019.

d. Josh Smith ‘eavesdropping’ on the Claimant and subjecting her to criticism as a result.

74. There was evidence that Mr Smith did overhear a political conversation between the Claimant and Ms Holford in the open plan office. There was no evidence that Mr Smith subjected the Claimant to any criticism as a result of this matter.

e. Josh Smith characterising the Claimant’s contribution in meetings as destructive and confrontational.

75. The Tribunal found that Mr Smith did characterise the Claimant’s contribution as disruptive and confrontational on occasions. However, his views regarding her conduct were reasonable and had a well-documented basis in fact. It was based upon events that he had observed. Examples were set out in detail in Mr Smith’s list of issues and to the Claimant on 4 June 2019 which is referred to above. His record of such matters was well documented and had been communicated to the Claimant in advance of the meeting on 19 June 2019.

76. There was a plausible non-discriminatory reason for him to characterise the Claimant’s conduct as such.

f. Josh Smith in pursuing the formal 9 month performance review when the Claimant was suffering from stress.

77. The Tribunal found that it was not unreasonable for the nine-month probation review process to be continued even though the Claimant was suffering from stress. It seems that it was the probation review process, which was causing the stress, but it needed to be concluded by the end of the nine-month period in accordance with the Respondent’s probation policy. It was not unreasonable and it was not discriminatory to continue the process.

78. There was no evidence to link the decision to continue the probation review process with the perceived disability.

g. Sarah Milum in dismissing the Claimant at the end of her probationary period.

79. The reasons for the Claimant’s dismissal were set out in the letter dated 26 June 2019 which is quoted extensively above. The Claimant’s alleged conduct was set out in detail, with examples, in Mr Smith’s list of issues, sent to the Claimant on 4 June 2019. It is clear and would have been clear to the Claimant, that there were concerns about her direct communication style, intensive questioning during team meetings or one to one face interactions, repeating questions, abruptly leaving meetings and making other people feel uneasy and not realising how this behaviour came across

and impacted on others. All the examples given by Mr Smith were rejected by the Claimant. She rejected feedback and accused her managers. At the meeting on 19 June 2019, she refused to discuss these matters and referred to it as “a pattern of bullshit” and left the meeting.

80. The Claimant’s conduct was well documented and consistently recorded by her managers Mr Westlake, Mr Smith, and Ms Holford.
81. There were reasonable non-discriminatory reasons for her dismissal. Any other employee in the same circumstances, regardless of disability, would have been treated the same.
82. The Claimant failed her probation because of her conduct and her dismissal was not an act of perceived disability discrimination.

Direct Sex / Age Discrimination

83. **Has the Claimant established facts from which the Tribunal could decide, in the absence of any other explanation, on the balance of probabilities that the Respondent treated her less favourably than a male comparator and/or a comparator not of the Claimant’s age.**
84. The Claimant was female and aged 46 years. In her evidence she confirmed that paragraph 9 and 10 of her witness statement provided evidence in support of these claims as follows:

“9 Managers kept dangling the promise of being something to alleviate the stress they had caused, with the lengthy bullying investigation and stress risk assessment, but they never did anything – they only continued to pursue me. The June 19 performance review was the final straw after months of unjustified attacks and threats. I saw other people in the office sitting around chatting every day, young men laughing loudly messing around, while I tried to work quietly yet I was perceived as some kind of a problem. In some ways it was a relief to be marched out of the office by Sarah Milum and Deborah Kay after the meeting because being there had become a torture. Even whilst suspended I tried to make some more points by e-mail to boost my case, but I received no replies until getting the messages that my bullying complaint had been rejected and I had been dismissed.

10. *I believe that the reason for my appalling treatment was that the managers didn’t like an older experienced woman taking an interest in trade remedies and asking questions about how we would do things. They preferred the graduates who were sitting around chatting and let men be far more disruptive in meetings than I ever was. They put similar pressure on the lawyer Marcia who told me she and I were being targeted. Ironically some of these managers, Clare Bassett, Clare Brodie, Sarah Milum and Nora Holford were older women themselves. The managers then decided to associate their actions with their claim that I had Asperger’s, making me think that I had a disability and needed*

to somehow fix it or lose my job. They simultaneously accused me of being too passive and too direct.”

85. In her submissions at page 19, paragraph 105, the Claimant said as follows:

“My staff list

53 men identified, 37 women. 10 out of the 90 left the TRID to my knowledge, including myself. Sarah Milum and Clare Bassett have now also left. Of the Investigators listed, 35 are men and 16 are women. I estimate that 11 of the 51 people on the Investigative Team were older than me – including the Chief Investigators, John, and Sarah plus the expert advisor Jeff. I estimate that 3 of the 16 G7s on the Investigative Team were older than me. I counted 5 HEOs in the Investigative Team, 22 SEOs, 16 G7s, 4 G6s, the 2 Chief Investigators and Jeff. So, 23 people at G7 or above for 27 SEOs and HEOs. This seems like a disproportionate number of managers to write reports about people. In practice it also didn't seem that diversity meant encouraging the minority of women investigators to succeed in a male dominated environment....”

86. The events relied upon by the Claimant as being acts of sex and age discrimination are the same as those set out above in the claim for direct disability discrimination in addition to the following:

- a. **Nora Holford having favourites particular calling Kevin (Kev) and saying “You cheeky monkey” to another man and allowing Hamish to hold the floor in meetings.**
- b. **Nora Holford complaining that the Claimant was being discourteous to James Iddiols during a meeting.**

87. The Tribunal found there was no arguable case of age or sex discrimination. There was no evidence of any act or animosity by the Respondent and its managers towards the Claimant's age or sex.

88. The Claimant produced a list of comparators in her further and better particulars of her claim. The Tribunal found that notwithstanding the information provided by the Claimant above there was no evidence upon which the Tribunal could find or infer that she was treated less favourably than a hypothetical comparator or the comparators to which she named because of her age or sex. This claim was based upon unsubstantiated belief which had no evidential foundation.

89. The comparators cited included some brief detail of their circumstances, but no details were provided of any comparison between her treatment and theirs. It was unclear which comparators were relied upon in relation to which claims. It was not possible to compare the comparators with the Claimant's circumstances and no evidence to show differences in treatment because of age or sex. There was no evidence upon which a finding of discrimination could be based.

Summary

- 90. The Tribunal has not found any of the Claimant's claims proved. They were speculative. The fairness, or lack of it, of any treatment of the Claimant cannot, by itself, without more, amount to discrimination. There was no evidence of any animosity towards the Claimant's perceived disability, sex or age by the Respondent's managers. There was no evidence upon which the Tribunal could find or infer any disability, gender or age motive for any of the treatment alleged. And there were plausible, reasonable and well documented non-discriminatory reasons shown for the conduct of the Respondent towards the Claimant.
- 91. There was no evidence upon which the Tribunal could find or infer any discrimination on any of the protected characteristics referred to by the Claimant.
- 92. Accordingly, all the claims fail in their entirety.

I confirm that this is the Reserved Unanimous Judgment in the case of Ms S Hurst v Department for International Trade case no. 3321214/2019 and that I have dated and signed by electronic signature.

Employment Judge Vowles
Date: 31 March 2021

Sent to the parties on:

16th April 2021

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THY

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For the Tribunals Office