\

THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Y Dozie	**v**	**(1) Moorfields Eye Hospital NHS Foundation Trust** **(2) Venn Group Limited**

Heard at: London Central

On: 26-30 October 2020
23 & 24 November 2020
In chambers 15 February 2021

Before: **Employment Judge Glennie**
Ms T Shaah
Ms L Moreton

Representation:
Claimant: In person
Respondent: (1) Mr S Nicholls (Counsel)
(2) Mr T Sheppard (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. **The Claimant's application to amend the claim dated 26 October 2020 is refused.**

2. **All of the complaints in the claim are dismissed.**

REASONS

1. By her claim to the Tribunal presented on 19 October 2018, the Claimant, Ms Dozie, identified complaints of unfair dismissal and discrimination on the grounds of race, disability and sex. The Respondents, Moorfields Eye Hospital NHS Foundation Trust, and Venn Group Limited, disputed those complaints.

2. The Tribunal is unanimous in the reasons that follow.

3. Page numbers in these reasons refer to the agreed bundle of documents.

Procedural matters

4. There was a fairly extensive procedural history prior to the full hearing. A Preliminary Hearing for case management took place before Employment Judge Norris on 1 March 2019. The Claimant did not attend for medical reasons. EJ Norris decided to list a Preliminary Hearing in public on 24 April 2019 to determine three jurisdictional issues; whether the claims should be struck out or made the subject of a deposit order by reason of having no, or little, reasonable prospect of success; and (time permitting) whether the Claimant was a disabled person within the Equality Act definition.

5. On 17 April 2019 the Preliminary Hearing on 24 April was postponed and re-listed on 12 and 13 June 2019 (the first 2 days of the 3 originally given by the Tribunal for the full hearing). That Preliminary Hearing came before Employment Judge Wisby, who used the first day in an endeavour to clarify the issues in the case, producing an extensive list at pages 69 (b) to (g). EJ Wisby described this as "the issues currently identified between the parties which potentially fall to be determined by the Tribunal." The Claimant withdrew her complaint of unfair dismissal, which was dismissed on withdrawal. The Claimant did not attend on the second day for health reasons, and EJ Wisby made further orders, including for 3 additional Preliminary Hearings and for the final hearing over 5 days commencing on 15 January 2020.

6. A further Preliminary Hearing took place on 30 September 2019 before Employment Judge Hodgson. EJ Hodgson recorded that the process of defining the issues had not been completed at EJ Wisby's hearing and at pages 69(xiii) to (xv) set out the claims which were within the claim form and could proceed.

7. EJ Hodgson then defined the issues as follows:

"2.7 The Claimant relies on the protected characteristics of sex, disability, and race. She describes herself as a black person of African and Caribbean origin.

2.8 The specific allegations of direct race discrimination are as follows:

2.8.1 Allegation 1: By Llinos Bradley her line manager, during the second week of employment (1-7 June 2018) saying to a colleague (the information and security manager Mr Salmon) words to the effect – she wished she could move from her seat, albeit the Claimant cannot recall the exact words Then she told [the Claimant that she] should move her seat and sit somewhere else as she needed space. It is alleged to have been said in a rude and underhand sort of way.

2.8.2 Allegation 2: By Llinos Bradley providing a reference that was inaccurate. In particular she stated that the Claimant lied about her competency in the interview and stated the Claimant was dishonest.

2.8.3 Allegation 3: By removing the Claimant from the post on 12 June 2018.

2.8.4 Allegation 4: When the Claimant complained to the Second Respondent about the termination of her post, by emails and phone calls from June onwards, the Second Respondent did not investigate. (This appears to be against the Second Respondent only).

2.9 It is the First and Second Respondent's case that the only allegation against the Second Respondent is allegation 4. The remaining allegations are against the First Respondent. This had been agreed by the Claimant previously; however, she was equivocal at this hearing.

2.10 The claims of direct discrimination are put, in the alternative, as claims of harassment relying on the same protected characteristics.

2.11 It was noted that [EJ] Wisby made reference to other potential allegations of direct discrimination in her note of 13 and 14 June 2019. It is clear that she was contemplating identifying matters that could proceed by way of amendment. That process was not completed, and no amendment has been allowed. The matters recorded in this note of the issues identify only those allegations that are sufficiently identified in the claim form. If the Claimant wishes to make any other allegations or bring any other claims, she must apply to amend.

2.12 There is no claim of victimisation…….

2.13 It is accepted there is a claim of failure to make reasonable adjustments.

2.14 The provision criterion or practice relied on is the requirement to come into work.

2.15 The disadvantage alleged is the Claimant could not always come into work because of her fibroids condition.

2.16 The adjustment requested is that she should have been allowed to work at home during the periods when her conditions were at their worst.

2.17 It was agreed that there were no other claims of failure to make reasonable adjustments.

2.18 …..I cannot read the claim as including an indirect discrimination claim, albeit it is possible that the reasonable adjustments claim set out above could be interpreted as an indirect discrimination claim.

2.19 ……

2.20 (Section 15, discrimination in consequence of something arising from disability) It is both Respondents' case that the claim is against the First Respondent only. As noted, the Claimant's position is equivocal.

2.21 The matter arising in consequence of disability is the absence from work for three days.

2.22 It is the Claimant's case she was dismissed because of that absence.

2.23 The First Respondent says the dismissal was justified having regard to its business needs. It will need to clarify this defence.

2.24 There may be time issues to be determined.

8. In the present hearing, the Tribunal also identified an issue as to disability and, if the Claimant was disabled at the material time, the Respondents' knowledge of this. As will be explained, a question also arose as to whether there was any complaint before the Tribunal based on the protected characteristic of sex.

9. EJ Wisby heard another Preliminary Hearing on 28 November 2019, at which the Claimant was not present. As well as making further case management orders, EJ Wisby noted that the issues were set out in EJ Hodgson's order of 1 October 2019.

10. There was a telephone Preliminary Hearing before Employment Judge Brown on 6 January 2020. The Claimant indicated a wish to amend the claim: EJ Brown stated that any application to amend should be put in writing in good time before the full hearing. EJ Brown noted an issue about the way in which witness statements had been exchanged, but stated that she was satisfied that exchange had taken place in a proper fashion on 30 December 2019.

11. The full hearing listed to commence on 15 January 2020 could not take place because of health reasons affecting one of the First Respondent's witnesses.

12. The full hearing was re-listed, again for 5 days, to commence on 26 October 2020. By that time, the covid-19 pandemic had occurred and was continuing. The Claimant applied for a postponement of the hearing, alternatively for a remote hearing, on the grounds that she should not be required to attend an in-person hearing because of the health risk (referring here to the pandemic) involved in travelling to and attending at the Tribunal. Regional Employment Judge Wade directed that the parties should attend the hearing on the first day in order to discuss how the hearing would take place. The Claimant appealed this decision, and His Honour Judge Tayler effectively adjourned the appeal pending the Tribunal's further consideration of how to proceed.

13. The Tribunal then directed that the parties should attend the first day remotely (by CVP video link), at which time a decision would be made as to how

to proceed. That decision was that the hearing should take place in a hybrid fashion, with the members of the Tribunal present in the hearing room, but all parties and witnesses attending by video link.

14. The Claimant also sought a postponement on the grounds that she had appealed EJ Brown's finding about the exchange of witness statements to the Employment Appeal Tribunal. The Claimant contended that it would be a waste of the Tribunal's time if it were to proceed with the hearing, and the EAT were to decide the appeal in her favour. The Respondents both resisted that application.

15. The Tribunal decided that the hearing should proceed. EJ Brown had accepted what she was told about the exchange of statements, and there was therefore no reason to anticipate that the appeal would succeed. The Tribunal considered that it would not be in the interests of justice to delay the hearing further for this reason.

16. The Claimant had made an application to amend the claim in an email of 26 October 2020. The application was to include all of the issues noted by EJ Wisby on 12 and 13 June 2019. These were the allegations that EJ Wisby identified as "potentially" falling to be determined, and which EJ Hodgson had identified as requiring an amendment to the claim if they were to be included.

17. In support of her application, the Claimant said that there had been no bundles available when EJ Hodgson defined the issues and that she had not been able to argue clearly. Mr Nicholls submitted that EJ Hodgson had been very careful in his analysis of the claim form and that the application was wide-ranging. He said that if the application were allowed, the hearing would have to be postponed; that EJ Hodgson had said that the Claimant needed to apply to amend the claim in order to raise further issues; and that EJ Brown had said in January 2020 that the Claimant should make any application in good time before the hearing. Mr Sheppard agreed with these submissions and added that the amendment would add new forms of discrimination to those already pleaded.

18. The Claimant submitted that the Respondents' two counsel should have been ready for an amendment on the day of the hearing, as this is something that happens all the time. She said that EJ Hodgson had observed that, if she did not agree with his analysis of the issues on the pleadings, she should put in an amendment. The Claimant invited the Tribunal to go through the claim form again, on the basis that we might not agree with EJ Hodgson's findings.

19. The Claimant continued that, when the pandemic occurred, she assumed that the Tribunal was closed down. (The building was indeed closed for several months, but the Tribunal continued to operate remotely, including holding hearings for case management, until the building opened again in September). She said that she thought that the Tribunal would be hearing other cases in October and that she had not been told that this hearing would be going ahead.

20. The Tribunal did not consider that it could re-open EJ Hodgson's decision about what issues were within the scope of the existing pleading. That was a judicial case management decision which had not been the subject of an appeal

or an application for reconsideration or variation. The Tribunal therefore proceeded on the basis that there was a need to apply to amend the claim if any additional issues were to be included.

21. The Tribunal reminded itself of the applicable principles, as set out in **Selkent Bus Company Limited v Moore [1996] ICR 836**. The Tribunal should take into account all the relevant circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of not allowing it. Particular relevant circumstances may include the nature of the amendment, the impact of any time limits, and the manner and timing of the application.

22. The Tribunal concluded that the balance of injustice and hardship meant that the application should be refused. There had been five preliminary hearings, including two after EJ Hodgson had defined the issues. The application could have been made at either of those two hearings, or at least promptly after the latest of them, when EJ Brown said that any application should be made well in advance of the full hearing. The pandemic had certainly caused confusion and uncertainty, but there was no reason to assume that the Tribunal had ceased to function: an enquiry would have established that it had not.

23. Crucially, allowing the application would cause the hearing to be postponed. The parties, including the Claimant, had prepared their witness statements in accordance with the issues defined by EJ Hodgson, and were ready to proceed with the hearing. It would be months before another 5-day hearing could be listed, and the case concerned events in mid-2018. If the hearing proceeded as it stood, the Claimant would not be left without a claim to be heard, as she would be able to put forward her existing complaints of direct discrimination, failure to make reasonable adjustments, and discrimination arising from disability. The Tribunal therefore refused the application to amend the claim.

24. The Claimant made it clear that she was dissatisfied with this decision, saying that she would appeal and that she was not now going to put heart and soul into the hearing.

25. The matters described so far, and the Tribunal's reading of the witness statements and documents, occupied the whole of the first day of the hearing. On the morning of day 2 the Claimant experienced various difficulties connecting with the hearing. It is not necessary, or proportionate, to describe these in detail, but the upshot was that it was not possible to commence the Claimant's evidence until 2.45pm. In the course of the discussions about the connection problems, the Claimant asserted that there was no longer enough time for the hearing, that the case should not be rushed, and that she was not having, or was not going to have, a fair trial.

26. The Claimant also had a brief difficulty connecting at the beginning of the third day. When she joined the hearing she again expressed concern about the time available. The Claimant said that the case could not be heard fully in the three days remaining, and that it might be that the hearing should have been listed

for more than five days in any event. She stated that it was redundant to continue unless there could be a guarantee of no further technical difficulties.

27. Mr Nicholls and Mr Sheppard both submitted that it was better to continue, even at the risk of going part-heard, than to abandon the hearing. The Tribunal decided that the hearing should continue. It was never possible to guarantee that there would be no difficulties in the future, and it would be a better use of the available time to continue and go part-heard if necessary, than to abandon the hearing after two days.

28. The Claimant's evidence resumed at 11.30 on day 3. Thereafter, she experienced occasional connection difficulties, but not on the scale that had occurred on the first two days. The hearing then went part-heard to 23 and 24 November, the Tribunal's stated intention being that the evidence and submissions should be completed over those two days. In the event, the evidence was concluded, but there was insufficient time for the parties' submissions to be made. The Tribunal therefore directed written submissions and arranged 2 days for deliberation in chambers on 22 and 23 December 2020.

29. Regrettably, the Tribunal building was closed to all users on an emergency basis shortly before the planned days in chambers. It was not possible for these to take place as intended, and a further day in chambers was arranged on 15 February 2021, when the Tribunal met and deliberated remotely. The Employment Judge then drafted these reasons and sent them to the lay members for approval.

Evidence and findings of fact

30. The Tribunal heard evidence from the following witnesses:

30.1 The Claimant.

30.2 Ms Llinos Bradley, formerly the First Respondent's Information Governance Manager, and the Claimant's line manager at the relevant time.

30.3 Ms Jo Downing, the First Respondent's Head of Information and Governance.

30.4 Mr Ian Tombleson, the First Respondent's Director of Quality and Safety.

30.5 Mr David Preedy, a Recruitment Consultant with the Second Respondent.

30.6 Ms Natalie Murton, the Second Respondent's Head of Risk, Governance and Communications.

31. The First Respondent is the NHS Trust responsible for Moorfield's Eye Hospital in London. The Second Respondent is a recruitment agency. When the

First Respondent requires a temporary worker, it contacts another agency, Bank Partners: in this instance, the Claimant was recruited via Bank Partners and the Second Respondent.

32. The condition that the Claimant relies on as giving rise to disability is that of fibroids. Her GP and other medical records show that she has had this condition since at least October 2012, and that it has continued to affect her since then. In her witness statement and her oral evidence the Claimant described her condition as flaring up from time to time, and said that when it did so she would need to use the lavatory urgently. She might have several months without a flare up, but when one occurred she would have particular difficulty with travel (for example, to and from work) because she could, without warning, urgently need to use the lavatory.

33. The Claimant's GP records referred to this particular effect, for example in entries in February 2016, May 2018 and July 2019. There were notes from several specialist consultations over the years 2014 to 2018, also referring to this effect, and others.

34. The Tribunal accepted the Claimant's evidence about the effects of her condition, and found that, when she was experiencing a flare up, she would be unable to carry out the normal day to day activities of leaving home and of travelling by public transport.

35. In about April 2018 the First Respondent identified a need for an Assistant Information Governance Manager, to deal with Freedom of Information enquiries. This was to be an amalgamation of two pre-existing, currently vacant, roles. Ms Downing (who had joined the First Respondent in April 2018) and Ms Bradley decided that the role should be predominantly office-based, so that the person concerned would be available to deal with urgent FOI queries. On 2 May (all dates that follow will be in 2018) Ms Bradley contacted Bank Partners about the role. They contacted the Second Respondent, who put forward the Claimant for the role.

36. Ms Downing and Ms Bradley interviewed the Claimant on 15 May. They concluded that she had the necessary skills and experience, and that she should be offered the post. There was also some reference to the Claimant's medical condition, although there was a dispute about the precise terms of this. In her oral evidence the Claimant said that she outlined her symptoms, without giving her condition a label. Ms Downing and Ms Bradley's evidence was that the Claimant said that she had to use the bathroom often, but provided no further detail. Ms Downing and Ms Bradley also recalled the Claimant referring to occasional hospital appointments (Ms Bradley saying that the Claimant described these as occurring once a month), while the Claimant denied this, saying that it was only after this that the need for monthly appointments arose. The Tribunal concluded that all of this was within the range of different recollections of a discussion of this nature that those involved might reasonably have: what is apparent is that the Claimant gave some information about her condition without specifying a diagnosis.

37. Following the interview, the First and Second Respondents agreed on the Claimant being offered an assignment in the role from 29 May to 31 August.

38. On 17 May the Claimant completed the Second Respondent's medical questionnaire and registration form, at pages 218-219 and 220 respectively. On the first of these (page 218), the Claimant indicated that she did not have any illness, impairment or disability which might affect her ability to work, and that she did not think that she might need any adjustments or assistance to help her to do the job. One of the questions on the registration form was "Do you require any reasonable adjustments for your health when applying for positions?" (page 220). The Claimant had evidently ticked the "yes" box in the first instance, and had written something in the space for details: she had then crossed out and initialled both entries, and ticked the "no" box.

39. Mr Preedy's evidence was that the Claimant had been provided with the form before her start date with the First Respondent and that he had explained the purpose of the questions about disability and reasonable adjustments as being to identify individuals who were entitled to adjustments. In cross-examination, Mr Preedy agreed that the specific question on page 220 was directed to adjustments that might be needed for the application process, for example in relation to interviews. The Tribunal observed that the question on page 218 was of more general application. Mr Preedy also said that the Claimant had been delayed and had limited time available when she completed the forms: the Claimant in her evidence agreed that there was someone waiting for her in a car at the time.

40. The Tribunal found that the Claimant understood the meaning and significance of the questions on the forms: she did not suggest otherwise and made a point to the effect that people were generally reluctant to mention any disability because to do so might have an adverse effect on their application.

41. The Tribunal also concluded that the Second Respondent was entitled to take what the Claimant had written on the form at face value. Although it appeared that she had first indicated "yes" to the question on page 220, she had clearly changed this. The Tribunal did not consider that this in any way triggered an obligation on the part of the Second Respondent to investigate any further: they were entitled to assume that the Claimant meant what she had said.

42. The Claimant's first day with the First Respondent was 29 May. She and Ms Bradley agreed a slightly adjusted working day of 8.30 to 4.30 in order to help the Claimant with getting a seat on the train.

43. Soon after this (it is not apparent, or material, exactly when) there was an incident which was not an issue in the case but which was covered in the evidence and was relied on by the Claimant as evidence of Ms Bradley's attitude and behaviour towards her. The Claimant's account was that she politely asked whether she could comment on a matter that Ms Bradley was discussing with a colleague (Mr Salmon). Ms Bradley said that she could, but after Mr Salmon had gone, sneered at the Claimant, saying that she should speak when she was spoken to and that it was surprising that she would even suggest getting involved in the discussion. Ms Bradley's evidence was that the Claimant intervened in the

conversation unannounced, and that afterwards she politely said to the Claimant that, while she realised she was trying to help, it had not been appropriate to intervene.

44. There clearly was a conversation in which Ms Bradley indicated that the Claimant should not have intervened in the discussion with Mr Salmon. The Tribunal appreciated that those involved could have genuinely different perceptions of whether or not this was said politely. We found it unlikely that Ms Bradley would have spoken in a sneering tone or would say that the Claimant should speak when she was spoken to: there was no obvious reason why she should have been angry, or have spoken rudely, in this particular context. The Tribunal found, as a matter of probability, that Ms Bradley's account was more accurate.

45. There was also conflicting evidence about whether the Claimant was noisy in the office. Ms Bradley's evidence was that several of the team, including herself, witnessed the Claimant having loud telephone conversations in the office, including with debt collection companies. She advised the Claimant to be careful about volume and to remember that everyone could hear her private conversations. In her oral evidence, the Claimant stated the did not have loud conversations with debt collectors, and that it was a mortgage company that had called her on one occasion. The Claimant was referred to the note of an interview with Mr Salmon at page 409, where he said that she was very vocal: her response was that she did not agree, and that relying on what he said was not a good idea as he was not giving evidence.

46. The Claimant also said on this point that people from other sections would come and talk to her, and she would be friendly. She agreed that Ms Bradley spoke to her about being quieter, adding that she never asked anyone else to be quiet, and that it was not done in a polite manner, involving Ms Bradley waving her hand as she spoke.

47. The Tribunal found that the obvious reason why Ms Bradley would have spoken to the Claimant about being quieter was that she considered that she was being too noisy. The fact that Mr Salmon was not called as a witness did not mean that his recorded comment was irrelevant: it was at least some indication that someone other than Ms Bradley believed that the Claimant was, to some extent, noisy. As with regard to the conversation about the Claimant intervening with Mr Salmon, the Tribunal found as a matter of probability that Ms Bradley did not speak in an impolite way to the Claimant. We did not consider that there was any significance to the point that the Claimant did not witness Ms Bradley making the same request of anyone else, as there was no evidence that there was a need to do so.

48. On 30 May the Claimant telephoned Mr Preedy and spoke to him about how she felt about the job with the First Respondent. Mr Preedy stated that the Claimant said she had an issue with the seating arrangements, that she wished to work from home, and that there might have been a conversation about a medical issue which she had brought to the First Respondent's attention. When asked about this in cross-examination by Mr Sheppard, the Claimant said that she was

keeping Mr Preedy in the loop, and that she believed that he did (as suggested) say that they should discuss it after a week. She did not recall mentioning a medical problem, but was not saying that she did not do so. The Claimant sent an email to Mr Preedy on 31 May at page 244 thanking him for his understanding and saying that she would update him on Friday (apparently meaning the Friday of the next week).

49. The events which gave rise to allegation (1) occurred on Monday 4 June, the first day of the second week of the Claimant's engagement. The Claimant stated that she overheard Ms Bradley saying to a colleague that she wished that she could move from where she sat (which was next to the Claimant), and that when she returned to her seat, Ms Bradley told the Claimant to move, as she needed more space.

50. In her oral evidence the Claimant said that when Ms Bradley said that she wanted her to move, she flapped her hands and spoke in a flippant and abrupt tone. The Claimant also said that when Ms Bradley spoke to the colleague, she was behind a pillar, although when it was put to her that there was no pillar in the office, she said that this might have been a tall piece of furniture.

51. Mr Nicholls asked the Claimant why she believed that what occurred on this occasion was discriminatory. She replied to the effect that Ms Bradley was sitting next to a person (herself) who looked as though she had a protected characteristic, and said:

"We were working in a multicultural office. I never heard anyone else being told to move in that way. You have to ask, what is her motivation"; adding a little later:

"As if sitting by me she would catch something or smell something."

52. Ms Bradley's account was that there was a meeting on 4 June at which seating arrangements, including a general change of desks, were discussed. She told Mr Salmon that she wished that she had chosen his desk, as it was a great location for meetings, and stated that this comment was not related to the Claimant, or spoken from behind a pillar. To the extent that it differed from what the Claimant said about this comment, the Tribunal accepted Ms Bradley's account as a matter of probability. We found it unlikely that Ms Bradley would have said that she wished she could move from where she sat, with any reference to the Claimant, as there would have been little point in saying this to Mr Salmon when Ms Bradley was about to ask the Claimant to move to a different desk.

53. Ms Bradley continued that she asked the Claimant whether she wanted to move to her predecessor's desk, as this would leave both of them with more space, and as that desk had a telephone connection to the main number for the team. Ms Bradley said that the Claimant was happy with this and raised no concerns.

54. The Tribunal found that Ms Bradley and the Claimant were clearly recounting the same conversation. We concluded that, rather than asking the Claimant whether she wanted to move, as a matter of probability Ms Bradley said

something to the effect that she would like her to move, or wanted her to move. The Tribunal found that Ms Bradley's stated reasons why the proposed move would be beneficial made sense, and that as manager, Ms Bradley would be more likely to positively ask the Claimant to do this, rather than ask her whether she would like to do it.

55. The Tribunal also found that the Claimant disliked what Ms Bradley said because she perceived this as being told what to do, as opposed to being asked. If the Claimant perceived what Ms Bradley said as flippant or dismissive, this was not, in the Tribunal's judgement, a reasonable perception. There had been a discussion about individuals changing desks, and Ms Bradley was entitled as manager to ask members of the team about the proposed arrangements, or tell them what the arrangements were to be.

56. The Tribunal further found that Ms Bradley's reason for saying that she would like, or wanted, the Claimant to move desks, was that she considered that this would be beneficial for the reasons that she gave. As has already been stated, the Tribunal found that these reasons made sense. The Tribunal found that there was nothing more to the request, or instruction, than that; and that the Claimant's perception that Ms Bradley did not want her sitting next to her was her perception, but no more than that. The proposed move would have meant that they were still sitting near each other, but diagonally opposite as opposed to side by side.

57. There was also on 4 June a conversation between Ms Downing and the Claimant about working from home. In cross-examination the Claimant said that she raised this with Ms Downing, who initially refused her request, but then agreed that this could be arranged on an ad hoc basis. The latter aspect was reflected in an email from the Claimant to Ms Downing at page 252(g). On the following day, Ms Downing sent an email to Ms Bradley asking her to arrange the return of the dongle given to the Claimant's predecessor in order to facilitate this.

58. The Tribunal found that Ms Downing agreed that the Claimant could work from home, on an ad hoc basis. Such an agreement (as opposed to agreeing to working from home generally) would have been consistent with the evidence about the Respondent's stance being that the role was primarily office based.

59. On Friday 8 June the Claimant contacted Ms Bradley to say that she was unwell and would not be coming in to the office. In her oral evidence, the Claimant explained that she was dehydrated and too ill to work, although she accepted that the First Respondent knew only that she was unwell.

60. On Monday 11 June the Claimant informed Mr Preedy that she was still unwell. He sent an email at page 263 to Ms Bradley relaying this, and saying that the Claimant had assured him that she would be in the following day. He also asked about the possibility of using a dongle in order to work from home. On the latter point, Ms Bradley replied that this was being sorted out, but was only to be used by exception as the role was predominantly office based. The Claimant's evidence was that, at this point, she was feeling better and was getting ready to return to work the following day.

61. The Claimant set out for work on Tuesday 12 June, but had to turn back and remain at home because of the need to use the bathroom frequently. She telephoned Mr Preedy to explain the situation, and sent an email to him at page 258. The Claimant again raised the question of remote working. Mr Preedy first tried to contact Bank Partners, without success. He therefore telephoned Ms Bradley on the afternoon of 12 June.

62. Ms Bradley's evidence was that, during the Claimant's absence, she had reviewed the latter's work with a view to addressing any urgent issues, and in order to redistribute any urgent tasks to other members of staff. The Tribunal accepted that Ms Bradley did this: it was something that a manager would naturally do in the circumstances.

63. Ms Bradley's evidence continued that she found that the Claimant had undertaken a "minimal amount of work", meaning that deadlines were at risk. She said that she became concerned that the Claimant did not have the understanding of Freedom of Information issues indicated during her interview. Ms Bradley also stated that other team members told her that the Claimant had a negative attitude to her work, would regularly interrupt them, and required significant support.

64. Ms Bradley further stated that she then discussed her concerns with Ms Downing, evidence which the latter confirmed and which is supported by an email of 12 June at page 260. Ms Bradley then spoke to Mr Preedy. In their witness statements, both described discussing the Claimant's absence and performance; Mr Preedy also said that they spoke about the "atmosphere" that the Claimant created in the office. In paragraph 8 of his witness statement Mr Preedy said: "…I was told that Moorfields didn't want Yvonne to come back. She had been off sick for a number of days before this discussion. I was told there were some performance related issues, as well as problems with the atmosphere Yvonne had created within the department. I told them I would need something in writing about this."

65. Still on 12 June, Ms Bradley sent an email to Mr Preedy at page 261. This did not expressly say that the Claimant should not return, but clearly meant this, as Ms Bradley wrote about a week's notice not being appropriate in the circumstances and about finding a replacement. Ms Bradley referred in the email to the Claimant's absence being a problem, but did not mention performance issues or "atmosphere".

66. Ms Bradley's evidence was that she was not really concerned about the Claimant's absence as such, but with the other issues raised. When asked about this in cross-examination, Ms Bradley said that she would not put performance or conduct concerns in an email, but would discuss them with Ms Downing. In reply to the Claimant, she said: "Your illness was not the crux of the dismissal, your performance was."

67. The Tribunal considered this aspect with care, given the content of the email at page 261. In the event, we accepted Ms Bradley's evidence, for the following reasons:

67.1 The evidence given by Mr Preedy and Ms Downing supported Ms Bradley's evidence that the real concern was with the Claimant's performance (primarily) and her conduct, and not with her absence.

67.2 It was logical for an employer to terminate a temporary worker's engagement if they found that she was not doing the job adequately and was causing some disruption in the office.

67.3 It would not, however, have been logical to terminate a satisfactory worker's engagement on the grounds of absence, when she was about to return. Doing so would have compounded the backlog of work while a replacement was found.

68. Mr Preedy sent an email at page 266 to the Claimant later on 12 June saying that Bank Partners had requested that she should not return to the Trust and wished to terminate her contract. The Claimant replied expressing her disappointment at this and citing her entitlement to 2 weeks' notice. She stated that she had been treated rather unfairly with regard to the workload and the lack of reasonable adjustments. The Claimant wrote that she had informed the First Respondent of her medical condition during the interview, but that she had not been allowed to use the remote access facility. She stated that she had looked into the situation and realised that she was entitled to reasonable adjustments even though she was a temp.

69. On 13 June the Claimant sent an email at pages 273-275 headed "Formal Appeal of Dismissal" to the First Respondent's HR officer Ms Barone. In this, she raised the issue of 2 weeks' notice and many of the issues that are the subject matter of the present case.

70. On the same day, 13 June, Mr Preedy and the Claimant spoke about the subject of notice pay. There was some dispute about what was said, and when, on this point, but this was not an issue in the case and the outcome was that the Second Respondent paid this to the Claimant. There was further email contact, and on 14 June at page 279 the Claimant asked Mr Preedy to refrain from contacting her.

71. Bank Partners sent their standard feedback form to Ms Bradley, who completed this on 15 June. What she wrote (at pages 268-269) is the subject of allegation 2. The form provided for ratings of excellent, good, fair or poor for 8 criteria, including attitude to work and colleagues; personal integrity, honesty and trustworthiness; conduct; timekeeping; and others. The Tribunal found it surprising that none of these was directly concerned with the skills required for the job, or competence in it. The form asked for further details to support any rating of fair or poor.

72. Ms Bradley gave the Claimant one rating of excellent (timekeeping); none of good; 5 of fair (including personal integrity, etc, which became the focus of attention at the hearing) and 2 of poor. In relation to integrity, Ms Bradley wrote the following:

"During the interview process Yvonne communicated knowledge and relevant experience about Freedom of Information and Data Protection however upon commencement in role needed substantial support from the team to draft responses as was the case in relation to a correct application of an exemption under FOI which required further investigation and analysis."

73. The Tribunal considered that it was, in itself, fair comment for Ms Bradley to write, in effect, that the Claimant had given the impression at interview that she had the skills and knowledge required for the job, but that her performance at work had demonstrated that this was not the case. The Tribunal also considered that it was unfortunate that this was presented as reflecting adversely on the Claimant's honesty and integrity, and we could understand why she took exception to this. The Tribunal considered that one would not usually view a situation where a worker had failed to live up to the expectations arising from the interview as a being a matter of integrity or honesty. It might be said that, in the absence of a question directly referring to ability, Ms Bradley put her comments where she thought most appropriate: there was, however, a section on page 269 for "additional comments" which could have been used.

74. Ms Bradley's evidence in cross-examination was that she was told that the Claimant was dissatisfied with the termination of the engagement, and she was asked to give full and frank feedback, which she did. Ms Bradley stated that she had spoken to Ms Downing and probably to Mr Salmon. She said that she would not include anything that was incorrect.

75. In paragraphs 10 to 12 of her witness statement the Claimant referred to the feedback form (describing it as a reference), saying that it was intended to discredit her conduct and provide an artificial basis for dismissal, and that Ms Bradley had stated that she was not honest while giving an example that concerned competence. The Claimant said that Ms Bradley had purposefully provided a false basis for terminating her engagement.

76. Although the Claimant did not expressly say that this was connected with her race, she had said in paragraph 6 that during her employment there were several incidents where she was made to feel that she was being treated unfavourably because of her race and colour. The Claimant did not put to Ms Bradley that what she wrote on the form was connected with her race, although she did ask about why she wrote what she did, and the Tribunal was aware that the Claimant's case was that this was an act of direct discrimination.

77. The Tribunal accepted Ms Bradley's evidence that what she wrote was a fair reflection of what she believed, and that she gave the rating of fair in respect of integrity, etc, because she believed that this was the appropriate place on the form to record and reflect her concerns about what she had found about the Claimant's work.

78. There was then some communication between the First Respondent, Bank Partners and Ms Murton about the Claimant's appeal (also described as her complaint). On 4 July at page 328 Ms Barone of the First Respondent wrote to Ms

Murton asking whether the Claimant would come in for an investigation meeting. Ms Murton then spoke to the Claimant, who sent an email on 5 July at page 329 headed "without prejudice save as to costs" in which she asked why the First Respondent had contacted Ms Murton rather than herself, and sought an invitation letter. There was a further exchange of emails and on 6 July at page 334 the Claimant wrote to Ms Murton expressing dissatisfaction with the manner in which her appeal was being deal with, and stating that Ms Murton had no authority to speak on her behalf. She also appeared to complain (the email was not entirely clear at this point) that the Second Respondent had failed to investigate her complaint.

79. This related to allegation 4 of direct discrimination. Ms Murton's evidence was that it would have been exceptionally difficult for the Second Respondent to investigate the Claimant's complaints about what had occurred during her time with the First Respondent. In paragraph 12 of her witness statement she said that the Second Respondent did not have any access to individuals involved at a workplace; had no knowledge of the day to day situation within a client's organisation; and had no involvement in or control over the client's management decisions. When asked about this aspect in cross-examination, Ms Murton said that if a client had terminated a contract without explanation and had provided no feedback, the Second Respondent would make enquiries. When it was put to her that there was no investigation because of stereotypical negative assumptions about the Claimant as a black person, Ms Murton denied this.

80. The Tribunal accepted Ms Murton's evidence on this point. The Second Respondent could not, realistically, get involved in any investigation, for the reasons given by Ms Murton. The Tribunal found it unlikely that trying to conduct an investigation in a situation such as this would achieve anything for the worker concerned, as whatever conclusion the Second Respondent might reach, they would not be in a position to impose it on their client. It would also not be in the Second Respondent's commercial interests to get involved, as this would put the relationship with the client at risk. Furthermore, the Claimant had asked the Second Respondent not to get involved. When asked about this in cross-examination, Mr Preedy answered, succinctly, "you asked me not to get involved, so I didn't".

81. In the event a meeting took place between Mr Tombleson and the Claimant on 8 November. Ms Barone took notes, which are at pages 393-396. Many of the issues arising in the present case were discussed. The Claimant stated that, at the interview, she had informed Ms Bradley and Ms Downing of her need to use the bathroom frequently because of her condition of fibroids. She said that reasonable adjustments should have been made for her in relation to working from home. On this point, the notes on pages 394 – 395 recorded: "MB asked YD whether she had disclosed at her interview that she would need reasonable adjustments made. YD explained that she didn't at her interview, as it might be that employers don't want to hire someone and then it can be said that there was discrimination because of disclosing your condition and requirements. She added that when she first started she had a discussion about hospital appointments but not about reasonable adjustments." Later, on page 396, the notes record the Claimant as stating that she was not told at any point that the role was office

based, and that there was proof that it did not need to be because Ms Bradley worked from home 2 days a week.

82. Mr Tombleson met each of Ms Downing, Ms Bradley and Mr Salmon on 20 November, with notes (again taken by Ms Barone) at pages 397 – 409. In relation to the interview, Ms Downing said that the Claimant had said that she had a condition and would require hospital appointments; Ms Bradley said that the Claimant had stated that she had a gynaecological condition and had a need to use the toilet more frequently. Other matters were discussed, including the Claimant's performance in the role and behaviour at work. On these, Mr Salmon said the Claimant was capable of doing the role but there were issues around her attitude, and that she was unprofessional and not focussed on work, and would chat with colleagues.

83. Mr Tombleson produced a report on 21 February 2019 at pages 410 – 416. He did not uphold any of the allegations, which he summarised in the following terms:

83.1 The Claimant said that she had been dismissed because of her condition and that reasonable adjustments should have been made. Mr Tombleson found that arrangements for remote working when the Claimant had hospital appointments were being made, and that these arrangements were a reasonable course of action. He also concluded that there was no reason disagree with Ms Bradley's assertion that the Claimant's appointment was terminated because of concerns about the Claimant's performance.

83.2 In relation to gender, the Claimant said that she had been discriminated against because fibroids is a female condition; also that this was a condition that particularly affects black women. Mr Tombleson stated that he found no evidence of such discrimination.

83.3 In relation to discrimination because of her colour, the Claimant cited Ms Bradley speaking in Welsh over the telephone to her mother. Mr Tombleson found this not to be discriminatory, although it might be considered a little impolite. He did not find any evidence of discrimination due to the Claimant's colour.

84. Mr Tombleson communicated the outcome of his investigation to the Claimant in a letter dated 22 February 2019 at page 419. In cross-examination, he stated that he did not liaise with the Second Respondent in the course of the investigation, and had no contact with them, although he could speculate that Ms Barone might have done so. The Tribunal saw no reason to doubt this evidence, which was consistent with what Ms Murton said about not getting involved.

The applicable law and conclusions

85. The Tribunal reminded itself of the burden of proof in discrimination cases. Section 136 of the Equality Act 2010 provides as follows:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that 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.

86. In **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura [2007] IRLR 246** the Court of Appeal identified a two-stage approach to the burden of proof. At the first stage, the Tribunal should consider whether the facts are such that, in the absence of an explanation from the Respondent, it could properly conclude that discrimination had occurred. In **Madarassy** the Court of Appeal emphasised that this must be a conclusion that the Tribunal could properly reach. A difference in treatment and a difference in protected characteristic without more would not be sufficient: there would have to be something more that could form the basis of a finding of discrimination, although that something more might not in itself be very significant.

87. If the facts are such that the Tribunal could properly conclude that discrimination had occurred, the burden is on the Respondent to prove that it did not. In **Pnaiser v NHS England [2016] IRLR** the Employment Appeal Tribunal identified the relevant standard at this stage as being that the protected characteristic did not have a significant or more than trivial influence on the relevant treatment.

88. In **Hewage v Grampian Health Board [2012] UKSC 37** Lord Hope, in the Supreme Court, endorsed the approach in **Madarassy** and observed that:

"…..it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another…."

89. In the present case, the Tribunal has largely been able to make positive findings on the evidence in the way envisaged by Lord Hope, but has also considered the complaints against the two-stage test.

90. The Tribunal then turned to the specific issues as identified in the list compiled by EJ Hodgson. One matter concerning the list of issues arose at the commencement of day 5 of the hearing, between the end of Mr Nicholls' cross-examination of the Claimant and the beginning of Mr Sheppard's. The Claimant pointed out that the allegations of direct discrimination had been treated as involving race only, and she asked whether sex was in issue as regards the direct discrimination complaints.

91. The Tribunal returned to the list of issues at page 69(xiv). In paragraph 2.7 EJ Hodgson identified the protected characteristics relied on by the Claimant as being sex, disability and race. In paragraph 2.8 he listed the allegations of direct race discrimination and in paragraph 2.10 stated that these were also relied on as

allegations of harassment. EJ Hodgson then identified complaints of failure to make reasonable adjustments and discrimination in consequence of something arising from disability. He ruled out complaints of victimisation and indirect discrimination. No complaint of sex discrimination was identified.

92. The Tribunal considered that the protected characteristic of sex might have been potentially relevant to an indirect discrimination complaint, which EJ Hodgson had ruled was not in issue. That would explain why the protected characteristic of sex was mentioned at the outset of the issues, but not thereafter. In her witness statement, the Claimant referred to the protected characteristics of race and disability, but not sex.

93. The Tribunal considered that the protected characteristic of sex was not in the event in issue in the case but that, as a matter of caution, we should consider the allegations of harassment or direct discrimination in relation to both race and sex.

94. Section 13 of the Equality Act makes the following provision about direct discrimination:

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

95. In relation to harassment, section 26 of the Equality Act provides as follows:

> *(1) A person (A) harasses another (B) if –*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic,and*
> *(b) The conduct has the purpose or effect of –*
> *(i) Violating B's dignity,or*
> *(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(2)*
> *(3)*
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –*
>
> *(a) The perception of B;*
> *(b) The other circumstances of the case;*
> *(c) Whether it is reasonable for the conduct to have that effect.*

96. In relation to the four individual allegations of harassment or direct discrimination, the Tribunal reached the conclusions set out below. We considered harassment first in each case given the requirement that the conduct should be "related to" race or sex, as opposed to the stricter requirement that it be "because of" race or sex for direct discrimination.

97. Having in mind EJ Hodgson's comments about which allegations were relevant to which Respondent, the Tribunal found that, in practical terms, allegations 1 to 3 could only relate to the First Respondent, and allegation 4 only to the Second Respondent.

98. Allegation 1 (comments by Ms Bradley about moving seats). The Tribunal accepted that what Mr Bradley said was unwanted by the Claimant. On the findings that the Tribunal has made, this was not said with the purpose of harassing the Claimant. The Tribunal accepted that the Claimant perceived these comments as harassing her (in the sense of giving rise to an environment that she found offensive), but also found that it was not reasonable for either or both comments to have the effect of harassing the Claimant. The first did not relate to her, and the second was a reasonable request expressed in a reasonable way.

99. The Tribunal has also found that the reason why Ms Bradley asked the Claimant to move to a different desk was that, for the reasons that she identified, she believed that this would be beneficial for operational reasons, and that there was nothing more to it than that. That finding excludes what Ms Bradley said being related to race or sex (for the purposes of harassment) or because of race or sex (for the purposes of direct discrimination). Alternatively, if the two stage approach is applied, the facts were not such that the Tribunal could properly find that harassment or discrimination had occurred; and if the Tribunal is wrong about that, its primary finding equally means that it finds that the First Respondent has proved that harassment or direct discrimination did not occur.

100. Allegation 2 (the contents of the feedback form). The Tribunal accepted that what Ms Bradley wrote was unwanted by the Claimant. Given the Tribunal's findings as to why Ms Bradley wrote what she did, this was not done with the purpose of harassing the Claimant. The Tribunal again accepted that the Claimant perceived what was written as harassing her, in that it gave rise to an offensive environment. On this point, the Tribunal found that it was reasonable for the apparently adverse comment on the Claimant's integrity to have that effect on her.

101. The Tribunal has found that Ms Bradley wrote what she did because she had been asked to give frank feedback; that she believed that this was a fair reflection of the Claimant's work; and that she put this where she did on the form because she believed that this was the most appropriate place. Those findings exclude Ms Bradley's decisions about what to write, and where to write it, being related to race or sex, or because of race or sex. Alternatively, if the two stage test is applied, the facts were not such that the Tribunal could properly find that harassment or discrimination had occurred. If the Tribunal is wrong about that, its primary finding equally means that the First Respondent has proved that harassment or direct discrimination did not occur.

102. Allegation 3 (removing the Claimant from the post). The Tribunal found that this was unwanted conduct. The Tribunal has found that Ms Bradley decided to terminate the Claimant's engagement because of what she discovered about her performance in the job and, to a lesser extent, because of her conduct in the office. Ms Bradley had discovered the performance issues when the Claimant's

absence caused her to look into her work. That being so, the decision was not made with the purpose of harassing the Claimant. The Tribunal accepted that the Claimant perceived the decision as harassing her, in that it gave rise to a humiliating environment. It was not, however, reasonable for the decision to have that effect, as Ms Bradley's reasons for the decision were genuine and were of the sort that could reasonably lead an employer to terminate an engagement of this nature.

103. In the sense that Ms Bradley discovered the performance issue because she looked into the Claimant's work while the latter was absent, the decision was linked to the Claimant's absence. That link, however, does not provide any relevant connection with race or sex. The Tribunal's finding about why Ms Bradley decided to terminate the engagement excludes that decision being related to or because of race or sex. Alternatively, applying the two stage test, the facts are not such that the Tribunal could properly find that harassment or discrimination had occurred. It the Tribunal is wrong about that, its primary finding means that the First Respondent has proved that harassment or direct discrimination did not occur.

104. Allegation 4 (Second Respondent failing to investigate). The Tribunal has found that the Second Respondent was not realistically able to conduct an investigation, and furthermore that the Claimant asked Mr Preedy not to get involved. Both of these are cogent reasons why the Second Respondent did not investigate, and both of them exclude that failure being related to, or because of, race or sex. If the two stage test is applied, the facts are not such that the Tribunal could properly find that harassment or direct discrimination had occurred. Alternatively, the Tribunal's primary findings mean that the Second Respondent has proved that harassment or direct discrimination did not occur.

105. The Tribunal then considered the complaint of failure to make reasonable adjustments. The first issue to address in respect of this complaint, and that of discrimination in consequence of something arising from disability, was whether the Claimant was a disabled person within the statutory definition at the relevant time (i.e. the period of her engagement with the First Respondent).

106. Section 6 of the Equality Act provides as follows:

> *(1) A person (P) has a disability if –*
>
> *(a) P has a mental or physical 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.*

107. Paragraph (2) of Schedule 1 to the Act contains the following provisions about 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.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

108. The Tribunal found that the Claimant's condition of fibrositis gave rise to a physical impairment. We have already given our finding that, when this condition flares up, it prevents the Claimant carrying out the normal day to day activities of leaving home and using public transport. The Tribunal found these effects to be both substantial and adverse.

109. The Tribunal also found these effects to be long-term. This is a recurring condition. The Claimant may go for months without a flare up, but it is apparent from her evidence and from the medical records that flare ups had been occurring for a period of years by 2019. The Tribunal found that, at that time, the effects were likely to recur, such that the condition was to be treated as continuing to have those effects, within paragraph (2)(2).

110. The Tribunal therefore found that, at the relevant time, the Claimant had a disability within the meaning of section 6.

111. Section 20 of the Equality Act includes the following provision about the duty to make reasonable adjustments:

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

112. Paragraph 20 of Schedule 8 to the Equality Act includes the following:

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –

(a)
(b) ….that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to……

113. In **Jennings v Barts and the London NHS Trust [2011] All ER 73** the Employment Appeal Tribunal held that it is not necessary for the employer to know the diagnosis of the condition which gives rise to the impairment, but only to know of the impairment and its consequences. In the present case, the Claimant had completed the Second Respondent's form saying that she had no disability. At interview, she told Ms Bradley and Ms Downing that she needed to use the bathroom often. The Tribunal found that this did not give rise to actual knowledge of the existence of a disability: such a need is not necessarily an indicator of a disability.

114. The Claimant argued that the information she had given was sufficient to put the First Respondent on notice that she might have a disability, and that they should have referred her to Occupational Health, or made other enquiries, in order to establish whether this was the case. The Tribunal disagreed with this submission for two reasons.

115. The first was that the Claimant had asserted to the Second Respondent that she was not disabled: it was not, therefore, a case where the recruitment agency passed on to the employer information to the effect that the applicant was, or might be, disabled. The second reason was that all of the events in the case occurred over a very short period of time. The position might have been different as regards constructive knowledge had the First Respondent become aware over a period of weeks or months that the Claimant was experiencing an inability to travel into work when she suffered flare ups in her condition: but the Claimant's time with the First Respondent was measured in days. The First Respondent could not reasonably be expected to know about the impairment and its consequences in such a short period.

116. This finding means that the complaint of failure to make reasonable adjustments is unsuccessful. The Tribunal will, however, set out its findings on the other elements of that complaint, in case it is wrong about the issue as to knowledge.

117. The provision, criterion or practice (PCP) relied on by the Claimant was that of coming into the office as opposed to working from home. The Tribunal has found that the role was said to be predominantly office based, but that Ms Downing had agreed that the Claimant could work from home on an ad hoc basis. The First Respondent was in the process of facilitating this when the Claimant's engagement was brought to an end.

118. The Tribunal concluded that the PCP applied was in fact that the role should be performed predominantly from the office, but that occasional working from home would be acceptable. The Tribunal found that this PCP did not put the Claimant at a substantial disadvantage in comparison with persons who were not disabled, as it would have enabled her to work from home on an ad hoc basis when flare ups in her condition made it difficult or impossible for her to travel to the office.

119. Alternatively, the position could be analysed in terms of a PCP that the role should be predominantly office based, with an adjustment being made that enabled the Claimant to work from home on an ad hoc basis. On this approach, the Tribunal found that the First Respondent had taken such steps as it was reasonable to have to take in order to avoid the disadvantage to the Claimant. In any event, the situation was overtaken by the decision, on unrelated grounds, to bring the Claimant's engagement to an end.

120. Section 15 of the Equality Act provides as follows:

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

121. The Tribunal's findings on the issue of knowledge under paragraph 20 of Schedule 8 above are equally applicable to the same issue under subsection (2). The effect of these findings is that the complaint under section 15 fails.

122. The complaint would equally fail by reason of the Tribunal's findings as to the reason for the decision to terminate the Claimant's engagement, as this was the "something arising" relied upon by her. The defence of justification was not argued and, in the event, did not arise for consideration.

123. It follows from the above that each of the complaints, when considered individually, is unsuccessful. At this point the Tribunal paused in order to consider whether, on looking at the case as a whole, that outcome was appropriate. We concluded that it was.

124. The outcome, therefore, is that all of the complaints are unsuccessful and should be dismissed.

125. In the circumstances, it was not necessary to determine any issue as to time limits, as the complaints have all been determined on their merits and have all been found to be unsuccessful. Had the Tribunal's findings on the merits been otherwise in any particular regard, we would have extended time if necessary in respect of those complaints, on the grounds that it has been possible to hear and decide the complaints on their merits, and there has been no evidential prejudice to either Respondent.

Employment Judge Glennie

_____

Employment Judge Glennie

Dated: ……10 May 2021……..……..

Judgment sent to the parties on:

11/05/2021..

.

For the Tribunal Office