# EMPLOYMENT TRIBUNALS

**Claimant:** **Miss B Norgrove**

**Respondent:** **The Back Up Trust**

**Heard at:** **London South Employment Tribunal (by CVP)**

**On:** **14 – 16 July 2021, in chambers 21 July 2021**

**Before:** Employment Judge Dyal, Ms Jane Forecast, Dr Nigel Westwood

**Representation:**
**Claimant:** in person
**Respondent:** Mr Johnston, counsel

# RESERVED JUDGMENT

1. The complaint of unauthorised deduction from wages fails and is dismissed.
2. The complaints of sex discrimination fail and are dismissed.
3. The complaint of harassment related to disability succeeds.
4. The complaint of failure to make reasonable adjustments:
    a. relating to the failure to keep the course evaluation documentation confidential succeeds;
    b. otherwise fails and is dismissed.
5. The complaint of indirect disability discrimination:
    a. relating to the failure to keep the course evaluation documentation confidential succeeds;
    b. otherwise fails and is dismissed.

# REASONS

## Introduction

*The issues*

1. At the outset of the hearing we heard applications from the Claimant to add complaints of sex discrimination and harassment related to disability by amendment. For reasons we

gave at the time we allowed the applications in respect of sex discrimination and one, but only, of the allegations of harassment related to disability.

2. In advance of the hearing the Respondent had a produced a draft list of issues and sent it to the Claimant. We discussed that draft list at the hearing and through that discussion agreed certain amendments to it, including adding to the list of issues the complaints added to the claim by amendment. Mr Johnston then revised the list of issues and circulated it. It was agreed that the revised list of issues was faithful to our discussion.

3. However, at that point the Claimant indicated for the first time that she wished to also bring a s15 Equality Act 2010 claim. She had not mentioned this in her previous applications to amend (which had been made both in writing in advance of the hearing and orally on the morning of the hearing). The tribunal explained that there was no time limit for making an application to amend but that if the Claimant was to make an application to add a s15 Equality Act 2010 claim she would need to identify what the claim was with sufficient detail for it to be understood, we would need to hear from the Respondent on the application and then take time to adjudicate upon it. At that point the Claimant indicated that she did not pursue the application.

4. The list of issues below is therefore an agreed list:

The Claims

1. The Claimant brings the following claims:
    a. Direct sex discrimination, contrary to section 13 Equality Act 2010;
    b. Failure to make reasonable adjustments under section 20 Equality Act 2010;
    c. Indirect disability discrimination contrary to section 19 Equality Act 2010;
    d. Disability-related harassment, contrary to section 26 Equality Act 2010; and
    e. Unlawful deduction of wages under section 13 Employment Rights Act 1996

Jurisdiction

2. Have the Claimant's complaints of direct sex discrimination been presented in time? For the avoidance of doubt, it is the Respondent's position that each of the complaints relied upon was already substantially out of time at the date of the presentation of the Claimant's original ET1 on 29th January 2020.

3. If the Claimant's complaints of direct sex discrimination (or either of them) have been presented out of time, would it be just and equitable to permit the Claimant to pursue it/them?

Direct Sex Discrimination

4. Did the Respondent treat the Claimant less favourably than it treated or would have treated a male comparator:
    a. by not paying her an increased salary during the period between 10th May 2019 and 16th July 2019 when there was not a full complement of staff in the Respondent's Events and Challenge team?
    b. By not appointing her to the role of Events and Challenge Fundraiser on or about 16th July 2019?

5. In respect of the complaint at 4(a), the Claimant seeks to rely upon Jack Phillips, a male Communications Assistant, as her comparator. It is the Respondent's case that the circumstances relating to Mr Phillips' case were materially different to those of

the Claimant such that he is not an appropriate comparator. Alternatively a hypothetical comparator.

6. In respect of the complaint at 4(b), the Claimant relies upon the successful male applicant, Reece Remedios, as her comparator. Alternatively a hypothetical comparator.

7. If the Claimant establishes that she was treated less favourably than an appropriate comparator in respect of the matters complained of at 2(i) or 2(ii) above, has the Claimant established facts from which the Tribunal could decide, in the absence of any other explanation, that the difference in treatment was because of her sex?

8. If so, can the Respondent establish that any difference in treatment was not because of the Claimant's sex?

Disability

9. It is accepted that the Claimant was, at all material times for the purposes of her claim, a disabled person within the meaning of section 6 of the Equality Act 2010 by reason of a mental impairment, namely acute anxiety and depression.

10. Did the Respondent know or ought the Respondent reasonably to have known that the Claimant was a disabled person by reason of the said mental impairment? If so, from what date did the Respondent have such actual or constructive knowledge?

Duty to make Reasonable Adjustments - s.20 Equality Act 2010

11. Did the Respondent operate any of the following provisions, criteria or practices ("PCPs")?
    a. Requiring the Claimant to share a hotel room while attending the Edinburgh City Skills course from 26th September 2019 to 1st October 2019;
    b. The requirement and/or expectation that employees must share a room with a course '~~buddy~~' participant (it was agreed in closing submissions that the word participant was intended and this change could be made);
    c. The requirement and/or expectation that employees on the training course are required to undertake duties that fall outside the scope of their role;
    d. The practice, provision and/or criteria of providing an unfavourable course evaluation, specifically referring to actions taken out of necessity by a disabled employee;
    e. The practice, provision and/or criteria of making the course valuation free to access to all colleagues of said employee, causing further humiliation.

12. If so, did any of the PCPs place the Claimant at a substantial disadvantage as a disabled person in comparison with person who were not disabled?

13. If so, did the Respondent know (or could it reasonably have been expected to know) that the Claimant would be placed at a substantial disadvantage by the relevant PCP?

14. If so, did the Respondent take such steps as were reasonable for it to have taken to avoid that disadvantage?

15. The Claimant suggests that the following would have amounted to reasonable adjustments:
    a. In respect of the PCPs at 11(a) and 11(b) above:

i. being provided with a single room;
ii. being permitted to share a room with someone whom she knew rather than a stranger;

b. In respect of the PCP at 11(c) above:
i. placing course attendees who required assistance in transfers with an experienced buddy or a qualified PA;

c. In respect of the PCP at 11(d) above:
i. not providing unfavourable comments specifically referring to actions taken out of necessity by a disabled employee within course evaluation documentation; or
ii. keeping such comments confidential rather than accessible to all employees;

d. In respect of the PCP at 11(e) above:
i. keeping unfavourable comments contained in course evaluation documentation referring to actions taken out of necessity by disabled employees confidential rather than accessible to all employees.

Indirect disability discrimination –s.19 Equality Act 2010

16. Do any of the following amount to a PCP?
    a. The requirement and/or expectation that employees must share a room with a course '~~buddy~~' participant (it was agreed in closing submissions that the word participant was intended and this change could be made);
    b. The requirement and/or expectation that employees on the training course are required to undertake duties that fall outside the scope of their role;
    c. The practice, provision and/or criteria of providing an unfavourable course evaluation, specifically referring to actions taken out of necessity by a disabled employee;
    d. The practice, provision and/or criteria of making the course valuation free to access to all colleagues of said employee, causing further humiliation.

17. If so, taking each PCP listed above individually:-
    a. Is the PCP applied to those persons who are not disabled?
    b. Does the PCP put disabled persons at a particular disadvantage when compared with non-disabled persons?
    c. Does the PCP put the Claimant at that disadvantage?
    d. Can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim?

        a. To utilise charity funds in order to maximise benefit received by SCI sufferers upon courses it organises.

        b. To ensure course participants are provided and will be provided with appropriate support when attending courses R organises.

Harassment related to Disability

18. Did the Respondent subject the Claimant to unwanted conduct by including within the Group Leader Feedback Report for the Edinburgh City Skills course reference to *"Beth's midnight adventures"*?

19. If so, was the said unwanted conduct related to the Claimant's disability of acute anxiety and depression?

20. If so, did the conduct in question:

a. have the purpose of violating the Claimant's dignity or subjecting her to an intimidating, hostile, degrading, humiliating or offensive environment?
b. have the effect of violating the Claimant's dignity or subjecting her to an intimidating, hostile, degrading, humiliating or offensive environment, having regard to:
    i. the perception of the Claimant;
    ii. the other circumstances of the case; and
    iii. whether it was reasonable for the conduct to have that effect?

Unlawful Deduction of Wages

21. Did the Respondent unlawfully deduct any of the Claimant's wages by way of the difference in salary for the job role of Events and Challenge Fundraiser which she was unsuccessful in obtaining following interview?

22. If so, what is the Claimant owed?

Remedy

23. If the Claimant succeeds in the aforementioned claims, what sums, if any, should be awarded to the Claimant by way of compensation?

24. If the Claimant succeeds in the aforementioned claims, what sums, if any, should be awarded to the Claimant by way of injury to feelings?

**The hearing**

5. *Documents before the tribunal*:

5.1. An agreed bundle;
5.2. *Confidentiality and Data Protection Policy and Guidelines*: 5 page document admitted into evidence on the morning of day 3;
5.3. Witness statements for:

5.3.1. The Claimant
5.3.2. Diana Hare (Claimant's mother);
5.3.3. Mr Sean McCallion;
5.3.4. Ms Merryn Thomas;
5.3.5. Mr Karim Dafallah;
5.3.6. Mr Andy Masters.

6. *Witnesses the tribunal heard from*:

6.1. The tribunal heard oral evidence from all of the above witnesses save for Ms Hare. It was unnecessary for Ms Hare to be called since her witness statement was not challenged.

7. *Submissions*:

7.1. Mr Johnston made oral closing submissions. The tribunal asked him in advance whether he would be referring to any authorities. He initially indicated that he would not. The tribunal indicated that the complaints, particularly indirect discrimination, traversed some complex areas of law and that it would be helpful to refer to authority. In the event Mr Johston referred the tribunal to two authorities on indirect discrimination as set out below.

7.2. The Claimant read a closing statement in which she emphasised parts of the evidence and the impact upon her of the events that are the subject of the claim.

**Findings of fact**

8. The tribunal makes the following finds of fact on the balance of probabilities.

*Chronological narrative*

9. The Claimant has had anxiety and depression since she was 16 years old. At times, the anxiety and depression were very severe indeed and left the Claimant unable to eat, wash and get out of bed. At times she self harmed and at times she was suicidal.

10. By the time the Claimant's employment with the Respondent began she was much better able to manage her anxiety and depression through the use of both medication and coping mechanisms learnt through therapy. However she remained vulnerable to relapse and experienced fluctuations in the quality of her mental health.

11. In the week before this hearing, the Claimant was diagnosed with Borderline Personality Disorder. However, the case is not put on the basis of that condition.

12. The Respondent is a small charity that helps people rebuild their confidence and independence following spinal cord injury (SCI). It employs approximately 32 people. Women are well represented in the workforce including in the management grades:

    12.1. The current CEO and the former CEO who was in post during the Claimant's employment are both women;
    12.2. There are more female managers than male managers;
    12.3. The Claimant had two line managers during her employment with the Respondent and an interim line manager in the period between her first line manager leaving and her second line manager commencing. All three were women.

13. The Claimant was employed by the Respondent in the role of Events and Challenge assistant from 20 August 2018, initially on a part time basis. The Claimant's immediate team, the Events and Challenge team, comprised three people:

    13.1. The Claimant:
    13.2. Alexandra Provan, Events and Challenge fundraiser (also known as coordinator);
    13.3. Emma Prince, Events and Challenge manager (who was the Claimant's manager).

14. The Events and Challenge Team was responsible for a particular type of fundraising and was part of a wider fundraising team that comprised around 10 people in total. Events in this context means fun things such as balls. Challenges means organised group activities of a challenging nature such as mountain climbing and bike racing.

15. On the commencement of her employment, the Claimant was told that Mr McCallion had said words to the effect that "*she's a bit strong and opinionated*" and "*we don't need another one of them*". She was not present when Mr McCallion is alleged to have said this so has no direct knowledge of whether he did or not. Mr McCallion denies that he made any such comment. On balance we accept Mr McCallion's evidence. We think his evidence is the most reliable evidence before us on this point.

16. In her witness statement the Claimant says that (unspecified) men made inappropriate comments (unspecified) about the way she dressed. Ms Thomas' evidence was that the Claimant dressed in an inappropriate fashion for the office. Ms Thomas did not recollect

raising this with the Claimant at the time, however the Claimant recollects here doing so on a couple of occasions. We find that comments were made about the way the Claimant dressed by both men and at least one woman (Ms Thomas). There is no detail about what the comments were in the evidence before us nor who the men were that made the comments, save that the Claimant does not allege that it was Mr McCallion.

17. The Claimant made a very good start to her employment and generally impressed. The Events and Challenge Team was close-knit and functional. In October 2018, the Claimant had a glowing appraisal.

18. In September 2018, the Claimant had a meeting with Emma Prince and explained that she suffered with anxiety and depression. She told Ms Prince she was going through a difficult time relating, in particular, to her relationship with her then boyfriend which was an on and off relationship.

19. The Claimant's on/off boyfriend was a videographer and had been booked by the Respondent to record an upcoming event it was running - a charity ball on 17 November 2018. Ms Provan offered to find a different videographer for the ball, but the Claimant indicated this was not necessary.

20. At the ball itself the Claimant found it extremely difficult to be in the same place as her (by then) ex-boyfriend and she had a panic attack. At some point, she removed herself from the ball and went upstairs. Ms Prince sent the Claimant a message saying "*Beth are you there"* and the Claimant said, "*I've just gone upstairs for a second cause I'm having a panic attac*k". Ms Prince went on "*Are you ok. Do you need to stay upstairs*". The Claimant responded at 21:41: "*I'll be ok, I'm just gonna calm myself down and come back*". At 22.08 Ms Prince asked the Claimant "*Are you ok?*". She responded "*I'm okay, it's just lasting a while*" [213].

21. Following the ball, the Claimant took a period of sick leave on account of her mental health. On the 20 November Ms Prince asked by text message "*How are you doing today?"* and she responded *"Hey Emma, I've been to the doctors today and she has signed me off work for a week. I have been suffering with <u>severe</u> [emphasis added] depression and anxiety triggered by things with Oli. I think trying to carry on working and not taking time off before the ball has perhaps made things worse. So I'm hoping this week will allow me to get back to my usual self!"*

22. On the Claimant's return to work, a wellness action plan was agreed with her. The plan was not very detailed but it included the following: "*stage 3 serious warning signs… Panic attack (increased heart rate, get very hot, possibly crying, not breathing*)… *action to be taken, Go outside*." It also identified as a stage 3 warning sign "*unable to do everyday things e.g. get out of bed"*. This gave a clear indication that sometimes the Claimant's mental health was so bad that she could not get out of bed and that there was reason to think this could happen again.

23. On 1 March 2019, the Claimant passed her probation and Ms Prince thanked her in writing for her hard work.

24. On 15 March 2019 Ms Prince resigned on notice to expire on 10 May 2019. The Claimant was aware of the resignation immediately but its wider announcement was delayed for a brief period until a large challenge event had completed. The manager vacancy was advertised on 16 April 2019.

25. By this point the Claimant had become unhappy at work. There were several reasons for this. The Claimant had experienced major difficulties in her personal life, including the difficult breakup with a partner (as above) and the loss of a close friend to cancer. The

Claimant's relationship with Ms Prince deteriorated. From the Claimant's perspective she became the "emotional punchbag" for the department and was blamed by Ms Prince for everything including matters that were not her fault.

26. The Events and Challenge department generally became an unhappy place with low morale. On 18 April 2019 Ms Provan resigned from her employment on notice to expire on 11 June 2019.

27. Upon the termination of Ms Prince's employment the Claimant was given an interim manager. Her interim manager provided the Claimant with emotional support but she was not in the Challenge and Events team so was not involved in the Claimant's day-to-day work.

28. On 1 May 2019, Mr McCallion arranged to meet with the Claimant to make plans and make sure she had the support needed while the Respondent recruited replacements for Ms Prince and Ms Provan. In the email inviting the Claimant to the meeting Mr McCallion indicated that he wanted to offer the Claimant a full-time role.

29. On 1 May 2019, the Claimant had the discussion with Mr McCallion about the state of the Events and Challenge department. He told the Claimant that she would have a pay increase of 2.5% from 1 May 2020. This raised her salary from £19,000 per annum to £19,475 per annum. This was a standard increment that was also given to other employees at that time of year (though not those with under 6 months service). It was agreed that the Claimant's hours would increase from 28 to 35 per week (full-time). At this meeting, the Claimant asked if she could be paid the rate of a fundraiser/coordinator. In her view, she was doing the job of a manager since she was alone in the team. Mr McCallion told her straight she could not. Although the Claimant was working hard she was only alone in the department for a brief period and it was always the intention for the department to return to its full complement of staff in short order.

30. On 8 May 2019, Ms Prince emailed Mr McCallion with some notes to assist with the Claimant's appraisal which would take place in June after her departure. The notes include the odd positive comment but generally the feedback was very negative in relation to the Claimant's ability to fulfil her main duties. The negative feedback included:

    *30.1. "organisational efficiencies slipped when she was working on multiple projects at the same time";*
    *30.2. "her attention to detail slipped when she was busy";*
    *30.3. "she needed to take more initiative and think things through";*
    *30.4. "her communication skills needed to be developed such as communicating any difficulty meeting a deadline";*
    *30.5. "lack of initiative and drive in recruiting for challenge events";*
    *30.6. "trouble listening – I often have to repeat myself multiple times";*
    *30.7. "losing focus on certain tasks when it feels like things are a hassle when they are actually part of her job."*

31. We find that there had been a significant change in the Claimant's performance since her appraisal in October 2018. The Claimant herself broadly accepts that her performance dropped. She considers that it was caused by a decline in her mental health, difficult personal circumstances and Ms Prince's and Ms Provan's unhappiness in the team and decisions to leave. We accept that those matters are likely to have been significant factors to explain the drop in performance; but nonetheless there was a significant drop.

32. There is no suggestion whatsoever that Ms Prince's negative feedback was in any way related to the Claimant's sex and in cross-examination the Claimant indicated that she did not believe that Ms Prince's negative feedback was related to her sex.

33. The Respondent runs residential city skills courses for people with SCI. The courses are designed to improve wheelchair users' independence and ability to navigate around challenging environments such as city centres. The course is run by group leaders who are volunteers trained by the Respondent. The primary delegates are people with SCI; they can be people of all ages and abilities and with a variety of different needs. Also on the course is a care team of nurses and personal assistants who provide personal care and assistance with medication to those who need it. Finally there are buddies. A buddy is a person who does not have SCI and volunteers to assist with the course. Buddies are intended to play an active role in the course. This can include providing hands on assistance to the delegates with SCI (such as pushing a wheelchair if that is wanted). However, it is not a buddy's job to assist with personal care. As set out further below, the pre-course literature says in terms that buddies must not do so - not least because they are not trained to.

34. The Respondent encourages its employees to go on at least one city skills course. Anyone (whether an employee of the Respondent or not) can apply to go on the course as a buddy. One such city skills course was running in Edinburgh in late Sept and early October 2019.

35. On 3 May 2019, Ms X, a woman in her 20s with SCI, completed an application form for the city skills course in Edinburgh. Ms X would go on to be the Claimant's room-mate on the course. Participants with SCI are asked to answer a detailed set of questions to assess their needs in advance of the course. In answer to question 20, assistance with personal care, Ms X responded *"I do not need assistance with my personal care."* In response to the question *can you independently transfer from your chair to a surface on an equal level?* she answered "*yes"*. In answer to the question *do you use equipment to enable you to transfer independently* she answered "*yes"* and that she used a slide board/banana board. She also indicated that she used a self-propelled shower chair for showering and that she could transfer independently from the shower chair, did not require assistance washing or dressing or with bowel management. She indicated that she did not need any assistance with night care.

36. On 11 June 2019, Ms Provan's employment came to an end. The vacancy for Events and Challenge fundraiser was advertised on 14 June 2019.

37. The Claimant did work extra hard in the absence of a team manager and team coordinator. For instance, the Respondent had an event, the Snowdon Push, upcoming on 21 - 23 June 2019 which was very demanding on the Claimant's time. Some additional resource was brought in - a past event manager, assisted. Nonetheless it is fair to say that the Claimant was taking on additional responsibilities that would have been shared by the team manager and coordinator if they had been in place.

38. On 15 June 2019, Mr McCallion emailed the Claimant and said to her that she had done a brilliant job over the last week and that he felt like everything had come together for the Snowdon Push and another upcoming event. He also said that he had just put the Events and Challenge fundraiser job on the website and that he hoped the Claimant was still keen to apply. He added that the experience she gained in the last few weeks and would gain over the next week would give her good examples to talk about. Finally, he indicated that he was willing to extend the deadline for her to apply should that be necessary.

39. On 18 June 2019, the Claimant had a mid-year appraisal. This was conducted by Mr McCallion. She admitted that her focus and attention had slipped. She attributed this to personal circumstances and a difficult professional environment. The feedback given to the Claimant was clearly informed by Ms Prince's email of 8 May 2019 and reflected many of the points made there. However, the negatives were presented in a more moderate way and were balanced with more positives.

40. A new events manager, Emma Sargent, commenced employment on 8 July 2019. At that point the interviews for the fundraiser role were scheduled, having been deliberately delayed so that the new manager could be involved in the selection.

41. The Claimant was interviewed for the challenge fundraiser role on 15 July 2019. She was one of four internal candidates and four external candidates to be interviewed for the role. The successful candidate was Mr Reece Remedios. He was an internal candidate and was hitherto a close friend of the Claimant's.

42. The interviews were conducted by a panel comprised of, Mr McCallion, Emma Sargant and Tim Farr, Corporate Partnerships Manager. The candidates were all asked the same pre-determined questions which were relevant and appropriate ones to ask. However, there were no scoring criteria and no numerical scores were given. The selection was made simply through panel discussion after the interviews had been completed.

43. We are satisfied that by the end of the discussion that all of the panel agreed that Mr Remedios was the best candidate and that the panel genuinely believed that to be the case based upon his performance at interview, the emphasis of the role on challenge events and Mr Remedios' experience which was particularly relevant to challenge events.

44. The Claimant has heard on the grapevine that she was preferred candidate of Mr Farr and Ms Sargant. In our view, even if they expressed an initial preference for the Claimant, by the end of the panel discussion they agreed with Mr McCallion that Mr Remedios was the best candidate for the reasons given above.

45. Mr McCallion did not share Ms Prince's negative feedback about the Claimant with the other panellists. However, we are sure that he had it at the front of his mind and that it was highly influential in his thinking. Since he was the head of fundraising, Ms Sargant was new in post and Mr Farr managed a different department, we think Mr McCallion's views are likely to have carried great weight with the other panellists.

46. The Claimant had a meeting with Mr McCallion and Ms Sargen on 16 July 2020 in which they informed her that she had not been successful. In advance of the meeting a plan for the meeting was produced that bullet pointed the feedback the Claimant would be given. It bears a striking similarity to the points made by Ms Prince in her email of 8 May 2019.

47. The Claimant's recollection is that Mr McCallion said at the meeting words to the effect that her *"anxiety meant I could not successfully do the job*." We do not accept that Mr McCallion said this. In our judgment it is inherently implausible that Mr McCallion would have said this. It would be a very crass thing to say. It is also not consistent with the feedback listed in the meeting plan. In our view Mr McCallion was too guarded and cautious a communicator to speak in this way. We also do not think it was his view that the Claimant's anxiety prevented her from doing the job.

48. The Claimant reacted extremely negatively to the outcome of the selection process. She felt personally betrayed by Mr Remedios. In her view, he had no right to apply for the role and should not have done so. Also in her view the job should not have been advertised and she should simply have been appointed to it because she had been acting up in the absence of a team. (In our view Mr Remedios was entitled to apply and it was right for the job to be advertised, not least from an equal opportunities perspective).

49. The outcome of the selection process fundamentally changed the Claimant's perspective on the Respondent. She no longer felt valued there and resolved to leave as soon as she found

an alternative job. She did not make a secret of this and her attitude in the work changed significantly and became negative.

50. In early or mid August 2019 the Claimant booked onto the Edinburgh city skills course. By this stage, she was romantically involved with one of the Respondent's employees who lives in Edinburgh, referred to in the evidence simply as Rich. Rich had previously been romantically involved with Ms Merryn Thomas at an earlier point in time. Ms Thomas was the Respondent's acting Head of Courses. She was also, at this point, a good friend of the Claimant's.

51. At around this time the Claimant contacted the course administrator, Mr Karim Dafallah, with an instant message on Skype for Business, asking to have her own bedroom when on the course, rather than to share. There was an exchange of messages which unfortunately have been lost or at any rate the Respondent has not been able to access since switching to Teams. Mr Dafallah does not recollect the Claimant mentioning anxiety when making the room request. However, the Claimant does recollect doing so and we prefer her recollection. We think it is very likely that she would have given a reason and, since anxiety was the reason we think that is the reason she gave. We do not think she went into any detail but simply asked for a room of her own because she was anxious about sharing. Mr Dafallah indicated that it was very unlikely that the Claimant would be able to have her own room.

52. On 19 August 2019, the Claimant had the following exchange of messages with Ms Thomas (p299):

> *19/08/2019, 10:56 - Beth Norgrove: Do I have to share a room for the course?*
> *19/08/2019, 11:04 - Merryn: Maybe...*
> *19/08/2019, 11:14 - Beth Norgrove: If possible can I have a room on my own? Makes me anxious sleeping in a room with people I don't know very well*
> *19/08/2019, 11:14 - Beth Norgrove: Weird I know*
> *19/08/2019, 11:28 - Merryn: Can deff try but unfortunately can't promise as it depends on the group set up. Sorry I know that's not very helpful!*
> *19/08/2019, 11:32 - Beth Norgrove: Nono it's fine I getcha!*
> *19/08/2019, 11:32 - Merryn: Will try my best* 😊😊

53. The general practice was for course participants to share a room with one other person. The intention was to save cost and to enrich experience and understanding by pairing someone with SCI with someone that does not have a SCI.

54. On 22 August 2019, Karim Dafallah wrote to the Claimant confirming her place as a buddy on the Edinburgh city skills course. He asked the Claimant to complete a number of documents to ensure her place including a medical form. He also attached a buddy role description and description of the course itself.

55. The buddy role description states: "*Buddies must not carry out or assist SCI participants with any personal or medical care as they are not trained to do this. This includes: anything to do with bowel or bladder management; skincare management; giving medication; shaving; washing; helping sci participants to turn during the night."*

56. The Claimant returned the medical form on 22 August 2019. She indicated that she was on sertraline for anxiety and depression, 100mg once a day.

57. On 25 September 2019, Mr Dafallah wrote to the Claimant and asked for further information in light of her declaration that she had anxiety and depression. There were the following

questions and answers which were posed and answered twice (once in the text of the email and once in an attached form that replicated the text of Mr Defallah's email):

57.1. How does this mental condition affect you day-to-day? *Can't handle crowds but that's about it / Big Crowds are the main issue but that should be it.*
57.2. How is it managed? *Alll [sic] the meds / medication and my own coping mechanism*
57.3. Is anything we need to be looking out for in terms of you having a bad day what are the signs? *N/A / No need to worry about that.*
57.4. Is anything we can do to support you have this happens? *N/A / No need to worry about that.*

58. Having received the Claimant's answers, Mr Dafallah followed up with a further email asking whether the Claimant had any further detail to give. She responded *"Nah it's pretty unlikely to happen and I have my own coping mechanism if it does".* At this stage the Claimant knew that she would be likely to be sharing a room.

59. The Claimant said in evidence that the reason she did not give any further detail was because she had already raised the matter of not sharing a room with Mr Dafallah and Ms Thomas and it was now the eve of the course. We can accept that was in her mind.

60. The Claimant also says that she did not give further information because she was concerned about the lack of data protection at the Respondent with information not being stored securely. As discussed further below it is true that the Respondent's electronic files were available to all employees without password protection. However, we do not accept that this was part of the Claimant's reasoning at this time and consider it to be an after the event rationalisation. If the concern really related to document security the Claimant could and we think would have found an alternative way of providing more detailed information about her health conditions. For example, speaking in person or over the telephone and raising the need for the information given to be kept confidential.

61. By around early September 2019, the Claimant and Rich were in a settled relationship and the Claimant decided to tell Ms Thomas about it. This, and the delay in the Claimant telling Ms Thomas she was involved with Rich, appears to have affected their friendship and they were less close thereafter. (For the avoidance of doubt, no criticism of either party is intended here – the tribunal simply has no view about the rights and wrongs of this matter.)

62. On 16 September 2019 the Claimant gave written notice of resignation to end on 17 October 2019. She attributed this to "*declining mental health*" and said she could provide a doctor's note if required.

*City skills course*

63. The Claimant attended the City Skills course that commenced on 26 September 2019. We reject any suggestion that she only went on the course because Rich lived in Edinburgh and it was a convenient way of seeing him. We are satisfied the Claimant went on the course because she was interested in its content. She had an ongoing passion for SCI issues not least because her boyfriend had a SCI. The fact he was local to the course was no doubt welcome especially as the Claimant was able to take a period of TOIL following the course and spend it in Edinburgh with her boyfriend. There is nothing wrong with any of that.

64. On attendance at the course the Claimant was indeed required to share a bedroom. She was paired with Ms X. In the event the Claimant found sharing a room very difficult. This was in significant part because it meant she did not have time to herself (which was one of her primary coping mechanisms). It was also because of certain characteristics of Ms X:

64.1. Ms X was unboundaried: she would be naked around the hotel room, not just in bathroom;
64.2. On the morning of 27 September 2019, the Claimant awoke to Ms X crying. She was crying about a break up and the Claimant spoke to her for an hour;
64.3. Ms X was not as independent as her pre-course information implied. On one occasion the Claimant assisted her to transfer from a shower chair to her wheelchair. The Claimant did this because Ms X was about to fall.

65. Events at course unfolded as follows:

65.1. Having experienced difficulties with sharing a room overnight on the first night of the course, the Claimant then found the course very intensive. Her coping mechanisms broke down. A particular factor in this was being unable to have any time alone, since Ms X was in the bedroom.
65.2. By around 21:00 on 27 September 2018, the Claimant was in crisis. She was had a major panic attack. She tried her coping mechanisms, including telephoning her mother which usually worked, but this failed to bring the panic attack under control. She tried to get a room of her own at the hotel or other hotels but there were none available.
65.3. At 21:40 the Claimant messaged Michelle, one of the group leaders, and arranged to speak. They spoke and agreed that the Claimant could leave and spend the night at her boyfriend's house and return in the morning.
65.4. Michelle checked in with the Claimant the following morning in sympathetic terms by text message. The Claimant returned to the course the following morning shortly after 10.30am and told Michelle she as feeling "tonnes better".
65.5. On her return there was a discussion with the Claimant about rooms and she was told that she could swap rooms and share instead with Janet McQuade, who was a familiar work colleague. The Claimant agreed to this and did not raise a concern about it.
65.6. The Claimant had an exchange of messages with Merryn Thomas, who messaged her to check on her welfare. The Claimant said "*I'm hoping I'll be okay now, I just find it really hard not having any space or time to myself and I started to panic. [Ms X] is pretty intense!."*
65.7. The Claimant then spoke to Ms Thomas in the early afternoon over the telephone. We find that Ms Thomas was sceptical of the Claimant's motivation and reasons for leaving the course (suspecting it had been a pre-mediated plan to see Rich). She did not say this to the Claimant but it was clear from her tone that she was dissatisfied that the Claimant had left the group. This felt like a telling off to the Claimant.
65.8. After lunch, on 27 September 2019 the Claimant left the group and went back to the hotel for a nap. She was feeling exhausted from the panic attack. At that point she did not have a key to her new room so she went to her original room and slept there. The Claimant did not make much effort to get the key to the new room. She could have messaged a group leader or tried to get a spare from hotel. The Claimant slept for a long time – she was exhausted following the panic attack. At 5pm when someone checked on her she was still asleep. However, she spent the evening with the group.
65.9. The Claimant did not take any steps to inquire about the room change and arrangements until 23.24 when she messaged Michelle and said "*Where am I sleeping tonight? I only have key for the room with Lorraine".* Michelle did not respond to this message.
65.10. The Claimant completed the course and did not change hotel room. She remained in the original room for rest of the course. The course continued until 1 October 2019. Nothing more was said about changing room by anyone.

65.11. Subjectively the Claimant was very uncomfortable on the remainder of the course. She felt judged and did not feel able to raise the matter further. Her outward presentation however was one of disengagement.

66. It was the Respondent's practice to evaluate the city skills courses. Ms Thomas captured the feedback from the group leaders in a telephone call. She typed the feedback up and saved it in the relevant folder. The folder was not password protected or marked confidential and was available to any employee who chose to access it.

67. After the course the Claimant spent a week in Edinburgh. She returned to the office on around 7 or 8 October 2019. There was a strange atmosphere and it was clear that people in the office had found out about what had happened on the course.

68. The Claimant was told that she could take garden leave for the final week of her employment. This was not the norm for the Respondent and seemed odd to the Claimant. Her instinct was that it related to what had happened in Edinburgh so she decided to check what the group leaders had said in the course evaluation feedback.

69. The course evaluation feedback in relation to the Claimant was as follows:

*69.1. "lovely girl but not the most helpful*
*69.2. Any concerns about any of the volunteer being involved again? If so please explain. "Beth"*
*69.3. Any incidents or near misses? "Beth's midnight adventures"*

70. After the Claimant's employment ended, at a later point in October 2019, Jack Philips, communications assistant, received a pay rise. This was based on good performance in his role. Jack had not been employed for 6 months in April 2019 so he did get an increment then. He was awarded the pay rise by the then CEO because the manager post in his team was vacant. The pay rise did not relate specifically to working without a manager, but generally to good performance.

**Law**

*Direct disability discrimination*

71. Section 13 EqA provides: *"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."*

72. Section 23 EqA provides:

> *(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.*
> *(2) The circumstances relating to a case include each person's abilities if –*
> *on a comparison for the purposes of section 13, the protected characteristic is disability…*

73. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

74. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

*'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*

*The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'*

75. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

> *'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'*

*Indirect discrimination*

76. Section 19 EQA provides as follows:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> *(c) it puts, or would put, B at that disadvantage, and*
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

77. Mr Johnston submitted that in an indirect discrimination claim the employee is not entitled to select an artificially narrow pool, citing *Cheshire & Wirral Partnership NHS Trust v Abbott* [2006] IRLR 546 and *R (Unison) v Lord Chancellor* [2016] ICR 1. We agree with that principle.

78. However, in a disability discrimination claim the group can properly be identified not as disabled people generally, but as disabled people with the claimant's particular disability (in

this case anxiety and depression). See for example the EHRC Code of Practice on Employment which makes this point. Mr Johnston accepted this point in closing submissions.

79. The best guidance, in relation to the identification of the pool is that of Lady Hale in ***Naeem v Secretary of State for Justice*** [2017] ICR 64:

> 40 … In the equal pay case of *Grundy v British Airways plc* [2008] IRLR 74, para 27, Sedley LJ said that the pool chosen should be that which suitably tests the particular discrimination complained of. In relation to the indirect discrimination claim in *Allonby v Accrington and Rossendale College* [2001] ICR 1189, para 18, he observed that identifying the pool was not a matter of discretion or of fact-finding but of logic. Giving permission to appeal to the Court of Appeal in this case, he observed that "*There is no formula for identifying indirect discrimination pools, but there are some guiding principles. Amongst these is the principle that the pool should not be so drawn as to incorporate the disputed condition*."
>
> 41 Consistently with these observations, the Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006, at para 4.18, advises that: *"In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively."* In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it"—ie the PCP in question—puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison.

80. In ***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601, Lady Hale said this at [14]

> *…as Mr Allen points out on behalf of Mr Homer, the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in* Equality: the New Legal Framework*, Hart 2011, pp.64–68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages.*

*81.* **In *McNeil and others v Revenue and Customs Commissioners*** [2019] EWCA Civ 1112, the court said this about particular *disadvantage:* "*In* CHEZ Razpredelenie Bulgaria v Komisia za zashtita ot diskriminatsia*, case C-83/14, [2016] 1 CMLR 14, the CJEU confirmed that the word "particular" in the phrase "particular disadvantage" was not intended to connote a disadvantage which was "serious, obvious and particularly significant" but simply to make clear that it was persons with the relevant protected characteristic who were disadvantaged: see paras. 99-100 of its judgment (p. 546). (That being so, the word would appear to be, strictly speaking, to be redundant, since that would be the effect of the statutory language even without it.)"*

82. In considering the particular disadvantage issue the tribunal is entitled to take into account the combined effect of two or more PCPs: ***Ministry of Defence v. DeBique [2010] IRLR 471.***

83. In ***MacCulloch v ICI*** [2008] IRLR 846, Elias J (as he then was) set out four legal principles with regard to justification, which have since been approved by the Court of Appeal in ***Lockwood v DWP*** [2014] ICR 1257:

    *(1) The burden of proof is on the Respondent to establish justification….*
    *(2) The classic test was set out in **Bilka-Kaufhaus GmbH v Weber Von Hartz** (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.*
    *(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].*
    *(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."*

84. Concrete evidence is not always required to prove justification (***Lumsdon v Legal Services Board*** [2015] UKSC 41).

    <u>*Reasonable adjustments*</u>

85. Section 20(3) EQA 2010 provides:

    > *"…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, [there is a requirement] to take such steps as it is reasonable to have to take to avoid the disadvantage."*

86. "Substantial" is defined at section 212(1) EQA 2010 to mean "more than minor or trivial".

87. An employer is not under a duty to make reasonable adjustments unless it knows or ought to know the employee has a disability and is likely to be placed at the substantial disadvantage in question (per paragraph 20(1) Schedule 8, EA 2010). The EHRC *Code of Practice on Employment* gives useful guidance on knowledge particularly at paragraph 5.15 and 6.19 which emphasis that employers must do all they can reasonably be expected to do to find out.

88. The relevant case law was summarised by HHJ Eady QC (as she then was) in *A Ltd v Z* [2020] ICR 199 EAT at [23]. Although this guidance was given in the context of s15 EQA, it can be read across to the s20 context:

    > …
    > (2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the

employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect: see *Donelien v Liberata UK Ltd* (unreported) 16 December 2014, para 5, *per* Langstaff J (President), and also see *Pnaiser v NHS England* [2016] IRLR 170, para 69, *per* Simler J.

(3) The question of reasonableness is one of fact and evaluation: see *Donelien v Liberata UK Ltd* [2018] IRLR 535, para 27; none the less, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes (see *Herry v Dudley Metropolitan Borough Council* [2017] ICR 610, *per* Judge David Richardson, citing *J v DLA Piper UK llp* [2010] ICR 1052 ), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already] done so", *per* Langstaff J in *Donelien* 16 December 2014, para 31.

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the code, which (relevantly) provides as follows:

> 5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.
>
> 5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

(6) It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so: *Ridout v TC Group* [1998] IRLR 628; *Secretary of State for Work and Pensions v Alam* [2010] ICR 665 .

(7) Reasonableness, for the purposes of section 15(2) , must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code.

*89.* General guidance as to the overall approach to reasonable adjustments was given in ***Environment Agency v Rowan*** [2008] ICR 218:

*89.1.* The PCP must be identified;
*89.2.* The identity of the non-disabled comparators must be identified (where appropriate);
*89.3.* The nature and extent of the substantial disadvantage suffered by C must be identified;
*89.4.* The reasonableness of the adjustment claimed must be analysed.

90. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal (***Morse v Wiltshire County Council*** [1998] IRLR 352).

91. The Equality and Human Rights Commission Code of Practice gives useful guidance at paragraphs 6.28 and 6.29 upon potentially relevant factors.

92. In ***Tarbuck v Sainsbury's Supermarkets*** [2006] IRLR 664**,** the EAT held that the duty to make adjustments does not extend to matters such as consultations or assessments and declined to follow ***Mid-Staffordshire General Hospital NHS Trust v Cambridge*** [2003] IRLR 566. The only question is whether the employer has *substantively* complied with its obligations or not. ***Tarbuck*** has been repeatedly followed since and correctly states the law.

*Harassment related to disability*

93. 22. Section 26 EQA 2010 provides:

> (1) A *person (A) harasses another (B) if –*
> *(a) A engages in unwanted conduct related to a relevant 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 [for short we will refer to this as a "proscribed environment"].*
> *…*
> *(4) In deciding whether conduct has the purpose or 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."

94. In ***Weeks v Newham College of Further Education*** UKEAT/0630/11/ZT, Langstaff J said this at [21]:

> *"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."*

95. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336 (at ¶15), Underhill J (as he was) said:

> 15…*A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard….Whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."*
>
> *22…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"*

96. A finding that it is not objectively reasonable to regard the conduct as harassing is fatal to a complaint of harassment. That point may not be crystal clear on the face of s.26 Equality Act 2010 but see the *obita dicta* of Underhill LJ in ***Pemberton v Inwood*** [2018] IRLR 557 at [88] and the ratio of ***Ahmed v The Cardinal Hume Academies***, unreported EAT Appeal No. UKEAT/0196/18/RN in which Choudhury J held that ***Pemberton*** indeed correctly stated the law [39].

97. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic of disability, the Tribunal has to ask itself whether, objectively, the remark relates to the Claimant's disability. The knowledge or perception by the person said to have made the remark of the alleged victim's disability is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The Tribunal should look at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services*** UKEAT/0033/15/LA at [24-2].)

98. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (***Unite the Union v Nailard*** [2018] IRLR 730 at [80]).

*99.* In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 HHJ Auerbach gave further guidance:

> *[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.*
>
> *[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.*
>
> *[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.*

*Time limits*

100. S.123(1)(a) EqA provides that a claim must be brought within three months, starting with the date of the act to which the complaint relates.

101. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

102. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In ***Hendricks v Commissioner of Police of the Metropolis*** [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

103. S.123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which may include factors such as: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICR 1194).

<u>The burden of proof</u>

104. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

105. The effect of these provisions was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

> ‘It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:
> (1) At the first stage the Claimant must prove “a *prima facie* case”. That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving “facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination”. As he continued (pp. 878-9):
>
> > “56. … The bare 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 probabilities, the Respondent had committed an unlawful act of discrimination.

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> 57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"
>
> (2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:
>
> "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."
>
> He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

106. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

107. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

108. In a complaint of failure to make reasonable adjustments the Claimant has the burden of proving that the PCP, physical feature or failure to provide auxiliary aid, would put him at a substantial disadvantage compared to others who are not disabled. The burden does not shift unless there is evidence of some apparently reasonable adjustment which could have been made. This does not necessarily mean providing the detailed adjustment but at the least requires the broad nature of the adjustment to be clear enough for the Respondent to understand and engage with it. See ***Project Management Institute v Latif*** [2007] IRLR 579.

*109.* In an indirect discrimination claim the Claimant has the burden of proving that the PCP put the group with the relevant protected characteristic at a particular disadvantage compared to others: see ***Nelson v Carillon*** *[2003] IRLR 428.*

110. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

*Unauthorised deduction from wages*

111. The basic statutory provisions are as follows:

111.1. The right not to suffer an unauthorised deductions from wages is established by s.13 ERA.
111.2. 'Deduction' is defined at s.13(3) ERA.
111.3. Wages are defined at s.27 ERA.

112. In ***New Century Cleaning v Church*** [2000] IRLR 27 the majority of the CA held that in s.13(3) ERA the words 'properly payable' denote a legal entitlement to payment although not necessarily a contractual one (per Morrit LJ at [43]).

113. The starting point is to analyse what sum was properly payable within the meaning of s.13(3) ERA. It is only if the sum claimed is in fact properly payable that any issue arises in relation to deduction (***Hellewell v Axa*****,** unreported EAT 2011, Silber J at paragraph 23).

**Discussion and conclusions**

**Sex discrimination**

114. Before reaching our conclusions in respect of sex discrimination we stepped back from the evidence and looked at it as a whole to see what inference of sex discrimination if any might be drawn.

115. We did not think there was any basis to draw inferences of sex discrimination. In light of our findings of fact, the only matter from which inferences might have been drawn were the comments about the Claimant manner of dressing. However we did not think that that was in fact a basis of drawing any inferences. The content of the comments was not in evidence and in any event, Mr McCallion (the only impugned person) is not one of the people who commented.

116. More generally, on the evidence, the Respondent organisation is one in which female employees are successful and are well represented in the management grades.

117. The first complaint is *'Not paying the Claimant an increased salary during the period between 10th May 2019 and 16th July 2019 when there was not a full complement of staff in the Respondent's Events and Challenge team.'*

118. It is true that the Claimant did not receive an increased salary for this period, and true that there was not a full complement of staff in the team during it is.

119. However, we find that the reason why the Claimant did not receive a salary increase was because there was only a short period of time in which she took on some additional duties in light of the staffing levels and Mr McCallion did not consider that this merited, or that it would be appropriate to give the Claimant, a raise. She was not formally acting up in a more senior role and it was always known that appointments would be made in short order to both the fundraiser and manager positions that were briefly vacant.

120. We are satisfied that Mr Philips' circumstances were materially different to the Claimant's. He did receive a pay rise, but it was for general good performance. In the period leading up to the Claimant's conversation with Mr McCallion about a pay rise, the Claimant's performance had significantly deteriorated.

121. We are also satisfied a hypothetical male comparator whose circumstances were the same or not materially different to the Claimant's, would have been treated in the same way that she was.

*Not appointing the Claimant to the role of Events and Challenge Fundraiser on or about 16th July 2019.*

122. The Claimant was a good candidate for this role given her experience and performed well at interview. We therefore can well understand why she thought she ought to get the role.

123. The reason why the Claimant did not get the role was twofold.

123.1. Firstly, because Mr McCallion was very concerned by feedback that Ms Prince left about the Claimant 8 May 2019. That feedback was generally very negative indeed and was highly relevant to the Claimant's ability to perform well in the more senior fundraiser role. In our view Mr McCallion did not want to appoint the Claimant to the fundraiser role because of this *so long as* there was a good alternative candidate whom the role could be offered to.

123.2. Secondly, Mr Remedios was a very good candidate for the role who interviewed well. There therefore was a very viable alternative candidate whom Mr McCallion preferred to appoint, namely, because he thought Mr Remedios was the better candidate particularly but not exclusively in light of the concerns about the Claimant.

123.3. Thus Mr McCallion did not want to appoint the Claimant once it was clear there was a good alternative candidate. The other members of the interview panel were not privy to Ms Prince's feedback. However, there was no scoring criteria at the interview and just a general discussion of candidates. Mr McCallion was head of fundraising and we therefore think that his views carried the greatest weight in the selection process. Even if the other panellists had an initial preference for the Claimant, ultimately the whole panel's decision was that Mr Remedios was the better candidate.

124. We are entirely satisfied that sex was not a factor in any way in the selection process.

125. For completeness we note that Mr Remedios' circumstances were materially different to the Claimant's. He unlike the Claimant, did not have highly negative feedback from his manager.

126. We also satisfied that hypothetical comparator in the Claimant's circumstances would have been treated in exactly the same way as the Claimant.

*Limitation and sex discrimination*

127. We can deal with this matter very briefly in light of our conclusions on the merits of the sex discrimination claim.

127.1. It is right that even at the date the claim was presented the complaints of sex discrimination were out of time (which is the essential basis upon which Mr Johnston opposed an extension of time);

127.2. However we consider it would be just and equitable to extend time because:

127.2.1. The Respondent accepted that it was not prejudiced by the delay. That was a wholly realistic concession.

127.2.2. We heard full evidence and submissions about the sex discrimination issues.

127.2.3. It was right and proper having done so, in circumstances in which the Respondent suffered no prejudice by the delay, to deal with the complaints on their merits.

127.2.4. Although there was no explanation for presenting the complaints out of time, that is not an essential requirement for an extension of time

particularly not in a case of this kind were limitation is dealt with at the conclusion of the case rather than at a preliminary hearing.

127.2.5. All in all, particularly in light of the lack of prejudice to the Respondent, we considered it just and equitable to extend time.

**Reasonable adjustments**

128. It is convenient to begin by addressing the issue of knowledge of disability. While the Respondent admits that the Claimant was a disabled person by reason of depression and anxiety at all relevant times it denies that it knew or ought reasonably to have known that.

129. We accept that the Respondent did not actually know that the Claimant was a disabled person at the relevant times (i.e., at the times of the acts of alleged failure to make reasonable adjustments). However, we find that it ought reasonably to have the Claimant was a disabled person by reason of anxiety and depression at the relevant times.

130. The Claimant had done significant amount to put the Respondent on notice of her disability including the following:

130.1. On 17 November 2018, as set out above the Claimant had a significant panic attack at work (at the ball). She described it as such and it would have been obvious to Ms Prince that this was a major event;

130.2. On 20 November 2018, the Claimant told Ms Prince in a text messages "*I have been suffering with severe depression and anxiety triggered by things with Oli".*

130.3. On 4 December 2018, the Claimant met with her then manager and a wellness action plan was agreed. It identified three stages of warning signs, with stage III being "serious warning signs". The stage III indications were panic attacks and being unable to do everyday things like getting out of bed.

130.4. In the course of early to mid-2019, there was a noticeable drop in the standard of the Claimant's work including her ability to focus.

130.5. On 27 August 2019, the Claimant disclosed in a medical information form that she was on sertraline for anxiety and depression, 100mg per day.

130.6. On 25 September 2019, the Claimant indicated in response to questions from Mr Dafallah that she used medication and coping strategies to manage anxiety and depression.

130.7. In her letter of resignation she referred to leaving the Respondent's employment because of declining mental health.

131. We specifically acknowledge two things in particular:

131.1. It might be argued that based on what the Claimant said in the text message to Ms Prince about the mental health problems being triggered by things with Oli, her mental health problems appeared to be no more than a reaction to adverse life events in the normal range rather than of sufficient gravity to cross the threshold of disability. We do not accept that – it is a question of degree and she did refer to *severe* anxiety and depression. More over, as time went on and the mental health references continued as above.

131.2. In the exchanges with Mr Dafallah of 25 September 2019, the Claimant was asked *how does this mental health condition affect you day-to-day?* and she said simply "*can't handle crowds but that's about it*." However, a person can be disabled despite their impairment being presently well managed, for example through the use of medication or coping strategies. And the Claimant indicated that she used both medication and coping strategies.

132. In any event, the extent of the Claimant's mental health problems could only be properly understood by looking more deeply into them and into their history rather than just their impact on her at any given moment. On the evidence, this was never done. It could and should have been, and if it had been it would have been appreciated that the Claimant was obviously a disabled person within the meaning of the Equality Act 2010 meeting all elements of the definition of disability (impairment/long-term/substantial adverse effect on normal day-to-day activities, per s.6 EQA). Though the Claimant's mental health problems were comparatively well managed through medication and coping strategies whilst working for the Respondent they had historically been very severe. It was clear that they had not resolved and remained ongoing. This would have become apparent upon reasonable inquiry.

133. If the Respondent had been acting reasonably it would have made further inquiries about the history of and seriousness of her mental health problems long before the Edinburgh course. These could have been of the Claimant herself, her GP or occupational health. Had it done so, we are confident that it would have swiftly been obvious that the Claimant was a disabled person.

134. Did the Respondent operate any of the following provisions, criteria or practices ("PCPs")?

a. *Requiring the Claimant to share a hotel room while attending the Edinburgh City Skills course from 26th September 2019 to 1st October 2019 ('PCP A').* The Respondent did operate this PCP, although it did not just apply to the Claimant. There was a standing rule that course participants shared a room. Exceptions could be made, but that was the standing rule.
b. *The requirement and/or expectation that employees must share a room with a course participant ('PCP B')*. PCP B, and our analysis of it, is materially the same as PCP A.
c. *The requirement and/or expectation that employees on the training course are required to undertake duties that fall outside the scope of their role by providing personal care to others ('PCP C').* This PCP was not operated by the Respondent. In fact, the opposite PCP was operated for 'buddies' such as the Claimant. They were specifically instructed not to provide personal care to others in the pre-course literature and we are satisfied that the genuine rule and expectation is that they would not do so. The Claimant did choose to assist Ms X to prevent her falling. This was her choice and it was a good choice that demonstrated basic human decency. However, it was not a manifestation of PCP C which simply did not exist.
d. *The practice, provision and/or criteria of providing an unfavourable course evaluation, specifically referring to actions taken out of necessity by a disabled employee ('PCP D').* This is not the perfect characterisation of the PCP but there was a PCP essentially to this effect. The PCP was to undertake an evaluation of the course and refer in the evaluation to any relevant matter (whether good or bad). This certainly would include "actions taken out of necessity by a disabled employee".
e. *The practice, provision and/or criteria of making the course valuation free to access to all colleagues of said employee, causing further humiliation* (*'PCP E'*). This PCP was operated by the Respondent. The course evaluation document was stored in an electronic folder that was accessible to all employees of the Respondent whether they had any need to access the folder or not. The words "*causing further humiliation"* are best understood as a possible effect of the PCP*.*

135. If any of the PCPs were operated did they place the Claimant at a substantial

disadvantage as a disabled person in comparison with person who were not disabled?

a. PCP A/PCP B: This PCP did put the Claimant at a substantial disadvantage compared to others who are not disabled. Sharing a room was the major contributing factor to the Claimant suffering a serious panic attack on 27 September 2019 during which we accept she was extremely unwell. The effects of the panic attack lingered over the following days. The Claimant was exhausted and she more generally felt very uncomfortable at the course. We accept that other course participants who did not have the Claimant's disability might also feel some anxiety at sharing a room with a stranger; however it is a question of degree. What the Claimant experienced was very substantially worse than the ordinary anxiety one would expect from sharing a room with a stranger.
b. PCP C: this PCP did not exist so the issue does not arise.
c. PCP D and PCP E: We think it makes sense to analyse these PCPs together. PCP D in effect relates to capturing course evaluation information while PCP E relates to the fact that the information captured was not kept confidential so came to the Claimant's attention. It is the combined effect of those two things that is material. We think that in tandem these PCPs did put the Claimant at a substantial disadvantage compared to others who are not disabled. While it is true that any course participant whether disabled or not might be upset by an adverse comment about them in the course evaluation, it is again a question of degree. In our view it is clear that as a result of her disability the Claimant was emotionally very vulnerable. She had a significantly lower than normal threshold for negative emotions such as feelings of humiliation. Thus when she saw the course feedback she experienced feelings of humiliation and shame to the point that she required counselling to assist her work through it. This went well beyond the ordinary level of distress an employee who was not disabled might experience when reading a course evaluation document, even one that commented adversely upon them. N.B. We recognise that it was the Claimant's own choice to seek out the course evaluation – however we do not think that alters the overall analysis.

136. Did the Respondent know (or could it reasonably have been expected to know) that the Claimant would be placed at a substantial disadvantage by the relevant PCP?

a. PCP A/PCP B: We accept that the Respondent did not actually know that the Claimant would be placed at substantial disadvantage by this PCP. The question of whether it ought reasonably to have known is a difficult one and it must be broken in to two stages: before and after the panic attack on 27 September 2019:
    a. Before the panic attack: There are factors going both ways. On the one hand, the Respondent ought to have known that the Claimant was disabled by reason of depression and anxiety. It is also the case that the Claimant twice mentioned that she would like a room of her own (to Mr Defallah by Skype and to Ms Thomas by Whatsapp) because she was anxious about sharing with a stranger. However, despite the foregoing, on balance we conclude that we do *not* think the Respondent ought reasonably to have known that the Claimant would be put at a substantial disadvantage by PCP A/PCP B. On 25 September 2019, the Claimant had an exchange of messages with Mr Defallah specifically about her anxiety and depression and how it affected her. Her position was that there was nothing to be concerned about and that the only issue related to crowds. That had nothing to do with sharing a room with one other person. The Claimant did not mention a difficulty with sharing

a room at this stage at all. The Claimant suggested in her oral evidence that she did not raise this matter in terms because she was concerned about the lack of security in respect of documents at the Respondent. However, in our view that is an after the event rationalisation of her position and was not, contemporaneously part of her reasoning. If she had wanted to disclose that sharing a room might precipitate a mental health crisis then she could have done so by other means, for instance over the telephone and insisted that the information was kept confidential. On balance, we think the Respondent's understanding that the Claimant had 'ordinary' anxiety about sharing (ie., in the same order of concerns that anyone might have) was reasonable in the circumstance and we cannot say that it ought reasonably to have known that that in fact matters went way beyond that.

b. After the panic attack: The Claimant spoke to a group leader, Michelle, on the evening of 27 September 2019, and we think it was clear from that conversation that she was suffering a panic attack in substantial part because of the requirement to share a room. For this reason checks were made to see whether there was a free room at the hotel (but there was not). At this point then, it was clear that the PCP put the Claimant at a substantial disadvantage.

b. PCP C: PCP C was not applied, but there was in any event no reason to anticipate that the Claimant would be put at a substantial disadvantage compared to our others who are not disabled by it. She was known to be passionate about spinal injury issues and particularly comfortable around people with spinal injuries.

c. PCP D and PCP E:

a. The Respondent certainly knew all of the documents it stored electronically were accessible to all employees. It was therefore obvious that from time to time employees would look at documents that were not intended for their eyes.

b. The Respondent knew that the Claimant was by this stage a disaffected employee generally but also specifically in relation to the course.

c. The Respondent decided to put the Claimant on garden leave for the final week of her employment, which was not the norm in that workplace. This was bound to raise a question in the Claimant's mind as to why.

d. It was also obvious to all that the Claimant's behaviour at the course had been contentious. At the course itself the Claimant had spoken to the group leaders as well as Ms Thomas. And on returning to the office there had been a strange atmosphere.

e. In the circumstances we think it was readily foreseeable that the Claimant would look at the course evaluation forms, particularly as, in addition to not being stored securely they were not marked or otherwise demarcated as being confidential.

f. The Respondent ought reasonably to have known at this stage that the Claimant was disabled by reason of anxiety and depression and for that reason as well as because of what happened on the course, that she was put at the substantial disadvantage by PCP's D and E.

137. Ought the Respondent reasonably to have made the following adjustments:

137.1. In respect of the PCPs A and B:

137.1.1. *being provided with a single room*: we do not think the Respondent ought reasonably to have arranged the Claimant to have a single room in advance

of the course because it did not know and could not reasonably have known, that sharing a room would have substantial negative impact on the Claimant. In the absence of the same, there was no reason to depart from the primary rule that course participants shared rooms. That saved cost and could also be an enriching experience where someone without a spinal injury shared with someone with a spinal injury. We also do not think that the Respondent ought reasonably to have arranged the Claimant to have a single room after she had her panic attack. However this is more finely balanced. Sharing a room had been the major contributing factor to the Claimant suffering from a panic attack. However, the agreed way forward was for the Claimant to share with somebody else, Janet, whom she knew. The Claimant appeared content with the arrangements when she returned to the course on the morning of 28 September 2019. In the event she did not change rooms, and she said nothing more about having her own room. She also did not have any further panic attacks. So the appearance was that matters had broadly been resolved.

137.1.2. *being permitted to share a room with someone whom she knew rather than a stranger*; for the same reasons that we do not think the Respondent ought reasonably to have arranged for the Claimant to have a single room in advance of the course, we do not think it ought reasonably to have paired her with someone whom she knew rather than a stranger. The Claimant was paired with Ms X because they were close in age and it was anticipated that they would enrich each other's experience. Further the Respondent generally prefers not to pair work colleagues together because it wants the group as a whole to bond rather than people who are already familiar with themselves forming cliques. We do not think that the Respondent knew or ought reasonably to have known that there was any good reason for departing from its usual practice in the Claimant's case.

137.1.3. After the Claimant's panic attack it was agreed that she would share a room with somebody else whom she knew – Janet. However, in the event this adjustment was disrupted, inadvertently but nonetheless, by the Claimant. Having agreed that she would change rooms, at around lunchtime the Claimant left the course and when back to the hotel to have a nap. She didn't have a key to the new room so she simply went and slept in the old room. She did not take any real steps to try and get key to the new room, such as messaging one of the group leaders to try and get it, or raising the matter with the hotel. This rather gave the impression that she was content to revert to her original room. The Claimant then did not say anything at all about the matter until she sent Michelle a text late at night at 23:24 in which she simply asked where she was sleeping. This message was sent very late in the day and was simply phrased as a query rather than a request to change rooms as had been the plan. Michelle did not respond, but she can hardly be blamed that given the hour. The Claimant spent the night in her original room and said nothing at all about changing rooms thereafter. The Respondent did not say anything about the matter thereafter either. On balance we take the view that if the Claimant still wanted to change rooms it fell to her to say so because she had given the impression by returning to the original room and sleeping in it that she did not need a room change. We are also satisfied that if the Claimant had made clear that she required a room change at a reasonable time of day, say in the morning of 29 September 2019, the Respondent would have allowed her to swap rooms.

137.2. In respect of the PCP C: prior to the commencement of the course the Respondent's understanding was that Ms X did not require any assistance. Once the Claimant raised the matter the Respondent was prepared to swap the Claimant's room so that she shared with Janet and a more experienced buddy shared with Ms X. This did not happen for the reasons given above and we repeat that analysis.

137.3. In respect of the PCP D and E:

137.3.1. *Not providing unfavourable comments specifically referring to actions taken out of necessity by a disabled employee within course evaluation documentation;* we do not think this was an adjustment the Respondent ought reasonably to have made. It was important for the course to be evaluated and for it to capture all matters that might be of relevance to the evaluation of the course, including actions taken of necessity by disabled employees. The course evaluation would contribute to important matters such as quality control, learning points and safeguarding. That is not to say that group leaders had *carte blanche* to express themselves in an unnecessarily rude way when providing feedback but that is another matter altogether.

137.3.2. *Keeping such comments confidential rather than accessible to all employees / keeping unfavourable comments contained in course evaluation documentation referring to actions taken out of necessity by disabled employees confidential rather than accessible to all employees.* In our view the Respondent ought reasonably to have kept the course evaluation documentation confidential to the subset of staff who needed to see its content. No good reason has been offered for failing to do this. It was said that there was some difficulty with password protecting documents in the Respondent's CRM system. However no detail was given and the Respondent has now solved that problem. It is implausible that it could not have solved it before and it was important for many reasons including the present one to do so. In any event, if which we do not accept, storing the course evaluations securely was possible electronically, they could no doubt have been stored in paper form instead. Further, the course evaluation documents could have been marked private and confidential, to make clear that they had a limited intended audience, but even that step was not taken.

<u>Indirect disability discrimination –s.19 Equality Act 2010</u>

138. Do any of the following amount to a PCP?

138.1. The PCPs relied on the purposes of the indirect discrimination claim are the same as PCPs B, C, D and E above and our analysis of whether those matters were PCPs and whether they existed is repeated.

139. Does the PCP put disabled persons at a particular disadvantage when compared with non-disabled persons?

139.1. It was agreed in closing submissions that we were concerned in particular here not with disabled people generally but with people who are disabled by reason of depression and anxiety. This reflects paragraph 4.16 of the EHRC employment code.

139.2. The tribunal asked Mr Johnston the relevant pool was for testing the PCPs. He said the pool comprised anyone who could volunteer to be a buddy on the city skills course. This seems like a reasonable choice of pool for PCP B. However, it is too broad for PCPs D and E because only employees of the Respondent had access to the Respondent's electronic files (whereas the role of buddy was open to anyone to apply for). The pool therefore should be limited to the Respondent's employees.

139.3. PCP B: there is no evidence before us that requirement to share a room places people with depression anxiety at a particular disadvantage compared to others who do not have that disability. It is not obvious to us whether it does not. We can readily see that there may be others with anxiety and depression who like the Claimant

struggle to share a room particular with a stranger. But we can also see that there are may be others with anxiety and depression who might prefer to share a room rather than to be alone, particularly in new and unfamiliar environments. We do not think that this matter can be resolved through common sense, general life experience or industrial sense. The Claimant has the burden of proof here and she has not discharged it.

139.4. PCP C: this PCP was not applied so the question of substantial disadvantage does not arise. There is in any event no evidence of group disadvantage and the complaint fails for that reason too.

139.5. PCP D and PCP E: In our view this PCP did/would put disabled people with anxiety and depression at a particular disadvantage compared to others who are not disabled. People with anxiety and depression are more likely to suffer from intense emotional distress and have a lower threshold for experiencing feelings of humiliation than people who do not have that disability. Although there is no specific evidence of that before us, we think that it is a matter of common sense and experience that we are capable of forming a judgment about. As Lady Hale said in *Homer, "Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages."* We think it is the case that people with anxiety and depression at a level that it constitutes a disability within the meaning of the Equality Act 2010 are more likely to be associated with feelings of humiliation and intense emotional distress in the event of being criticised all the more so where the criticism is not kept confidential to those who have a legitimate need to know of it. Thus we think that PCPs D and E put disabled people with anxiety and depression at a particular disadvantage compared to others that do not have that protected characteristic. They are more likely to experience feelings of humiliation, offence and intensive emotional distress in the event of becoming aware of negative feedback in a course evaluation particularly where the information is left in a place accessible to all other employees and not kept confidential.

140. Did the PCPs put the Claimant at this disadvantage? As set out above, it is our view that the Claimant was put at this disadvantage by PCPs D and E.

141. Was the PCP(s) a proportionate means of achieving a legitimate aim?

141.1. The only justification relied upon that is potentially relevant to PCPs D and E is "*To ensure course participants are provided and will be provided with appropriate support when attending courses R organises."* We accept that this was a legitimate aim. However, the PCP D and E are not a proportionate means of achieving that aim because there was simply no good reason for failing to keep the course evaluation forms confidential to those who had a legitimate business reason to see them. If the course feedback information had been collected but kept confidential to those who had a need to see, the aim would have been fully achieved. However, the discriminatory impact on disabled people (including the Claimant) would have been substantially reduced or eliminated because, and these are both independently of each other important matters, the information would not come to the attention of the disabled person and the information would not be available to other people with no legitimate need or interest in seeing it. Thus the discriminatory impact of the PCPs could have been avoided or substantially reduced a no, or virtually no, cost to the Respondent.

<u>Harassment related to Disability</u>

142. There is no doubt that the comment on made the feedback evaluation form, *"Beth's midnight adventures"* was unwanted on the Claimant's part.

143. Mr Johnston conceded in closing submissions that the conduct related to disability. He was right to do so. The test is a broad one. There is no doubt that the comment was a reference to the decision to leave the course and stay at her boyfriend's house overnight on account of the panic attack that befell her on 27 September 2019. Having a panic attack undoubtedly a symptom of her disability. We would have had no hesitation in finding the comment related to disability.

144. The conduct did not have the purpose of violating the Claimant's dignity or creating a proscribed environment. It was not intended for the Claimant's eyes at all. The question then is whether it had that effect.

145. The Claimant certainly found the unwanted conduct humiliating and offensive and to create a humiliating and offensive environment for her. Her (unchallenged) evidence is that it caused her feelings of shame and had such a significant impact on her that it was a matter she required counselling to work through over a significant period of time.

146. However, we need to take into account the other circumstances of the case and whether it was reasonable for the conduct to create a humiliating/offensive environment.

147. It is of course relevant that no offense was intended by the comment and that it was probably intended in a light-hearted way. However, the intent behind the comment is no more than a non-determinative factor. It is also relevant that this comment was a one-off rather than part of a series of events.

148. We do think that the Claimant had a low level of resilience, low threshold for taking offence and low threshold experiencing feelings of humiliation. However, we also think that in this instance it is objectively reasonable to conclude that the comment created an offensive and/or humiliating environment:

148.1. The Claimant experienced a serious panic attack on 27 September 2019 which was one of the recurrent symptoms of her mental illness. This was a sudden mental health crisis in someone that had a history of very serious mental health problems (that had included matters such as suicidal ideation and self-harm).
148.2. The Claimant's wellness plan indicated that a panic attack was a stage 3 (ie., maximum level) warning sign;
148.3. The Claimant had disclosed in advance of the course that she suffered from depression and anxiety and was taking prescription medical for the same;
148.4. The reference to the Claimant having a 'midnight adventure' trivialised the panic attack. Further, to a degree, it mocked the Claimant for leaving the group in circumstances in which she left because of the panic attack. Yet further, it implied that the Claimant's reason for leaving the group was not really a sudden mental health crisis but something fun like an adventure.

149. We have at the front of our minds the guidance of Underhill J (as he was) in *Richmond Pharmacology.* We fully accept that not every unfortunate phrase or adverse comment will cross the threshold of creating a proscribed environment; but we think that this particular unfortunate phrase/adverse comment did cross the threshold.

<u>Unlawful Deduction of Wages</u>

150. The list of issues identifies the complaint as *Did the Respondent unlawfully deduct any of the Claimant's wages by way of the difference in salary for the job role of Events and Challenge Fundraiser which she was unsuccessful in obtaining following interview?*

151. In essence, the Claimant's position is that she should have been paid at the rate of a fundraiser/co-ordinator rather than at the rate of an assistant in the period between 10 May 2019 and 16 July 2019 when there was not a full complement of staff in the Events and Challenge team.

152. The Claimant had no legal entitlement to be paid at that rate and the mere fact that she carried out additional duties in the period during which the team was incomplete did not give her one. Her agreement with the Respondent was to be paid £19,000 p/a (pro-rata) and following her pay rise in May 2019, £19,475. That is the amount she was paid. She did ask to be paid more and Mr McCallion refused. There was thus no agreement that she would be paid more and no legal entitlement to be paid more.

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Employment Judge Dyal
Date: 23 July 2021

Sent to the parties on
Date: 4 August 2021