



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4104095/2020, 4104097/2020, 4107500/2020 and
4107501/2020

Held via Cloud Video Platform (CVP) on 13 October 2021

Employment Judge M Sangster
Tribunal Member N Elliot
Tribunal Member R Martin

Mrs A Harrower

**First Claimant
Represented by
Ms R Jiggins
Paralegal**

Mrs L McVicars

**Second Claimant
Represented by
Ms R Jiggins
Paralegal**

Mr A Bourke

**Respondent
Not present/represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that claimants' complaints of discrimination arising from disability, failure to make reasonable adjustments, harassment related to disability and/or sex and victimisation do not succeed and are dismissed.

REASONS

Introduction

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.

2. These claims have had a lengthy history, with each of the parties making various applications including for strike out of the claim or response. There are two sets of claims by each of the claimants, which have been ordered to be heard together.
- 5 3. The respondent was previously one of four respondents to the claims. He is now the only remaining respondent. The claims against the remaining respondents were dismissed, following withdrawal by the claimants, in August 2021.
- 10 4. The first set of claims were raised by the claimants, separately, on 27 July 2020. The first claimant directed her claim solely against her former employer, who is no longer a respondent in these proceedings. The second claimant directed her claim against her former employer and the current respondent. An early conciliation certificate, in the name of the second claimant and the current respondent, had been issued on 10 July 2020, with
15 conciliation stated to have started and ended on that date. This was the only early conciliation certificate in the names of these parties.
- 20 5. The claimants raised a further claim, on the same claim form, on 26 November 2020, against all four respondents. This largely repeated the allegations made in the original claims, albeit extending the scope to cover the additional respondents and, in case of the second claimant, including some additional allegations which arose in the course of her continued employment with the respondent.
- 25 6. An early conciliation certificate, in the names of the first claimant and the current respondent, was issued on 11 December 2020, with conciliation stated to have started and ended on that date. This was the only early conciliation certificate in the names of these parties.
7. Issues in relation to jurisdiction/timebar were raised and reserved to be determined at the final hearing.
- 30 8. At a preliminary hearing before EJ Kemp on 7 May 2021, the hearing dates were set and various orders were made to ensure parties were able to proceed with the final hearing. The final hearing was to determine all issues,

including remedy. It was agreed that witness statements would be used at the final hearing, which would be taken as read.

- 5 9. The respondent accepted, in correspondence to the Tribunal dated 8 June 2021, that the claimants were disabled persons for the purposes of section 6 of the Equality Act 2010 (**EqA**).
- 10 10. Three separate bundles were lodged in advance of the final hearing, addressing pleadings, evidence and remedy, and extending to 522, 491 and 54 pages respectively.
- 10 11. On 13 September 2021, the claimants applied to strike out the response. That application was considered as a preliminary matter on 11 & 12 October 2021. The response was struck out on 12 October 2021, for the reasons set out in the order and note dated and sent to the parties that day.
- 15 12. The final hearing accordingly proceeded as undefended. The claimants gave evidence themselves and did not call any witnesses. Evidence and submissions were heard on 13 October 2021. As ordered, the claimants' evidence in chief was by reference to witness statements, which were taken as read.

Issues

- 20 13. At the start of proceedings, the Tribunal sought clarification of the complaints being advanced. The claimants' representative confirmed that the claimants were pursuing each of the claims set out in their combined 'Grounds of Claim', which was prepared, in accordance with an order of the Tribunal, following the dismissal of the claims against the other three respondents. The complaints advanced were those set out at pages 14-26
- 25 of that document. The issues for the Tribunal to determine were accordingly as follows:

Discrimination Arising from Disability – s15 EqA

- 13.1. Did the respondent know, or could the respondent reasonably have been expected to know, that the claimants had disabilities?

- 13.2. Did the following thing(s) arise in consequence of the claimants' disabilities?

First Claimant

- 5 13.2.1. Direct and blunt 'unfiltered' communication;
- 13.2.2. Need to manage stress by not working overtime or taking on extra-contractual duties;
- 13.2.3. Giving literal answers to questions without consideration for social or other contexts; and
- 10 13.2.4. Emotive communications with colleagues while under stress.

Second Claimant

- 13.2.5. Complaints of 13 & 15 December and need for resolution to manage mental health symptoms;
- 15 13.2.6. Need to manage health by restricting work to the day shifts or minimising stressful or additional duties;
- 13.2.7. Need to remove colleagues from social media;
- 13.2.8. Emotive communication with colleagues while under stress; and
- 13.2.9. Sickness absence.

- 20 13.3. Did the respondent treat the claimants unfavourably as follows?

First Claimant

- 13.3.1. Advising/causing the employer to uphold a grievance against her for disability related conduct;
- 13.3.2. Advising/causing the employer to suspend her;
- 25 13.3.3. Drafting/advising/causing the employer to raise disciplinary charges against her;
- 13.3.4. Advising/causing the employer to dismiss her; and
- 13.3.5. Advising/causing the employer to reject her appeal against dismissal.

Second Claimant

- 5
- 13.3.6. Advising/causing the employer to uphold a grievance against her for disability related conduct;
- 13.3.7. Advising/causing the employer to suspend her; and
- 13.3.8. Drafting/advising/causing the employer to raise disciplinary charges against her.
- 13.4. If so, was that unfavourable treatment due to something arising in consequence the claimants' disabilities?
- 10 13.5. If so, was the treatment a proportionate means of achieving a legitimate aim?

Reasonable Adjustments – s20 & 21 EqA

- 13.6. The provision, criteria or practices (**PCPs**) relied on by the claimants are:
- 15 13.6.1. The practice of approaching workplace disputes without adequate consideration of disability;
- 13.6.2. Undertaking/maintaining appointment as HR consultant with inadequate knowledge and/or experience of cognitive disabilities and/or relevant equality law;
- 13.6.3. Practice of holding disciplinary meetings in real time;
- 20 13.6.4. Practice of not seeking medical information on disabilities from employees' attending medical professionals.
- 13.7. Did the respondent have such PCPs?
- 13.8. If so, did any such PCP put the claimants at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, as follows:
- 25

First Claimant

- 13.8.1. Increase in stress exacerbating pain and neurological symptoms; and

13.8.2. Negative perception of communication style by the respondent during disciplinary procedure that influenced decision against first claimant.

Second Claimant

5 13.8.3. Exacerbation of anxiety and depression symptoms/
breakdown of usual coping mechanisms;

13.8.4. Loss of income due to extended sick leave; and

10 13.8.5. Ongoing stress and exacerbation of anxiety and
depression symptoms/breakdown of usual coping
mechanisms.

13.9. If so, did the respondent know or could he reasonably have been expected to know the claimants were likely to be placed at any such disadvantage?

15 13.10. If so, would the steps identified by the claimants have alleviated the
identified disadvantage?

13.11. If so, would it have been reasonable for the respondent to have taken those steps at any relevant time and did he fail to do so?

Harassment related to disability/sex – s26 EqA

13.12. Did the respondent engage in the following conduct?

20 *First Claimant*

13.12.1. Differential treatment of colleague's grievance in stating that the perceptions of alleged victim are decisive for the colleague's grievance but not for the first claimant's complaints during the disciplinary process; and

25 13.12.2. Sharing the second claimant's [email of] 15 December 2019 with the first claimant, which the first claimant had not seen before the respondent shared it during disciplinary process and disciplinary charge made and upheld that the first claimant had seen the second claimants' grievance.

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Second Claimant

- 5 13.12.3. Sharing the second claimant's email of 15 December 2019 with the first claimant and her companion at the disciplinary hearing, without the second claimant's consent;
- 13.12.4. Accusing the second claimant of lying about the incident with the partner of the employer's business;
- 13.12.5. Failing to adequately investigate the second claimant's grievance;
- 10 13.12.6. Not permitting the second claimant to be accompanied at grievance hearing with the respondent;
- 13.12.7. Acting HR consultant who did not have adequate understanding of mental health disability and/or relevant equality law;
- 15 13.12.8. Differential treatment of colleague's alleged grievance in stating that the perceptions of alleged victim are decisive for the colleague's grievance but not for the second claimant's complaints;
- 13.12.9. Failing to obtain a medical report from the second claimant's own GP or specialist mental health practitioner; and
- 20 13.12.10. The respondent engaging in a course of conduct of email correspondence that was combative, repetitive and unsympathetic towards the second claimant's mental health distress.
- 25
- 13.13. If so, was that conduct unwanted?
- 13.14. If so, did it relate to the protected characteristic of disability/sex?
- 13.15. If so, did the conduct have the purpose or (considering the claimants' perception, the other circumstances of the case and whether it is reasonable for the conduct to have the effect) the effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimants?
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Victimisation - s27 EqA

13.16. Did the claimants do a protected act? The claimants rely upon the following:

13.16.1. The second claimant's complaints of 13 & 15 Dec 2019;

5 13.16.2. The respondent's belief that the first claimant would/did support the second claimant's complaints of breaches of the EqA; and

13.16.3. The respondent's belief that the second claimant would make complaints of breaches of EqA.

10 13.17. Did the respondent subject the claimants to any detriments as follows?

First Claimant

13.17.1. Advising/causing the suspension, dismissal and/or failure to uphold the appeal against dismissal;

15 13.17.2. Advising/causing inconsistent treatment of the second claimant and a colleague's complaints of bullying and harassment;

13.17.3. Failing to ensure the employer provided a fair and reasonable disciplinary process;

20 13.17.4. Failing to ensure the employer paid notice pay/summary dismissal

13.17.5. Failing to provide or advise any management support during the period of suspension;

25 13.17.6. Failing to provide/advise the employer to provide the first claimant with the opportunity to respond to complaints against her before upholding a colleague's grievance;

13.17.7. Failing to comply with the first claimant's subject access request of the employer and companies associated with the respondent.

30 *Second Claimant*

13.17.8. Advising/causing the suspension and initiation/continuation of disciplinary proceedings;

- 13.17.9. Advising/causing inconsistent treatment of the second claimant and a colleague's complaints of bullying and harassment;
- 5 13.17.10. Refusing the second claimant's request to take and be paid for annual leave during her sickness absence;
- 13.17.11. Failing to seek medical reports from the second claimant's GP/mental health nurse;
- 13.17.12. Failing to provide/advise the employer to provide the second claimant with the opportunity to respond to complaints against her before upholding a colleague's grievance;
- 10 13.17.13. Concluding/advising the employer to conclude that a partner of the employer's business had not physically assaulted the second claimant as alleged without giving the second claimant the opportunity to review or respond to that individual's evidence;
- 15 13.17.14. Refusal/failure to advise the employer to make reasonable adjustment of concluding disciplinary procedure in writing; and
- 20 13.17.15. Failing to comply with the second claimant's subject access request of the employer and companies associated with the respondent.
- 13.18. If so, was this because the claimants did a protected act and/or because the respondent believed the claimants had done, or might do, a protected act?
- 25

Time Limits

13.19. Were all of the claimants' complaints presented within the time limits set out in sections 123(1)(a) & (b) of the EqA?

13.20. If not should time be extended on a "just and equitable" basis?

30 **Findings in Fact**

14. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

15. The claimants both worked at a private taxi firm, as control room operators. The first claimant's employment commenced in March 2013 and the second claimant's employment commenced in November 2002. They have been friends for a number of years, socialising outwith the workplace also.
- 5 16. The claimants did not get on well with the employer's office manager. They raised a number of informal complaints about her conduct with their employer.
17. The claimants worked on a variety of shifts during their employment, including night shift. They would also cover other shifts, on an ad hoc basis,
10 when required. The second claimant stopped working night shifts as a result of the behaviour of one of the partners of the business, who would often come into the office drunk during the night shift and behave badly.
18. By the end of 2019, both claimants were working day shifts, from 7am to 3pm. The first claimant worked Sunday to Tuesday, the second claimant
15 worked Wednesday to Saturday. Around that time they both decided that they would not take on any additional shifts, other than covering shifts for each other. They informed their employer of this. They decided not to take on any additional shifts, beyond their allocated shifts, as they felt they were being taken for granted by their employer, were unhappy at the way they
20 felt they were being treated by management and felt their concerns in relation to the office manager were not being taken seriously.
19. The office manager was moved to an accounts function in/around November 2019. The claimants felt however that she continued to act as if she was still the office manager.
- 25 20. The claimants and their colleagues (other than management) participated in a group chat via Facebook.
21. On 13 December 2019, the second claimant orally raised with her employer that she felt she had been assaulted by one of the partners of the employer's business, when he grabbed her arm and then pushed her, as
30 she was trying to leave the office. She also raised concerns in relation to the former office manager, who had asked her to assist with training a new member of staff. The second claimant felt this was inappropriate, given that

the former office manager no longer had line management responsibility for her.

22. The second claimant expected a response to the concerns she raised the following day, but did not receive this. She discussed matters with the first claimant, who said she felt she was doing the right thing by complaining. Both claimants felt they had valid concerns, were not being appreciated by their employer and it was right to complain about that, at that time.
23. On 15 December 2019, the second claimant sent an email to her employer stating that she was expecting a response the previous day and she did not want to return to work unless something was done in relation to her concerns. She stated that she was sending the email as she was feeling very anxious about it all and making herself unwell as a result. She raised in her email the following concerns:
- 23.1. That a member of staff had made a comment *'Oh I knew something was wrong with you this morning'*, simply because she had chosen not to speak to them, which she felt was inappropriate;
- 23.2. That she had told her employer she would not be training anyone *'as I have enough to deal with phones emails etc I do not get paid to train!'*;
- 23.3. That a colleague had called her 'ignorant';
- 23.4. That the former office manager should not be commenting on anything she did or said;
- 23.5. That she and the first claimant were unhappy in their jobs and dread coming to work apart from at the weekend. She stated that they were the *'two people who get left with everything and also have to deal with getting moaned at constantly'*, that management *'do not manage properly'* and *'at no point should we be getting shouted or roared at!'* *'We are both fed up reporting this to you and nothing being done about it'*. She stated that the first claimant was happy for her name to be mentioned in the email.

23.6. That, on the previous Friday, as she was trying to leave one of the offices, one of the partners grabbed her arm twice. She stated that *'I told him to get his hands off me! I then open the door and he shoved me saying GO THEN!'* She stated that she felt this should not happen in any workplace and she had considered calling the police, but had been persuaded that it was best to allow her employer to try to deal with things in the first instance. She went on to say *'As you know I spent 13 years dealing with domestic abuse and to survive that and come out the other end and in 5 years worth of counselling and support to start to feel myself again only in the last few months I may add to now feel scared to come to work, I am totally disgusted by what happened you should not have that happen to you at work.'*

23.7. Her email concluded with a further, unrelated, concern.

24. The employer asked the respondent, an independent HR consultant, to investigate the concerns raised by the second claimant. While these were not expressed as a grievance, and the second claimant did not intend them to be addressed as such, the concerns raised were treated by the respondent as a grievance. The second claimant asked to withdraw the grievance, prior to the investigation commencing, but was informed by the respondent that that was not possible at that stage. The first claimant also encouraged the second claimant to pursue matters and not withdraw her complaint.

25. The respondent investigated the grievance by interviewing both claimants as well as four other individuals. The second claimant was informed by the respondent that she was not allowed to bring anyone with her to the grievance meeting she attended.

26. The respondent interviewed the first claimant on 13 January 2020. She raised with the respondent her concerns in relation to the former office manager and one of her colleagues, LM, who she thought was lazy. She stated that she, and the second claimant, were *'sick fed up with how things are right now'*. She also stated that the second claimant was *'a walk over, she was going to drop the grievance, but I told her not to.'*

27. Having investigated matters, the respondent concluded that there was no evidence to support the second claimant's complaints. He informed the employer and the second claimant of this on 15 January 2020. The second claimant did not receive written confirmation of this. She did not appeal against the grievance outcome reached.
28. LM attended an investigation meeting with the respondent on 13 January 2020. She received an important text from her partner on her Fitbit during the course of the meeting, which she required to respond to. She asked if she could take a break, to go and get her phone to respond, which she did. The first claimant saw her doing so and then sent her a text at 4.36pm stating *'Hi how did you get on with guy? Why did you need your phone what were you showing him?'* LM received this message while still in the meeting with the respondent and showed it to him, as she was concerned about the tone of the text.
29. Following the conclusion of the investigation meeting, LM responded to the first claimant explaining why she needed her phone. The first claimant responded *'How did you know barry had sent a text u were in the office wi the guy, why would you come for ur phone and take it into the office when that man was asking about the company n staff'*. LM again explained why she had needed her phone and stated *'Why? What are you accusing me of exactly?'* The first claimant responded *'What do you think im accusing you of? If you showed that man any texts, chat or anything at all relating to anything any of us has said in text or chat room in regard to this grievance I will be furious and I would like to think that would not be the case. And im quite sure you would think the same.'* LM took this as threatening and raised concerns about this with her employer, via the respondent. The respondent then conducted an investigation into this, as well as concerns raised by the former office manager in relation to the grievance which had been raised against her by the second claimant and her concerns that both claimants were refusing to carry out training for new staff.
30. On/around 10 February 2020, the second claimant stated in a text message to LM stating *'That's what's wrong with that place everyone getting involved in everyone's business I've took everyone off [Facebook] then no one can accuse me of anything best way'*.

31. By letters dated 10 February 2020, as a result of the further investigation conducted by the respondent into concerns raised about the conduct of the claimants, both claimants were suspended on full pay and invited to a disciplinary hearing. The letters to the claimants were sent from the respondent, for and on behalf of the employer. The allegations detailed in the letters to the claimants were of:
- 5
- 31.1. Breach of confidence regarding the claimants sharing/discussing of the details of the second claimant's grievance between themselves;
- 31.2. Bullying/harassment/verbal abuse towards LM, including the texts sent to her by the first claimant on 13 January 2020; and
- 10
- 31.3. Refusal to carry out management instructions in relation to training of new staff.
32. The letter to the second claimant also included an allegation that she had made false accusations about fellow employees in her grievance. The letter stated *'If what you stated did not happen (and this has been reviewed) then what you said must not be true.'*
- 15
33. Within the letters to the claimants the respondent stated *'As a point it is never about what your intent was in the texts, merely that you sent them, and that the person who received them, took them as both bullying and threatening.'*
- 20
34. The disciplinary hearings were scheduled to take place on 14 February 2020.
35. The first claimant ultimately attended the disciplinary hearing on 18 March 2020. A copy of the second claimant's grievance was provided to her as part of that process. The allegations against her were upheld and she was summarily dismissed with effect from 6 April 2020.
- 25
36. The first claimant appealed against her dismissal and an appeal hearing took place on 29 April 2020. Her appeal was rejected on 26 May 2020.
37. The second claimant was certified as unfit to work by her GP from 11 February 2020 onwards. Prior to this, her last sickness absences had
- 30

been in 2016, when she had had two periods of absence of around 8 weeks each, due to anxiety and depression.

- 5 38. The second claimant did not attend the disciplinary hearing scheduled for 14 February 2020. She was not invited to a further hearing, as she remained unfit to attend.
- 10 39. In mid-March 2020 respondent sought to refer the second claimant to an occupational health professional, but this did not take place due to the Covid-19 pandemic. While discussing arrangements for this assessment, the second claimant stated to the respondent that her doctor and mental health nurse were also willing to send a report. The respondent did not follow up on that.
- 15 40. During the second claimant's sickness absence, she applied to her car finance company for a payment holiday because she was absent from work. The car finance company contacted the second claimant's employer, who passed the correspondence on to the respondent to address. The respondent initially, and erroneously, thought the second claimant had applied for alternative employment with the car finance company. The second claimant explained however that this was not the case.
- 20 41. By September 2020, the second claimant had raised Employment Tribunal proceedings and instructed her representatives to correspond with her employer, on her behalf. All correspondence with her employer continued to take place via the respondent. On 3 September 2020, the respondent proposed that the second claimant attend a series of appointments with a mental health specialist, as an alternative to the occupational health referral which they had sought to arrange in March 2020. The second claimant's representatives requested further details as to who those appointments would be with. That information was provided by the respondent and they requested that the second claimant provide her consent to attend the consultations. She did not provide this, so the consultations did not take place.
- 30 42. On 28 October 2020, the second claimant's representatives wrote to the respondent by email proposing that the disciplinary process be concluded in writing as a reasonable adjustment, as she was not well enough to attend

in person. The respondent replied later that day stating that there was no current invite to any hearing. Rather the process was halted given concerns regarding the second claimant's mental health. The respondent stated however that he would discuss matters with the employer and revert. The Tribunal were not referred to any correspondence between the parties thereafter, whether related to this or any other matter.

43. The second claimant resigned from her employment in July 2021. At the time her employment terminated she had not attended a disciplinary hearing and had not been asked to attend any further hearing, other than that initially scheduled for 14 February 2020.

Claimants' submissions

44. The claimants' representative gave an oral submission, which is summarised as follows:

44.1. The claims were timeously presented. The exemptions contained in the Employment Tribunals (Early Conciliation: Exemptions & Rules of Procedure) Regulations 2014 apply and it is just and equitable to extend time;

44.2. The respondent had knowledge of the claimants' disabilities;

44.3. The respondent is personally liable under s109-112 EqA;

44.4. Each of the complaints made should be upheld; and

44.5. The sums stated on the schedules of loss should be awarded, with the awards for injury to feelings uplifted, to reflect the egregious manner in which the proceedings have been conducted. A further uplift of 25% should be applied as a result of the respondent's failure to follow the Acas Code in the disciplinary process.

Relevant Law

Discrimination arising from disability

45. Section 15 EqA states:

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

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

46. Guidance on how this section should be applied was given by the EAT in ***Pnaiser v NHS England*** [2016] IRLR 170, EAT, paragraph 31. In that case it was highlighted that ‘arising in consequence of’ could describe a range of causal links and there may be more than one link. It is a question of fact
10 whether something can properly be said to arise in consequence of disability. The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
15

47. There is no need for the alleged discriminator to know that the ‘something’ that causes the treatment arises in consequence of disability. The requirement for knowledge is of the disability only (***City of York Council v Grosset*** [2018] ICR 1492, CA).

20 48. The EAT held in ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090 that:

“the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an
25 (identified) something? and (ii) did that something arise in consequence of B’s disability? The first issue involves an examination of the putative discriminator’s state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the “something” was a more than trivial part of the reason for unfavourable
30 treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.’

49. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving

the legitimate aim and reasonably necessary in order to do so (**Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601).

Failure to make reasonable adjustments

50. Section 20 EqA states:

5 “Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.”

10 51. The duty comprises three requirements (of which the first is relevant to this case). The first requirement is a “*requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*”

15 52. Section 21 EqA provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

20 53. Further provisions in Schedule 8, Part 3, EqA provide that the duty is not triggered if the employer did not know, or could not reasonably be expected to know, that the claimant had a disability and that the provision, criteria or practice is likely to place the claimant at the identified substantial disadvantage.

25 54. The Court of Appeal in **Ishola v Transport for London** [2020] IRLR 368 considered the term ‘provision, criterion or practice’, noting that it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words ‘act’ or ‘decision’ in addition or instead. In context, all three words carried the connotation of a state of affairs indicating
30 how similar cases were generally treated or how a similar case would be treated. ‘Practice’ connotes some form of continuum in the sense that it is the way in which things generally are or will be done.

Harassment

55. Section 26(1) EqA states:

‘(1) A person (A) harasses another (B) if—

*(a) A engages in unwanted conduct related to a relevant protected
5 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.’*

10 56. Section 26(4) EqA provides that:

*‘(4) In deciding whether conduct has the effect referred to in subsection
(1)(b), each of the following must be taken into account—*

(a) the perception of B;

(b) the other circumstances of the case;

15 *(c) whether it is reasonable for the conduct to have that effect.’*

57. There are accordingly 3 essential elements of harassment claim under section 26(1), namely (i) unwanted conduct, (ii) which relates to a relevant protected characteristic and (iii) that has the proscribed purpose or effect.

Victimisation

20 58. Section 27 EqA states:

*‘(1) A person (A) victimises another person (B) if A subjects B to a
detriment because-*

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

25 *(2) Each of the following is a protected act-*

(a) bringing proceedings under this Act;

*(b) giving evidence or information in connection with proceedings
under this Act;*

30 *(c) doing any other thing for the purposes of or in connection with this
Act;*

(d) making an allegation (whether or not express) that A or another person has contravened this Act'

59. In **Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland)** (2003) UKHL, Lord Hope of Craighead provided guidance on the meaning of detriment at para 35, where he stated: '*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to 'detriment'.*'
60. The EHRC Code of Practice on Employment (2011) states, at paragraph 9.8, that: '*'Detriment' in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage....'* Paragraph 9.9 of the EHRC Code states: '*A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment.*'
61. In order to succeed in a claim of victimisation a claimant must show that he or she was subjected to the detriment because he or she did a protected act or because the employer believed he or she had done or might do a protected act. The essential question in determining the reason for the claimant's treatment is: what, consciously or subconsciously motivated the employer to subject the claimant to the detriment?
62. However, the test is not precisely one of causation. The case of **Chief Constable of West Yorkshire Police v Khan** 2001 ICR 1065, HL involved the refusal of a reference to the police force to which Mr Khan had applied for a post in circumstances where Mr Khan had an outstanding Tribunal application against the appellants. The House of Lords overturned the Court of Appeal and found that the real reason for the refusal of a reference to the claimant was that the provision of the reference might compromise the Chief Constable's handling of the Tribunal proceedings and that that was a legitimate reason. At paragraph 77 of his judgment Lord Stott gave helpful

guidance on the issue of causation in cases of victimisation when he stated that: *‘The words ‘by reason that’ suggest, to my mind, that it is the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified.’*

5 *Burden of proof*

63. Section 136 EqA provides:

10 *‘If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.’*

15 64. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, as explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of discrimination, harassment or victimisation by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent’s explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is
20 adequate, that conclusion is not reached.

25 65. In ***Madarassy***, it was held that the burden of proof does not shift to the respondent simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal “could conclude” that on a balance of probabilities, the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent’s explanation for its conduct, but the Tribunal must have
30 regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant’s case (as explained in ***Laing v Manchester City Council*** [2006]

IRLR 748, an EAT authority approved by the Court of Appeal in *Madarassy*).

Observations/Matters Arising

- 5 66. The claimants' evidence was very limited. Their witness statements were 9 and 10 pages respectively. Out of an 'Evidence Bundle' extending to 491 pages, only around 40 pages were referred to in evidence. The Tribunal were not referred to documents such as the first claimant's dismissal letter, appeal or appeal outcome. None of the documents in the 'Remedy Bundle' were referred to.
- 10 67. During submissions, the claimants' representative sought to rely on:
- 67.1. The terms of the respondent's witness statement; and
- 67.2. Documents which were in the bundle but had not been introduced into evidence.
68. The Tribunal confirmed that:
- 15 68.1. As the response had been struck out (at the claimants' request), no evidence was led by the respondent so it was not possible to refer to the respondent's witness statement; and
- 68.2. It was not possible for the claimants to refer to documents in submissions which had not been introduced into evidence.
- 20 69. This was accepted by the claimants' representative who requested, and was granted, additional time to reframe her submissions to remove these references.

Discussion & Decision

Discrimination Arising from Disability

- 25 70. In relation to the claims of discrimination arising from disability the Tribunal started by referring to section 15 EqA.
71. Section 15(2) states that section 15(1) will not apply if it the respondent shows that they did not know, and could not reasonably have been

expected to know, the claimant had the disability. The respondent has not demonstrated this. The Tribunal accordingly proceeded on the basis that the provisions of 15(1) applied.

72. To shift the burden of proof to the respondent in relation claim under s15 EqA, a claimant requires to show:

72.1. That he or she has been subjected to unfavourable treatment;

72.2. A link between the disability and the 'something' that is said to be the ground for the unfavourable treatment; and

72.3. Some evidence from which it could be inferred that the 'something' was the reason for the treatment.

73. In relation to the first question, the Tribunal noted that no question of comparison arises. The EHRC Code indicates that unfavourable treatment is treated synonymously with disadvantage. It is something about which a reasonable person would complain. Taking this into account the Tribunal accepted that the claimants had established each asserted act of unfavourable treatment: a grievance was upheld against the claimants, they were suspended, disciplinary charges were raised against them and the first claimant was dismissed and her appeal rejected.

74. The Tribunal then considered the second question, addressing each 'something' asserted by the claimants to have arisen in consequence of their disabilities, to determine whether a link between the 'something' asserted and the disability, had been established in the evidence presented. The Tribunal reached the following conclusions in relation to these:

First Claimant

74.1. **Direct and blunt 'unfiltered' communication.** No evidence was led in relation to the first claimant having direct and blunt 'unfiltered' communication, whether due to disability or otherwise. This was not mentioned in the first claimant's witness statement and the Tribunal were not referred to any documents suggesting this may be the case. Given that the asserted 'something' arising in consequence

of disability was not established, the claim under s15 EqA in relation to this does not succeed.

74.2. **Need to manage stress by not working overtime or taking on**

extra-contractual duties While evidence was led in relation to the first claimant not wanting to take on extra shifts, the evidence led by the first claimant indicated that this was a conscious choice on her part, in protest to the employer not taking action in relation to the claimants' complaints about the Office Manager and other feeling of dissatisfaction in relation to her employment. No evidence was led in relation to the first claimant being unable to work extra shifts as a result of a disability. Indeed, the first claimant indicated that she would and could work extra shifts, but at the end of 2019 she decided that, going forward, she would only do so to cover the second claimant's shifts. No evidence was led in relation to the first claimant not taking on additional contractual duties, whether as a result of a disability or otherwise. This was not mentioned in the first claimant's witness statement and the Tribunal were not referred to any documents suggesting this may be the case. Given that the asserted 'something' arising in consequence of disability was not established, the claim under s15 EqA in relation to this does not succeed.

74.3. **Giving literal answers to questions without consideration for social or other contexts.**

No evidence was led in relation to the first claimant giving literal answers to questions without consideration for social or other contexts, whether due to disability or otherwise. This was not mentioned in the first claimant's witness statement and the Tribunal were not referred to any documents suggesting this may be the case. Given that the asserted 'something' arising in consequence of disability was not established, the claim under s15 EqA in relation to this does not succeed.

74.4. **Emotive communications with colleagues while under stress.**

No evidence was led in relation to the first claimant engaging in emotive communications with colleagues while under stress,

whether due to disability or otherwise. This was not mentioned in the first claimant's witness statement and the Tribunal were not referred to any documents suggesting this may be the case. Given that the asserted 'something' arising in consequence of disability was not established, the claim under s15 EqA in relation to this does not succeed.

Second Claimant

74.5. **Complaints of 13 & 15 December and need for resolution to manage mental health symptoms.** The second claimant's complaints of 13 & 15 December 2021 did not arise in consequence of her disability. They were raised because she felt she had been assaulted and unfairly treated in the workplace. The evidence before the Tribunal was that the second claimant sought to withdraw her grievance before it was investigated and determined, but that request was refused. In light of that the Tribunal did not accept that the second claimant established that she required a resolution of her complaints to manage her mental health symptoms. Given that the asserted 'something' arising in consequence of disability was not established, the claim under s15 EqA in relation to this does not succeed.

74.6. **Need to manage health by restricting work to the day shifts or minimising stressful or additional duties.** No evidence was led to suggest that the second claimant could not work night shift, or shifts other than day shift, due to her disability. Indeed, the second claimant's evidence was that she had in fact previously worked night shifts. She stopped doing as a result of the actions of one of the partners of the employer business, not as a consequence of her disability. No evidence was led in relation to the second claimant being unable to work extra shifts as a result of a disability. Indeed, the evidence led was that the second claimant would and could work extra shifts, but at the end of 2019 she decided that, going forward, she would only do so to cover the first claimant's shifts. In relation to additional duties, the second claimant stated in her grievance that she did not wish to take on training responsibilities

as she did not have time to train staff and was not paid to do so. She did not state in her grievance that she was unable to do so as a result of her disability and no evidence was led to suggest that this was the case. Given that the asserted 'something' arising in consequence of disability was not established, the complaint under s15 EqA in relation to this does not succeed.

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74.7. **Need to remove colleagues from social media.** The evidence led was that the second claimant removed colleagues from Facebook only, not social media generally. In relation to the removal of colleagues from Facebook, this was so that '*no one can accuse [her] of anything*'. It did not arise in consequence of her disability, as is clear from the fact that she was able to participate in social media without the need to remove colleagues prior to that point. Given that the asserted 'something' arising in consequence of disability was not established, the claim under s15 EqA in relation to this does not succeed.

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74.8. **Emotive communication with colleagues while under stress.** No evidence was led in relation to the second claimant engaging in emotive communications with colleagues while under stress, whether due to disability or otherwise. This was not mentioned in the second claimant's witness statement and the Tribunal were not referred to any documents suggesting this may be the case. Given that the asserted 'something' arising in consequence of disability was not established, the claim under s15 EqA in relation to this does not succeed.

74.9. **Sickness absence.** The first claimant did have periods of sickness absence as a result of her disability. The requisite link between the disability and the 'something' that is said to be the ground for the unfavourable treatment has accordingly be established.

30 75. The Tribunal then considered whether there some evidence from which it could be inferred that the 'something' established (sickness absence of the second claimant) was the reason for her treatment. No evidence whatsoever was presented from which it could be inferred that the second

claimant's sickness absence was the reason for a grievance against her being upheld, her suspension or the raising of disciplinary charges against her. The Tribunal noted that, prior to the incidents complained of, the second claimant was last absent from work on two occasions in 2016, for approximately 8 weeks on each occasion. No evidence was presented to suggest any link with those absences and the unfavourable treatment complained of. The Tribunal concluded therefore that the second claimant had not established a prima facie case that she was discriminated against because of something arising in consequence of her disability, namely absence.

76. For these reasons the Tribunal concluded that the claims of discrimination arising from disability do not succeed.

Reasonable Adjustments

77. The Tribunal's first step was to identify the relevant PCPs. The PCPs relied upon by the claimants were stated as follows:

77.1. The practice of approaching workplace disputes without adequate consideration of disability;

77.2. Undertaking/maintaining appointment as HR consultant with inadequate knowledge and/or experience of cognitive disabilities and/or relevant equality law;

77.3. The practice of holding disciplinary meetings in real time; and

77.4. The practice of not seeking medical information on disabilities from employees' attending medical professionals.

78. The Tribunal considered each of the PCPs asserted to determine whether these had been established. The following conclusions were reached in relation to each:

78.1. **The practice of approaching workplace disputes without adequate consideration of disability.** No evidence was led by the claimants in relation to how other cases were dealt with, or would be dealt with, by the respondent. They simply asserted that this is

how the respondent approached matters with them. Taking into account the guidance given by the Court of Appeal in *Ishola v Transport for London*, the Tribunal concluded that the claimants had not demonstrated the practice asserted.

5 78.2. **Undertaking/maintaining appointment as HR consultant with inadequate knowledge and/or experience of cognitive disabilities and/or relevant equality law.** No evidence was led whatsoever in relation to the knowledge or experience of the respondent. The PCP asserted by the claimants was accordingly
10 not established.

 78.3. **The practice of holding disciplinary meetings in real time.** No evidence was led by the claimants in relation to how other disciplinary meetings were conducted, or would be conducted, by the respondent. They simply asserted that this is how the
15 respondent approached matters, or sought to approach matters, with them. Taking into account the guidance given by the Court of Appeal in *Ishola v Transport for London*, the Tribunal concluded that the second claimant had not demonstrated the practice asserted.

20 78.4. **The practice of not seeking medical information on disabilities from employees' attending medical professionals.** No evidence was led by the claimants in relation to whether the respondent sought medical information on disabilities from attending medical professionals in the past or would do so in the future. The second
25 claimant simply asserted that this is how the respondent approached matters with her. At best, the claimant demonstrated that this was a one-off act in the course of dealing with one individual. Taking into account the guidance given by the Court of
30 Appeal in *Ishola v Transport for London*, the Tribunal concluded that the second claimant had not demonstrated the practice asserted.

79. Given that none of the PCPs relied upon were established, the claims of failure to make reasonable adjustments do not succeed.

Harassment

80. The Tribunal considered each allegation of harassment, considering whether there was unwanted conduct, whether it related to disability/sex and, if so, whether the conduct had the proscribed purpose or effect. In relation to whether the conduct was related to disability/sex, the Tribunal was mindful of the need to analyse the words/conduct relied upon, together with the context, in order to establish whether there is any connection or association between the two. The Tribunal reached the following findings in relation to each alleged act of harassment.

10 *First Claimant*

80.1. **Differential treatment of LM's grievance in stating that the perceptions of alleged victim are decisive for LM's grievance but not for the first claimant's complaints during the disciplinary process.** In her witness statement, the first claimant confirmed that she raised this issue with the respondent during her disciplinary hearing. The concerns were in relation to a difference in treatment between LM and the second claimant, rather than between herself and LM. The first claimant did not however address in her evidence to the Tribunal why she felt they were treated differently, or state that she asserted any basis for the difference in treatment to the respondent. She did not state in her evidence that she felt that this conduct was related to disability or sex, or why she believed that to be the case. The Tribunal concluded that, while this may have been unwanted conduct, it was not related to disability or sex. There was no evidence before the Tribunal to suggest that it was so related in any way. The claimants' combined Grounds of Claim suggest that the conduct was related to a protected characteristic as LM's grievance did not relate to sex or disability, but the second claimant's did. The Tribunal found (as stated below) that no allegations of discrimination, harassment or victimisation were contained in the second claimant's grievance. While the grievance mentioned the second claimant's medical condition, and that she had experienced domestic abuse in the past, those were not the issues complained of. The issues complained of were an

alleged assault and unfair treatment. The Tribunal accordingly did not accept that the second claimant's grievance related to disability/sex. Given that unwanted conduct related to disability/sex has not been established, the complaint under s26 EqA in relation to this does not succeed.

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80.2. **Sharing the second claimant's [email of] 15 December 2019 with the first claimant, which the first claimant had not seen before the respondent shared it during disciplinary process and disciplinary charge made and upheld that the first claimant had seen the second claimants' grievance.** The

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Tribunal accepted that this conduct occurred and it amounted to unwanted conduct. The first claimant did not however state or assert in her evidence that she felt that this conduct was related to disability or sex, or why she believed that to be the case. The Tribunal concluded that, while this may have been unwanted conduct, it was not related to disability or sex. There was no evidence before the Tribunal to suggest that it was so related in any way. Rather, it was provided in as relevant evidence in the course of disciplinary proceedings in circumstances where the respondent reasonably believed (given the statements of both claimants) that the first claimant had already seen the second claimant's grievance. In any event no evidence was led in relation to the purpose of the email and the first claimant did not give any evidence at all in relation to the effect of the conduct on her. The Tribunal accordingly concluded that it did not have the proscribed effect. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

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Second Claimant

80.3. **Sharing the second claimant's email of 15 December 2019 with the first claimant and her companion at the disciplinary hearing, without the second claimant's consent.** The Tribunal accepted that this conduct occurred and it amounted to unwanted conduct. The second claimant did not however state or assert in her evidence that she felt that this conduct was related to disability or

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sex, or why she believed that to be the case. The Tribunal concluded that, while this may have been unwanted conduct, it was not related to disability or sex. There was no evidence before the Tribunal to suggest that it was so related in any way. Rather, it was provided in as relevant evidence in the course of disciplinary proceedings in circumstances where the respondent reasonably believed (given the statements of both claimants) that the first claimant had already seen the second claimant's grievance. In any event no evidence was led in relation to the purpose of the email and the second claimant did not give any evidence at all in relation to the effect of the conduct on her: in her witness statement the only mention of this is a sentence stating *'[the respondent] shared the grievance with [the first claimant], not me.'* The Tribunal accordingly concluded that it did not have the proscribed effect. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

80.4. **Accusing the second claimant of lying about the incident with the partner of the employer's business.** The Tribunal accepted that disciplinary proceedings were raised against the second claimant which included an allegation that she had not told the truth when she alleged that she had been assaulted by a partner of the business. The Tribunal accepted that that this amounted to unwanted conduct. The second claimant did not however state or assert in her evidence that she felt that this conduct was related to disability or sex, or why she believed that to be the case. The claimants' combined Grounds of Claim state that *'accusing a woman with experience of domestic abuse of lying about a physical assault is inherently related to sex.'* The Tribunal did not accept this assertion given the context, namely an allegation of assault in the workplace, which was unrelated to sex, and which had been investigated and not upheld. The Tribunal concluded that, while this was clearly unwanted conduct, it was not related to disability or sex. There was no evidence before the Tribunal to suggest that it was so related in any way. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

80.5. **Failing to adequately investigate the second claimant's grievance.** The Tribunal were referred to very few documents in relation to the investigation process and outcome. The second claimant's evidence was that she did not receive a copy of the notes of the grievance meeting, or a written outcome. On balance the Tribunal concluded that there were, at very least, procedural failings and this amounted to unwanted conduct. The second claimant did not however state or assert in her evidence that she felt that this conduct was related to disability or sex, or why she believed that to be the case. The claimants' combined Grounds of Claim state that this conduct was related to a protected characteristic as a '*Grievance relating to domestic abuse (sex) and disability is inherently related to sex and disability.*' The suggestion being that failure to investigate such a grievance would also be action related to sex/disability. The Tribunal did not accept this assertion. While the grievance mentioned the second claimant's medical condition and that she had experienced domestic abuse in the past, those were not the issues complained of. The issues complained of were an alleged assault and unfair treatment. Tribunal did not accept that the grievance was 'related to sex and disability' or that failure to adequately investigate the second claimant's grievance amounted to conduct related to sex or disability. There was no evidence before the Tribunal to suggest that it was so related in any way. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

80.6. **Not permitting the second claimant to be accompanied at grievance hearing with the respondent.** The Tribunal accepted that this conduct occurred and it amounted to unwanted conduct. The second claimant did not however state or assert in her evidence that she felt that this conduct was related to disability, or why she believed that to be the case. The Tribunal concluded that, while this was unwanted conduct, it was not related to disability or sex. There was no evidence before the Tribunal to suggest that it was so related in any way. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

- 5 80.7. **Acting HR consultant who did not have adequate understanding of mental health disability and/or relevant equality law.** No evidence was led whatsoever in relation to the knowledge or experience of the respondent. The Tribunal accordingly concluded that the conduct alleged was not established.
- 10 80.8. **Differential treatment of LM's alleged grievance in stating that the perceptions of alleged victim are decisive for LM's grievance but not for the second claimant's complaints.** The Tribunal accepted that this conduct occurred and it amounted to unwanted conduct. The second claimant did not however address in her evidence to the Tribunal why she felt they were treated differently, or state that she asserted any basis for the difference in treatment to the respondent. She did not state in her evidence that
- 15 she felt that this conduct was related to disability or sex, or why she believed that to be the case. The Tribunal concluded that, while this may have been unwanted conduct, it was not related to disability or sex. There was no evidence before the Tribunal to suggest that it was so related in any way. The claimants' combined Grounds of Claim suggest that it was related to a protected characteristic, as
- 20 LM's grievance did not relate to sex or disability, but the second claimant's did. The Tribunal found that, while the second claimant's grievance mentioned the second claimant's medical condition and that she had experienced domestic abuse in the past, those were
- 25 not the issues complained of. The Tribunal did not accept that the grievance 'related to sex and disability'. Given that unwanted conduct related to disability/sex has not been established, the complaint under s26 EqA in relation to this does not succeed.
- 30 80.9. **Failing to obtain a medical report from the second claimant's own GP or specialist mental health practitioner.** This was stated, in the Grounds of Claim, to have occurred in the period 19 March to 3 September 2021. The second claimant did not mention in her witness statement any failure to obtain a medical report from the second claimant's own GP or specialist mental

health practitioner. The only mention of this in the evidence referred to was an email from the second claimant dated 12 March 2020, when the second claimant stated to the respondent that her doctor and mental health nurse were willing to send a report. The Tribunal accepted that it was unwanted conduct not to obtain a medical report from the claimant's own GP or specialist mental health practitioner and that this was related to disability. No evidence was led however as to the purpose or effect of that treatment: it was not mentioned in the second claimant's witness statement at all. The Tribunal accordingly concluded that it did not have the proscribed purpose or effect. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

80.10. **The respondent engaging in a course of conduct of email correspondence that was combative, repetitive and unsympathetic towards the second claimant's mental health distress.** This was stated, in the Grounds of Claim, to have occurred in the period from 6 March 2020 to 3 September 2020. In her witness statement the second claimant stated that the respondent *'kept emailing [her] when she was off sick, each email had a load of questions and he didn't seem to understand that [she] I was genuinely too unwell to be dealing with all of this.'* The Tribunal were not however referred to any emails of this nature, in that period. The only emails referred to between the second claimant and the respondent were dated 12-13 March 2020. The Tribunal did not accept these were combative, repetitive and unsympathetic towards the second claimant's mental health. On the contrary, these were supportive and sympathetic. The only other emails in that period which the Tribunal were referred to were dated 3 September 2020. These however were between the respondent and the second claimant's representative. This consisted of an email from the respondent to the second claimant's representative which the Tribunal found to be entirely appropriate and not combative, repetitive and unsympathetic. The response from the second claimant's representative and the subsequent response from the respondent (who was acting for himself and as

representative for the other three respondents at that time) were both clearly sent with reference to the acrimonious litigation the parties were engaged in. While combative, it was an appropriate response to the combative email from the second claimant's representative. It was not repetitive and unsympathetic. No evidence was led as to the purpose of the email from the respondent to the second claimant's representative. The second claimant's evidence as to the effect on her was expressed generally, by reference to 'the whole situation', rather than in relation to each particular complaint raised. In determining whether the correspondence from the respondent to the second claimant's representative had the proscribed effect, the Tribunal considered the second claimant's perception, the circumstances of the case and whether it was reasonable for the conduct to have that effect. The Tribunal concluded that it was not reasonable, in circumstances where parties are engaged in acrimonious litigation, for the second claimant to find this particular correspondence between representatives as having the proscribed effect. The Tribunal accordingly concluded that it did not have the proscribed purpose or effect.

In her witness statement the second claimant also refers to what she stated were rude emails from the respondent in relation to emails from her car finance company. The Tribunal were not referred to these emails and it was not explained why the second claimant felt these were 'rude'. The Tribunal accordingly concluded that the conduct complained of was not established. In any event, the second claimant's position was that the respondent sent the emails he did because he thought the second claimant had applied for alternative employment. In light of this, the Tribunal found that they were not related to disability, but the respondent's erroneous belief that the second claimant was applying for alternative employment. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

81. The Tribunal accordingly concluded that the claims of harassment related to disability/sex do not succeed.

Victimisation

82. The Tribunal firstly considered the protected acts relied upon. These were

5 82.1. The second claimant's complaints of 13 & 15 December 2019;

82.2. The respondent's belief that the first claimant would/did support the second claimant's complaints of breaches of the EqA; and

82.3. The respondent's belief that the second claimant would make complaints of breaches of the EqA.

10 83. The Tribunal considered the terms of the second claimant's email of 15 December 2019, which set out in writing the complaint she had also made orally on 13 December 2019. The complaints set out in that email are of assault (a criminal offence) and unfair treatment. The email does not contain any allegation, whether express or not, that the employer or any
15 other person contravened any provisions of the EqA. The Tribunal accordingly concluded that the complaints made on 13 & 15 December 2019 did not amount to protected acts for the purposes of s27(2) EqA.

84. The Tribunal also notes that, despite lodging claims with the Tribunal setting out numerous complaints of discrimination, harassment and victimisation,
20 none of these complaints relate to the circumstances outlined in the email, supporting the Tribunal's conclusion that the terms of the grievance did not contain any assertion of discrimination, harassment or victimisation. Any such assertion would have been included as a ground of complaint in the claim forms lodged.

25 85. No evidence was presented to the Tribunal to suggest that the respondent believed that the second claimant would make complaints of breaches of the EqA, which would be supported by the first claimant, or that he subjected the claimants to any detriment because of any such belief.

86. For these reasons the Tribunal concluded that the complaints of
30 victimisation do not succeed.

Time Limits

87. While the complaints have not been upheld, the Tribunal wish to record what their conclusions would have been, in relation to jurisdiction/time bar regarding the first claimant's claims, had it required to determine this.
- 5 88. The Tribunal noted that the claimants raised their initial claims on separate claim forms. The claim raised by the first claimant on 27 July 2020 was not against the current respondent. The claim raised by the second claimant on 27 July 2020 included the current respondent as a respondent and she had engaged in early conciliation in relation to the current respondent on 10 July 10 2020.
89. In a single claim form, lodged with the Tribunal on 26 November 2020, both claimants raised further claims against a number of respondents, including the current respondent.
90. The second claimant then engaged in early conciliation in relation to the 15 **current** respondent on 11 December 2020.
91. The second claimant relied on s3(1)(a) of the ***Employment Tribunals (Early Conciliation: Exemptions & Rules of Procedure) Regulations 2014*** (the **EC Regulations**) to support her contention that she did not require to have engaged in early conciliation with the current respondent prior to raising her claim against him, as her claim was raised on the same 20 claim form as the second claimant and the second claimant had an early conciliation certificate in relation to the respondent in respect of the same dispute. In addition, once an early conciliation certificate is obtained, there is no requirement to obtain a further certificate to raise claims in relation to 25 matters which arise subsequently. The Tribunal noted that, for the exemption under s3(1)(a) of the Early Conciliation Regulations 2014 to apply, the claims would require to relate to the 'same dispute'. The Tribunal noted that, whilst there was some crossover, claims raised by each of the claimants were not exactly the same.
- 30 92. Even if this were accepted however, the Tribunal noted that the first claimant did not raise any proceedings against the current respondent until the 26 November 2020. The last act she complained of was the rejection of

her appeal on 26 May 2020. Her claim was accordingly, at best, three months out of time. It was submitted on behalf of the first claimant that it was just and equitable to extend time. Beyond that assertion however no detail was provided in submissions as to why it would be just and equitable to extend time in the particular circumstances of this case and no evidence whatsoever was led in relation to this, or the reasons why the first claimant did not raise a claim against the current respondent until 26 November 2020.

93. The Tribunal was mindful of the fact that what is just and equitable depends on all the circumstances, and the burden of proof is on a claimant to establish this (as explained by the Court of Appeal in *Robertson v Bexley Community Centre* [2003] IRLR 434). The Tribunal concluded that the first claimant had not established that it was just and equitable to extend time. No evidence was led in relation to this. Accordingly, had any of the particular complaints brought by the first claimant been established, the Tribunal would have determined that these were brought outside the requisite time limits and it was not just and equitable to extend those time limits. The complaints brought by the first claimant would accordingly have been dismissed on that basis.

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Employment Judge:
Date of Judgment:
Date sent to parties:

M Sangster
27 October 2021
28 October 2021

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