



EMPLOYMENT TRIBUNALS

Claimant: Mrs F. Kennedy

Respondent: Sewells Training and Consultancy Ltd.

HELD BY: CVP **ON:** 8th – 11th November 2021

BEFORE: Employment Judge T. Vincent Ryan
Mr. C. Stephenson
Mr. F. Collier

REPRESENTATION:

Claimant: Mrs Kennedy represented herself with the assistance of Dr Kennedy.

Respondent: Mr K. McDevitt, Counsel

JUDGMENT having been sent to the parties on 12th November 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Issues

1.1. The claimant (C) lives with anxiety and panic attacks; the respondent (R) concedes that she is a disabled person for the purposes of these claims but denies knowledge, actual and constructive knowledge; R disputes all C's claims. C makes the following claims:

1.1.1. Direct disability discrimination (s.13 Equality Act 2010 (EqA));

1.1.2. Discrimination arising from disability (s.15 EqA);

1.1.3. Failure to make reasonable adjustments (s.20-21 EqA).

1.2. The parties agreed a List of Issues and I have set them out in the appendix to this judgment.

1.3. The Tribunal resolved the said issues. Although the finding on the preliminary time issue was that C's claims were presented out of time and that it would not be just and equitable to extend time to the date of their presentation, the

Tribunal considered it appropriate to make findings of fact and explain how it would have applied the applicable law to those facts had the claims been “in time”.

- 1.4. Detailed oral reasons for the judgment were given at the conclusion of the hearing at dictation speed. The respondent has requested written reasons, as is its entitlement. These Reasons will be published as was explained at the hearing.

2. The facts

2.1. The Respondent (R):

2.1.1. R is a small company providing training and consultancy services to businesses. At all material times R employed between five and nine people. At the material time it was encountering a high staff turnover, to a level that concerned the managing director Dr Holden and his general manager Mrs Brookes. They seemed at a loss to explain the staff turnover, which, the tribunal understands from the evidence heard may have related at least in part to the respondent’s management style; it appears to the tribunal that at times there was a volatile atmosphere in the workplace resulting in loud outbursts from one or more people and we noted the number of incidents of resignations, rows and walkouts.

2.1.2. R does not have a HR function but is heavily reliant for all HR advice on external professional advisers (EW). Mrs Brookes worked closely with EW, which may have reflected the personnel difficulties being experienced by R as above.

2.1.3. R relies on documented policies and procedures with a handbook and written contract/job descriptions. It is its practice to make and retain detailed file notes on personnel and it was Mrs Brookes’ practice to ensure that those notes were sufficiently detailed that they could be understood both by her and EW if passed onto them for advice; this was so whether the notes were created by Mrs Brookes or others in her administrative team; this was so to the extent that she would on occasion, as she did with the claimant, ask an employee to expand upon or clarify an initial file note to the point of suggesting wording.

2.1.4. In addition to the administrative team of approximately nine employees Dr Holden was engaged in sales and training with clients, and he had a team of independent self-employed trainers who would visit clients.

2.2. The Claimant (C):

2.2.1. C lives with anxiety and panic attacks constituting a disability within the definition at s. 6 EqA.

2.2.2. C commenced employment with R on 19 November 2018 as a Senior Office Administrator. Her job description is at page 81 of the hearing

bundle to which all page references relate unless otherwise stated. Her contract of employment is at page 67. Mrs Brookes was her line manager.

2.2.3. C was dismissed by Mrs Brookes at a probationary review on 30th May 2019, confirmed on 31st May 2019 in writing at page 176; the reason for C's dismissal was stated as being: "performance and attitude were not at the levels expected... your probationary period has not proved successful"; they were the reasons for dismissal where "performance" was in fact a reference to conduct in the performance of her work rather than output of work and its quality (which were both relatively good); R, and in particular Mrs Brookes, took exception to C's conduct and attitude towards her and certain colleagues, particularly LK and DT, in and about the performance of her administrative duties.

2.2.4. Clause 10 of C's contract refers to probationary periods and R reserved the right to terminate a probationer's employment during the probationary period as well as the right to extend probation for a period not exceeding three months. C was engaged on a probationary contract. Her offer letter is at page 136, and it is dated 1 November 2018; the claimant was employed on a six-month probationary contract. Initially therefore it appeared that C's probationary period was due to end on 18 May 2019. On 1 February 2019 Mrs Brookes wrote to C setting out the dates of the probation reviews specifying that the second review would take place on 16 April 2019 and the final review on 4 June 2019; C queried why her probation was not ending on 16 May 2019 as she expected it to; in response Mrs Brookes explained that this was because she was going on holiday and needed time for preparation for the review meeting albeit she was prepared to hold the final review on 16 May if that was important to C. In response C said in an email to Mrs Brookes words to the effect that she could leave the plans as originally stated; she was content therefore with the final review taking place on 4 June 2019. The respondent had exercised its right to extend the probationary period and the claimant had consented to it. The claimant's probationary period was extended to 4 June 2019. The email exchange concerning this extension of time is at pages 150 – 151. The extension of the probationary period predated C's first alleged disclosure of disability in a medical questionnaire which she says she gave to R on 7 March 2019 (page 205 – 206). It is noted only at this stage that R denies receipt of this questionnaire (see below) and that C maintains that she alluded to problems with anxiety and mental ill-health following an incident at the office on 5 December 2018, which could have given rise to constructive knowledge.

2.3. C's disability and R's knowledge:

2.3.1. On 1 November 2018 C completed a medical questionnaire noting that she suffered naturally low blood pressure, that she had been absent from work for approximately two days with a cold and flu recently, and that she had only been absent for seven days from work in the previous five

years. The medical questionnaire is at page 201. C declared at section I that she had never “suffered” from symptoms of mental breakdown, anxiety, or depression. At section M of this form C declared that she had not “suffered” any condition not already mentioned on the form. She declared at section 6 that she was not receiving any medical treatment or taking any medication. C signed and dated that declaration confirming her answers to be true and correct in every respect. Her signature also indicated that she was aware this information was to be used in connection with her employment, “including making any reasonable adjustments to any provision, criterion, practice or company premises that may be required”.

2.3.2. On 5 December 2018 C was looking for a file and understood from LK that it had been lost. C reported this to Mrs Brookes as a result of which Mrs Brookes took the matter up with LK. LK became upset and tearful as she considered that Mrs Brookes had shouted at her inappropriately and so she walked out of the office; it was an unpleasant incident in which C was involved and played a part. On the following day C raised the matter again with Mrs Brookes. She told Mrs Brookes that she had been upset and that it was a stressful incident. It was both upsetting and stressful for all concerned. Nothing said by C gave Mrs Brookes cause to believe that C was living with a disability of anxiety and panic attacks, and she did not so believe. Nothing about the claimant’s performance to that date gave R any cause for concern or suspicion or belief that C was disabled. C had deliberately concealed the fact initially and did not say or do anything knowingly informing R of her disability.

2.3.3. On 6 March 2019 SS, an external consultant providing support and assistance to LK and who was reviewing R’s systems, spoke to C as part of a mentoring process. C had made a few mistakes in her work hence the mentoring and support provided by R via SS. C at least in part blamed what she referred to as a poor working atmosphere in the office and low morale for her errors; she also talked indiscreetly about Dr Holden, mentioning personal and commercial matters. Subsequently C went to speak to Mrs Brookes and in a conversation about other matters asked whether SS had told her anything of the mentoring conversation; at that point SS had not. Mrs Brookes was curious and said that she would speak to SS and did so on the telephone when SS relayed what C had said about the atmosphere, morale, and Dr Holden. In consequence Mrs Brookes invited C to a meeting to be held on 7 March 2019 at which C adopted a defensive and hostile tone or to which Mrs Brookes took exception. Mrs Brookes was disgruntled with C’s tone and of her being critical of Mrs Brookes personally; she also took exception to C’s indiscretion to SS. Although it appears that C completed a medical questionnaire dated 7 March 2019 (pages 205 – 206) she did not hand it to Mrs Brookes, and it did not come to Mrs Brookes’ attention until preparation for this tribunal hearing. In that completed questionnaire the claimant indicated at section I in relation to “mental breakdown anxiety depression” that she had a mini stroke in 2013 and that she had a history of anxiety for which she was hospitalised in 2013 for “high anxiety and

panic attacks". C says that she gave that questionnaire to Mrs Brookes or left it for her; Mrs Brooks says that she did not receive it and it was not left out for her. We preferred Mrs Brookes' evidence, which was consistent, clear, and plausible. Based on all the evidence we have heard we concluded that had Mrs Brookes received the questionnaire then, in accordance with her general practice, she would more likely than not have made a record and probably further questioned the claimant and would almost certainly have referred the matter to EW; none of these steps were taken. As at the end of March 2019 R still did not know and had no reason to know that C was a disabled person.

2.3.4. C considered that her own work performance was outstanding. She gave R no reason to believe that her performance or daily living was unduly affected by the volatile working environment where voices, and in particular that that of Mrs Brookes, would regularly be raised in anger or frustration and where, on occasion, Mrs Brookes would throw items such as her phone or slam doors. R's reviews of C held on 20 February 2019 and 16 April 2019 were both very positive. C was given responsibility for running the accounts department and was recognised as doing a good job in it. It appears from the said April review that Mrs Brookes had forgiven, and was prepared to overlook, C's indiscretion towards SS and the earlier instances of poor conduct and attitude, and that Mrs Brookes was content to move on. The tribunal considered that Mrs Brookes appeared to think the volatility was a normal part of ordinary working life in the office. Even where C was recorded as showing frustration in terms of attitude/conduct this was put down to "inspirational dissatisfaction" and she was marked in that respect as being fully satisfactory. C was adding value to the business. As at the end of April 2019 R did not know and had no reason to know that C was a disabled person.

2.3.5. On 15 May 2019 C requested time off to attend a medical appointment due on Thursday, 16 May 2019, where the reason for this appointment was stated to be "stress and potential health risk due to medical history". The request form completed and signed by C and authorised by Mrs Brookes is at page 122. R was now on notice of C's complaint of stress in the context of a relevant medical history. On making her request however C downplayed the significance and made light of the matter distracting Mrs Brookes from any further consideration that C's condition may amount to a disability. That said, and compliant with her usual procedure and caution, Mrs Brookes sought advice from EW. She sought advice as to what R ought to do in terms of potential reasonable adjustments and managing C if she had "stress and potential health risk due to medical history". EW advised that Mrs Brookes should await the outcome of this appointment and speak again to C before considering the matter further both with her and then EW. Mrs Brookes was then on holiday and did not return to work until 28 May 2019 and she did not receive any feedback from C in relation to the medical appointment; she did not get that opportunity. As at the end of May 2019 R was only on notice of a potential disability in a situation where knowledge, and the need to take any further action, was dependent on feedback from C and advice from

EW. Mrs Brookes and R did not know that C was a disabled person and could only reasonably have known of that potential; they had little actual information and the little information they had was played down by C who made light of it. Nothing said or done by C was such that R ought reasonably to have known that she would satisfy the definition of disability.

2.4. Management by Mrs Brookes and Dr Holden: R's management style was robust, blunt, and forthright with the frequent raising of voices addressed to subordinate staff. It was, perhaps understandably, considered by some to be "toxic". The evidence leads the tribunal to believe that Dr Holden and Mrs Brookes considered this to be normal and to an extent positively dynamic. By any measure it was a tough working environment. Mrs Brookes was not shy or reluctant of asking subordinate colleagues awkward questions and putting them on the spot, having difficult conversations with them. The tribunal agreed with Dr Holden's comment that the respondent's office "was a dreadful place for people who are underperforming". Mrs Brookes did not discriminate against the claimant in relation to any protected characteristics and she was indiscriminate in the application of her robust management style save that she aimed it at those she considered to be underperforming or not paying her due respect. That said, Mrs Brookes could also be supportive, and she was, at times to LK, DT and C; she did not set them up to fail but arranged support and took time to either clarify matters or to ensure a mentor did. She furthered C's advancement and supported her promotion (including a pay rise) and she arranged for SS to support her as mentor. SS was a suitably qualified and experienced mentor to C while C was working in the accounts department.

2.5. R's provision, criterion, and practice (PCP):

2.5.1. Further to our findings at paragraph 2.4 the tribunal finds that R required its employees to achieve an adequate level of performance at work at all times and not to challenge Mrs Brookes' authority, to avoid volatile reprimand and being subjected to disciplinary sanction.

2.5.2. C submitted in her part of the performance review process that her work was outstanding; R considered it was fully satisfactory; R considered that C was an asset based on her performance. Her performance was deteriorating as her probationary period carried on as she was working in a more high-powered and responsible position in the accounts team but not to the extent that she was upbraided by Mrs Brookes or subjected to any disciplinary procedures. C did not consider there was a deterioration. C was confident and self-assured; she was very able to lay down the law and criticise others including Mrs Brookes. She was both able and willing to challenge Mrs Brookes and to do so in a very forthright manner. She challenged and upbraided certain colleagues whose work she did not value, also in a forthright manner. The claimant was not put at a disadvantage let alone a substantial disadvantage by R's PCP as described above; she gave as good as she got and was able to cope with it. R afforded C management time and clarified matters for

her including by the appointment of a mentor to support her; R considered that her work performance was satisfactory and had no reason to believe that C was at any disadvantage at all operating within its PCP.

2.6. Dismissal:

2.6.1. DT was employed by R, and she twice tendered her resignation on the grounds of alleged bullying by C. The allegation of bullying related to C's exercise of her authority and the way that she gave instructions and criticised DTs work. On 23 April 2019 DT resigned citing a torrent of criticism from C, but she withdrew her resignation. The second specific allegation of bullying for the same reason as above related to C's conduct on 28 May 2019. DT understood from C's conduct towards her and what was said that C considered she would succeed Mrs Brookes on Mrs Brookes' imminent retirement, and that C would ensure DT would not be employed by R much longer. This occurred when Mrs Brookes was on holiday prior to her final day at work. Upon Mrs Brookes' return to work DT told Mrs Brookes her allegations against C. Mrs Brookes met with DT and C to discuss the matter and for Mrs Brookes to catch up on what had happened in her absence. Mrs Brookes and DT formed the opinion individually that C was aggressive and rude at that meeting. C followed up the meeting with an email of the same date that appears at page 170 effectively accusing Mrs Brookes of causing confusion, calling the meeting deliberately to embarrass C, and of poor treatment.

2.6.2. Mrs Brookes was not prepared to accept C's perceived rudeness, aggression, and persistent challenge as evidenced at the meeting and in this email both of 28 May 2019. This all brought to Mrs Brookes' mind previous difficulties encountered and C's indiscretions to SS. Mrs Brookes had reached the end of her tether; she was intolerant of C's challenges and conduct towards her. For these reasons Mrs Brookes decided that C should be dismissed for her conduct and attitude, albeit the wording used was a more general "performance and attitude".

2.6.3. C appealed against the decision to dismiss her, and Dr Holden considered her appeal on 17 June 2019 dismissing it for the reasons stated by him in his letter of the 28 June 2019 that appears at page 195. The tribunal accepted the evidence of Dr Holden which was given credibly and plausibly; It is consistent with the Tribunal's findings generally, the documentation and the evidence heard, save that heard from C. He believes that the fact of the bullying allegations against C to the point of multiple resignations taken together with C's conduct in and towards Mrs Brookes, mindful of her indiscretions to SS and her reaction to being spoken about that at the time, meant that the decision not to confirm her employment at the end of the probationary period was correct. He was wholly supportive of the decision to dismiss.

2.7. The Time Issue:

- 2.7.1. The effective date of termination of C's employment, being the last alleged discriminatory event, was 30th May 2019;
- 2.7.2. C commenced ACAS early conciliation on 1 July 2019 and an early conciliation certificate was issued on 10 July 2019;
- 2.7.3. By virtue of the extension to the primary limitation periods as a result of early conciliation the latest date for presentation of a claim in relation to dismissal was 7 September 2019.
- 2.7.4. C presented her claim form to the tribunal alleging disability discrimination on 8 September 2019.
- 2.7.5. No evidence was led, or submission made that persuaded the tribunal it would be just and equitable to extend time by one day. Also considering the tribunal's general findings of fact and its application of law to the facts, the Tribunal finds that the claimant's claims are out of time, and it would not be just and equitable to extend time. The tribunal has no jurisdiction.

3. The law

3.1. Burden of proof:

- 3.1.1. The burden of proof provisions of the Equality Act 2010 are set out in s.136. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that A contravened the provision concerned, the tribunal must hold that the contravention occurred, save where A shows that A did not contravene the provision. This is referred to as a two-stage test, facts being established at the first stage showing a potential for discrimination and then at the second stage a respondent (A) showing, proving facts, to establish an innocent explanation for acts, omissions, or words (or otherwise, such as where A establishes in fact that the alleged acts etc did not occur) and therefore that there was no contravention as alleged.
- 3.1.2. At the so-called first stage the tribunal must find sufficient facts, which may be proved by either the claimant or the respondent, to pass any burden of showing there was no contravention of the provision to A, although any mere explanation from the respondent (A) is to be ignored at that first stage. One would expect the claimant to advance evidence to prove facts beyond merely making assertions of discrimination.
- 3.1.3. In discrimination cases there is often the obvious difficulty of positively proving that discrimination took place from available oral and documentary evidence. A tribunal may, but is not obliged to, draw adverse inferences from established facts, and by that route find that

there was contravention of a relevant provision. In this judgment if adverse inferences have been drawn from established facts this will be made clear; if it is not clear that adverse inferences have been drawn then, on consideration and for good reason, it was not deemed necessary to draw any.

3.2. Disability and Discrimination:

3.2.1. Disability: s 6 EqA defines disability as a physical or mental impairment having a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. The Secretary of State has issued guidance on matters to be considered in determining questions relating to the definition of this disability. R must know either in fact or constructively of the disability for there to be liability for the claims C advances, and in respect of the claim of a failure to make reasonable adjustments it must also know, actually or constructively, of a substantial disadvantage to C from the PCP. Constructive knowledge is where the respondent to a claim ought reasonably to have known.

3.2.2. Direct: S.13 EqA:

3.2.2.1. A person discriminates against another if because of a protected characteristic, such as disability, they treat that other less favourably than a comparator (whether a named comparator or a hypothetical comparator but in either case the person whose material circumstances are the same save in respect of disability).

3.2.2.2. Unlawful discrimination cannot be inferred from unreasonableness alone (*Bahl v The Law Society & others* [2004] EWCA Civ 1070) nor can it be established by showing merely a difference in status (e.g., disabled versus non-disabled) and a difference in treatment of the two (*Madarassy v Nomura International Plc* [2007] ICR 867).

3.2.2.3. Disability does not have to be the only or main cause of the treatment if it had "a significant influence" (*Nagarajan v London Regional Transport* [2000] 1AC 501). To make a valid comparison there must be no material difference between the circumstances of each case (s.23 EqA).

3.2.3. Arising: S.15 EqA:

3.2.3.1. A person discriminates against another if they treat that other unfavourably because of something arising in consequence of that person's disability, where the alleged discriminator cannot show that the treatment was a proportionate means of achieving a legitimate aim.

3.2.3.2. Guidance on how to approach a discrimination arising claim was given in *Pnaiser v NHS England* [2016] IRLR 170: (a) the tribunal

must identify if there was unfavourable treatment, and by whom; (b) the tribunal must identify what caused the impugned treatment, or what was the reason for it (the 'something arising' need not be the sole reason, but must have at least a significant, or more than trivial, influence on the unfavourable treatment); (c) motives are irrelevant; (d) the tribunal must determine whether the reason (or a reason) is 'something arising in consequence of C's disability; (e) the more links there are in the chain between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact; (f) this stage of the causation test requires an objective question and does not depend on the thought processes of the alleged discriminator; (g) it is not necessary for there to be a discriminatory motive, or for the alleged discriminator to know that the 'something' that causes the treatment arises in consequence of disability; (h) the knowledge required is of disability only; (i) it does not matter precisely in which order these questions are addressed.

3.2.3.3. A respondent to such a claim may not know that the "something" arose out of disability (*City of York Council v Grosset* [2018] EWCA Civ 1105. What matters is whether the unfavourable treatment was because of that "something", which arose out of disability.

3.2.3.4. In deciding whether the treatment complained of was a proportionate means of achieving a legitimate aim(s), the tribunal should consider whether it was reasonably necessary and appropriate to achieve the aim (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15).

3.2.4. Reasonable adjustments:

3.2.4.1. S.20 & s.21 EqA: where a PCP, or a physical feature, 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 duty on an employer to make reasonable adjustments to avoid the disadvantage. It is necessary to identify: (a) the PCP applied by or on behalf of the employer; (b) the identity of non-disabled comparators (where appropriate); (c) the nature and extent of the substantial disadvantage suffered by the claimant (see *Environment Agency v Rowan* [2008] IRLR 20).

3.2.4.2. 'Practice' connotes something which occurs on more than on a one-off occasion and has an element of repetition about it (*Nottingham City Transport Ltd v Harvey* [2013] EqLR 4).

3.2.4.3. Substantial means more than minor or trivial. The disadvantage must arise from the disability (*Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley* UKEAT/0417/11). Identification of a substantial disadvantage involves the accumulative assessment of the PCPs. Physical features or lack of auxiliary aids (*Environment*

Agency v Rowan [2008] IRLR 218). Not being able to work as efficiently or productively as colleagues who do not live with disabilities may amount to a substantial disadvantage in this context.

3.2.4.4. The duty does not arise if R did not know, and could not reasonably have been expected to know, both that C was disabled and that C was likely to be at a substantial disadvantage in comparison with persons who are not disabled (Secretary of State for Work and Pensions v Alam [2010] IRLR 283).

3.2.4.5. Paragraph 6.28 of the EHRC Code of Practice recommends that when deciding what is a reasonable step for an employer to have to take some of the factors that should be considered are: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of disruption caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (e.g. through Access to Work); the type and size of employer.

3.2.4.6. Where the duty arises, an employer who was unaware of the duty to make reasonable adjustments may still show that it was not in breach of the relevant duty because a particular step would not have been a reasonable one to take. The question is whether, objectively, the employer complied with its obligations or not (Tarbuck v Sainsbury's Supermarket Ltd [2006] IRLR 664, paragraph 71).

3.2.4.7. An employee does not have to suggest any, or any particular, adjustments at the material time and may even first make the suggestion during a final hearing (Project Management Institute v Latif [2007] IRLR 579).

4. Application of law to facts

4.1. Where there are issues between C's evidence and that of R in relation to knowledge of disability, we prefer that of R which was supported by the documentary evidence and corroborated by R's witnesses. C appeared to the Tribunal to be exaggerating some of her alleged reactions to the way she was managed when it appears that she too was robust and forthright in dealings with her colleagues, and where (we accept) she was performing to a high standard save in the way she managed subordinate members of staff and interacted with Mrs Brookes. C's witnesses gave evidence that led us in part to conclude that there was an atmosphere at work perceived by some as toxic, and that Mrs Brookes was forthright to the point of upsetting people by her management style and by resenting challenges to her authority which led to unfavourable treatment by her. The evidence available led us to make these findings. We did not need to make draw inferences. There were many conflicts between people, and they ultimately led to C's dismissal, her departure being one of many in recent times that were caused by or

contributed to by R's combative management, regardless of any employees protected characteristics. The Tribunal did not find evidence to suggest that C's mental health impairment affected her particularly because of R's management style, or that it was a material factor in any of R's treatment of C.

4.2. The Equality Act Section 13 – Direct discrimination because of disability

4.2.1. *Did the respondent treat the claimant less favourably when they dismissed her?* Dismissal is obviously unfavourable treatment. The key question is whether it was less favourable than that of another because of disability.

4.2.2. *Was that treatment less favourable i.e., did the respondent treat the claimant less favourably than it treated or would have treated others (comparators) in not materially different circumstances?* No. C was one of several employees who were dismissed or resigned in the context of R's robust, forthright, management, a style seen by some as toxic. The evidence, even of C's witnesses, suggests that anyone who fought R's management's fire with fire would be treated in the same way. There was no place for deemed insubordination. C was intolerant of others as Mrs Brookes ultimately proved to be of C. In mitigation it ought to be noted that R dismissed C in part also because of her treatment of DT on two occasions, which R and DT described as bullying.

4.2.3. *The claimant relies on the following comparator – Diane Tidbury.* DT's circumstances are not strictly comparable to C's. She was not in the same position of authority. She enjoyed a better, less volatile and challenging, relationship with Mrs Brookes than C did, for reasons related to her way of conducting herself with R's management (and not for reasons related to disability); she was not insubordinate or challenging of authority; she did not upset people as C did in the conduct of her duties.

4.2.4. *If so, was this because of the claimant's disability and/ or because of the protected characteristic of disability more generally?* No. C was dismissed because of her conduct (including challenging Mrs Brookes, insubordination, and perceived bullying of DT, twice), and her performance in terms of managing subordinates (her interactions with some staff against the background of her indiscretion to her mentor SS).

4.3 The Equality Act Section 15 – Discrimination arising from disability

4.3.1 *Did the following things arise in consequence of the claimant's disability?*

4.3.1.1 *The claimant was unable to deal with confrontation and aggression:* the claimant, along with others, was upset at times by the volatility in the office due to R's management style. She was most often able to deal with confrontation and aggression. At times she was confrontational and aggressive in her own right and not just as a reaction to anything said or done by Mrs Brookes. The Tribunal concluded that C was exaggerating

her ability to cope. The Tribunal has not found evidence that C was unable to deal as alleged owing to her disability; this is a difficult matter because she may have been. We are not medical experts. C's description of the effects of R's management is subjective. Objectively we have found evidence to suggest anyone would have found some aspects of R's management difficult to cope with regardless of disability. It is impossible to determine the extent to which, if at all, C's ability or inability to deal with it was affected by her disability. One would have expected her to be vulnerable to it, but there was no sign of this apart from C claiming it.

4.3.2 Did the respondent treat the claimant unfavourably as follows?

4.3.2.1 Was the claimant's line manager confrontational with the claimant and did she isolate and target the claimant Mrs Brookes did not isolate or target C. She was no more confrontational with C than anyone else regardless of disability; Mrs Brookes did not see C as being vulnerable and more likely to be unable to cope than anyone else. Mrs Brookes was supportive and appreciative of C. She approved her promotion and a pay rise. She appointed a supportive mentor; she reviewed her favourably twice.

4.3.2.2 treat her unfavourably by dismissing her? R dismissed C for the reasons stated above paragraph 4.2.4, because of issues of conduct and attitude in the performance of her duties and interactions with management and colleagues. C's claimed inability to deal with aggression and confrontation was not the reason for her dismissal.

4.3.3 Did the respondent treat the claimant unfavourably in any of those ways because of the claimant's inability to deal with confrontation and aggression?
No, as stated.

4.3.4 If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the legitimate aim of protecting the respondent's staff from disruptive behaviour. R has shown that it would not accept confrontational and aggressive behaviour from C, especially in terms of insubordination towards Mrs Brookes and perceived, reported, bullying of DT. R has shown that it pursued the legitimate aim of protecting its staff from C's behaviour. R has established justification for dismissing C during her probation.

4.3.5 Alternatively has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant has the disability?
Yes. R did not know and could not reasonably have known that C was a disabled person by reason of anxiety and panic attacks; she did not evidence either condition at work; she concealed the diagnosis from R.

4.4 Reasonable adjustments

- 4.4.1 *Did the respondent have or apply the PCP that the claimant had to maintain an adequate level of performance at work in order not to be subjected to the risk of disciplinary sanctions including dismissal. Yes.*
- 4.4.2 *Did that PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that the respondent gave other employees such as Diane Tidbury time and clarifications to support their work and it did not provide reasonable adjustments for the claimant's disability? The PCP did not put C at any disadvantage. C considered that her work was outstanding and said so to R. She did not allege any disadvantage but, on the contrary, she felt that she was thriving and that her probation had been a success. The quality and output of her work was satisfactory to R, until her personal management style affected it. By either party's measure C achieved "an adequate level of performance" of her work duties. The same could not be said of her attitude and management or interaction with other staff.*
- 4.4.3 *The claimant's mental health disability symptoms were exacerbated by the respondent's lack of clarity, behaviour and isolation. There was no evidence of this; the Tribunal did not find that there was the claimed exacerbation.*
- 4.4.4 *If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage? No – for all the reasons stated above. R did not know and could not reasonably have known of C's disability.*
- 4.4.5 *If so, were there steps that were not taken, that could have been taken by the respondent, to avoid the disadvantage? The burden of proof does not lie on the claimant: the claimant alleges that the respondent should have given the claimant time and clarifications to support her in her work. The statutory duty did not arise. In any event R was supportive of C including by appointing a mentor. R took appropriate steps to assist C with her work. Ultimately it was C's conduct that led to her dismissal and not any failure to otherwise maintain an adequate level of performance.*
- 4.4.6 *The respondent refers to its legitimate aim set out above; Namely the need to protect the respondent's other staff from disruptive behaviour. This aim played a part in the decision to dismiss C, to protect DT from perceived bullying.*

4.4.7 *If so, would it have been reasonable for the respondent to have taken those steps at any relevant time?* No further steps were required in the circumstances.

Employment Judge T V Ryan

Date: 20.12.21

REASONS SENT TO THE PARTIES ON 21 December 2021

.....
FOR THE TRIBUNAL OFFICE Mr N Roche

AGREED LIST OF ISSUES

1The Equality Act Section 13 – Direct discrimination because of disability

- 1.1 Did the respondent treat the claimant less favourably when they dismissed her?
- 1.2 Was that treatment less favourable i.e., did the respondent treat the claimant less favourably than it treated or would have treated others (comparators) in not materially different circumstances?
- 1.3 The claimant relies on the following comparator – Diane Tidbury.
- 1.4 If so, was this because of the claimant's disability and/ or because of the protected characteristic of disability more generally?

2. The Equality Act Section 15 – Discrimination arising from disability

- 2.1 Did the following things arise in consequence of the claimant's disability?
- 4.5 The claimant was unable to deal with confrontation and aggression
- 4.6 Did the respondent treat the claimant unfavourably as follows (1) Was the claimant's line manager confrontational with the claimant and did she isolate and target the claimant and treat her unfavourably by dismissing her?
- 2.2 Did the respondent treat the claimant unfavourably in any of those ways? Was the respondent's manager confrontational with the claimant and did she isolate and target and or dismiss the claimant because of any of those things i.e., the claimant's inability to deal with confrontation and aggression?
- 2.3 If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the legitimate aim of protecting the respondent's staff from disruptive behaviour.
- 2.4 Alternatively has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant has the disability?
- 2.5 A PCP is a provision criteria or practice. Did the respondent have or apply the following PCP; Namely that the claimant had to maintain an adequate level of performance at work in order not to be subjected to the risk of disciplinary sanctions including dismissal.
- 2.6 Did any PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that the respondent gave other employees such as Diane

Tidbury time and clarifications to support their work and it did not provide reasonable adjustments for the claimant's disability?

2.7 The claimant's mental health disability symptoms were exacerbated by the respondent's lack of clarity, behaviour and isolation.

2.8 If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage?

2.9 If so, were there steps that were not taken, that could have been taken by the respondent, to avoid the disadvantage? The burden of proof does not lie on the claimant: the claimant alleges that the respondent should have given the claimant time and clarifications to support her in her work.

2.10 The respondent refers to its legitimate aim set out above; Namely the need to protect the respondent's other staff from disruptive behaviour

2.11 If so, would it have been reasonable for the respondent to have taken those steps at any relevant time?

[tvr]