EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs C Shenk	AND	Carson TM Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (By CVP) **ON** 6 to 8 September 2021

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: Mrs Shenk (in person)
For the Respondent: Mr Wilkinson (director)

JUDGMENT

1. The Respondent contravened section 39(2)(d) of the Equality Act 2010 and the Claimant succeeded in her claims of discrimination arising from disability/harassment in relation to the meetings on 8 and 26 January 2020, discrimination arising from disability in relation to the lack of a hearing in relation to her grievance appeal, and that the Respondent had failed to make reasonable adjustments.

2. All other claims of direct discrimination, discrimination arising from disability and harassment are dismissed.

3. The Claimant's claim that there had been an unlawful deduction from wages was not well founded and it was dismissed.

REMEDY

1. The Respondent is ordered to pay the Claimant the sum of £7,500 for injury to feelings in respect of her claim of disability discrimination.

2. The Respondent is ordered to pay interest on the sum of £7,500 in the sum of £976.43

3. The total sum to be paid is £8,476.43.

REASONS

The claim

1. In this case the Claimant claimed that she had been discriminated against on the grounds of disability and that there had been an unlawful deduction from wages. The Respondent denied the claims.

Background

2. The Claimant notified ACAS of the dispute on 8 February 2020 and the certificate was issued on 26 February 2020. The Claimant presented her claim on 6 May 2020.

3. On 14 January 2021, the parties attended a telephone case management preliminary hearing at which the issues were discussed and agreed.

4. On 2 February 2021, both parties confirmed by e-mail that they consented to the final hearing being heard by a Judge sitting alone, in accordance with s. 4(3)(e) of the Employment Tribunals Act 1996.

5. The Respondent has ceased trading and I was told that it has no assets. There is an active proposal to strike it off the Companies House Register, to which the Claimant has objected.

The issues

6. At a Telephone Case Management Preliminary Hearing on 14 January 2021, Employment Judge Goraj identified the issues to be determined and they were reconfirmed at the start of the hearing. The Respondent confirmed that it accepted that the Claimant was disabled by reason of PTSD, Anxiety and Depression at all material times. It was also agreed between the parties that the Respondent knew the Claimant was disabled from 2 December 2019 and that the Claimant agreed that it ought not to have known of her disability before that date.

7. It was agreed that any claims before 20 January 2020 were potentially out of time.

Adjustments during the hearing

8. During the hearing, regular breaks were taken to assist the Claimant.

The Evidence

9. I heard from the Claimant and also Mr Pearson on her behalf. I heard from Mr Wilkinson and Ms Saunders on behalf of the Respondent.

10. I was also provided with a bundle of documents of 247 pages. Any references in square brackets, in these reasons, are references to page numbers in the bundle. I was also provided with written submissions prepared by the Respondent's solicitor who had been acting on a pro bono basis during the proceedings.

11. There was a degree of conflict on the evidence.

Facts

12. I found the following facts proven on the balance of probabilities, after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

13. The Respondent was a telemarketing agency. It had two directors, Mr Nigel Wilkinson and Mr Richard Carpenter. It operated from a single office with dimensions of 7.28m x 4.8m. It received HR advice from an external company, HR Dept.

14. On 1 April 2019, the Claimant commenced employment with the Respondent as a business to business telemarketer. The only other employee at this time was Ms Seagrave, with whom the Claimant had some minor disagreements about the temperature of the room.

15. The Claimant's contract of employment provided, in relation to deductions from wages:

> "If, either during or on the termination of your employment, you owe the Employer money as a result of any loan, overpayment, default on your part or any other reason whatsoever, the Employer shall be entitled to deduct the amount of your indebtedness to it from any payment or final payment of wages which it may be due to make you. Such deductions may include, but are not limited to:
> …
> The market value of any unreturned Employer property on the termination of your employment.
> …"

16. The Grievance procedure said that an employee would receive a reply to any appeal within 5 working days and a date for a hearing would be set.

17. At all times material to the claim, the Claimant was disabled by reason of post traumatic stress disorder, anxiety and depression. At the material times the effects of the Claimant's disabilities on her were that she suffered from high arousal and anxiety, sleeplessness, flashbacks, night terrors, shaking, tearfulness and tenseness in her body.

18. Ms Seagrave left the Respondent's employment in August 2019. In September 2019, Mr Adebola commenced employment with the Respondent.

19. Mr Adebola and the Claimant's workstations were next to each other and there was a room divider between them to reduce noise from when talking on the telephone. On the plan of the office [p228], the Claimant's desk was in a corner and the door was diagonally across the room. Mr Carpenter set on the other side of the room to the Claimant and Mr Adebola. There were also other desks in the room.

20. About 2 months after Mr Adebola started working for the Respondent he told the Claimant that he was going to refuse to work on certain accounts and demand the ones he wanted. The Claimant mentioned it to Mr Wilkinson. From this time Mr Adebola was reluctant to acknowledge or exchange in social pleasantries with the Claimant.

21. On 19 November 2019 an incident occurred between the Claimant and Mr Adebola. Mr Adebola left the room, and on his return the Claimant spoke to Mr Wilkinson. The Claimant informed Mr Wilkinson that Mr Adebola pointed his finger at her and, in close proximity, angrily said 'don't you talk to me, don't you ever talk to me'. The Claimant responded by saying they needed to maintain a professional relationship to which he had walked intimidatingly towards her, pointed and said, 'Don't you ever talk to me again.'

22. Mr Wilkinson also spoke to Mr Adebola, who said that the Claimant was harassing him about his campaigns and commission he was earning, he was being interrupted and wanted to be left in peace to do his job. He agreed that there had been a breakdown in communication but denied that he had been aggressive.

23. Mr Wilkinson spoke to both the Claimant and Mr Adebola and asked them to refrain from communicating with each other until he had decided what they should do.

24. On 19 November 2019, the Claimant raised a grievance in which she set out the background and what happened that day. She concluded by saying that the aggression was extremely upsetting and not appropriate in the workplace.

25. Mr Wilkinson and Mr Carpenter discussed the matter and concluded that because there were differing versions of events and no witnesses, it would be difficult to pursue formal action against either party. Mr Wilkinson typed an e-mail but did not send it.

26. On 20 November 2019, Mr Wilkinson and Mr Carpenter were at an important trade show.

27. On 21 November 2019, the Claimant spoke to Mr Wilkinson and asked what was happening regarding the incident on 19 November. Mr Wilkinson explained and realised he had not sent the e-mail. He then e-mailed the Claimant and Mr Adebola [p89] reminding them that everyone should act professionally and courteously and they would work with them to resolve the matter. They were reminded of the expected standards and were told that the matter was being taken seriously. The Claimant responded, expressing a willingness to work towards reconciliation and was hopeful it would settle down. She said that she was not pushing for a disciplinary procedure. The Claimant considered that her grievance was informal, and Mr Wilkinson had reached the same conclusion.

28. Both the Claimant and Mr Wilkinson were on leave between 22 November and 1 December 2019. Whilst on annual leave the Claimant's anxiety levels increased and she suffered from panic attacks and flashbacks of the incident and of previous unrelated traumatic incidents.

29. On 1 December 2019, the Claimant e-mailed Mr Wilkinson and Mr Carpenter and suggested, after having reflected, that she worked from home and that the issue of Mr Adebola's behaviour and the anxiety response would cease it she did [p92]. Mr Wilkinson was reluctant to do this because the Respondent was a small business with little money.

30. On 2 December 2019, the Claimant went into the office and spoke to Mr Carpenter who said that she could not work from home or sit away from Mr Adebola. He also remarked that she 'did not get on too well with Alex Seagrave'. When the Claimant was asked, when giving her evidence, how this was related to her disability, she said that she did not know.

31. The Claimant then went into Mr Wilkinson's office and asked what was happening with her grievance. The Claimant was told that there was insufficient evidence to discipline Mr Adebola, and she became upset. She asked if there was another space in which she could work and was told that there was not. The only workstations were in the same office and if she moved she would still have been within a few metres of Mr Adebola. The Claimant became more distressed and went to her desk and started to write an e-mail to Mr Carpenter and Mr Wilkinson. Mr Wilkinson approached the Claimant and asked why she was so upset. She told him that she suffered

from PTSD and could feel extremely anxious if aggression was shown towards her and what happened on 19 November 2019 had triggered a bad exacerbation.

32. The Claimant then sent her e-mail to Mr Carpenter and Mr Wilkinson setting out the effects on her, including that she was having anxiety responses to being in the same space as Mr Adebola, and even from the thought of being in it. She then went home feeling very unwell. The Claimant from this time did not feel able to work in close proximity to Mr Adebola.

33. Later that day, Mr Wilkinson sent a message to the Claimant saying they were urgently exploring options to enable homeworking [p95], which the Claimant thought sounded positive. From this point the Claimant did not return to the office to work but was paid full pay for the remainder of her employment.

34. On 3 December 2019 the Claimant thanked the Respondent for the working from home option. She was happy for Mr Carpenter to install the equipment but thereafter wanted Mr Wilkinson to manage her.

35. Before setting up homeworking it was necessary for the Respondent to consider a health and safety risk assessment, data security, necessary computer and communications equipment and its installation, running costs and insurance.

36. On 5 December 2019 Mr Wilkinson e-mailed the Claimant. She was told that, after taking advice, setting up homeworking was not as straight forward as they had hoped as there were insurance and risk assessment checks was sent an e-mail. She was also told that her grievance was ongoing and they would decide the appropriate route as soon as practical.

37. The Claimant was also asked to sign a medical consent form so that the Respondent could contact her GP, to gain a better understanding of her medical condition. The Claimant signed the medical consent form on 7 December 2021 and returned it. The Respondent received the form on 16 December 2019. The Respondent wanted to obtain a medical report so that it knew how best to assist the Claimant, in the meantime it decided to implement homeworking.

38. On 8 December 2019, the Claimant, by e-mail, said that she would be able to work from home the following day and asked whether there was a change in the position of the desks in the office so that she and Mr Adebola were not sitting near each other [p101].

39. Mr Wilkinson and Mr Carpenter did not think that moving the position of the Claimant's desk was a sensible proposal. It would only take a couple of

seconds to walk across the office and it was not possible to put any significant distance between her and Mr Adebola and if she was feeling threatened it would make a negligible difference. They did not want to exacerbate the Claimant's medical condition without obtaining proper advice. It was considered that homeworking was the best way forwards. This was not discussed with the Claimant.

40. The Claimant also suggested as part of her case, that the removal of the room divider would have been a reasonable adjustment because she would have been able to see where Mr Adebola was, however this was never suggested to the Respondent at the material times. Mr Wilkinson did not consider that this would have assisted.

41. On 9 December 2019, Mr Carpenter said that there were logistical and other problems and they were unable to get the equipment to her straightaway and they would be back in touch when they had better ideas about timeframes. It was suggested that she stayed at home and be available for work if things rapidly changed.

42. On 16 December 2019, the Claimant chased for an update [p103], she said she was ready to work from home or in the office if there was greater distance between her and Mr Adebola. Mr Wilkinson replied and said they were waiting for information from HR, she was still employed and they would set her up for home working as soon as possible. He had also received her medical consent form and would be contacting her GP as soon as possible. Mr Wilkinson did not seek advice from HR Dept in relation to the Claimant returning to the office as he considered homeworking was the logical solution.

43. On 18 December 2019, the Claimant was sent a revised contract of employment to enable homeworking.

44. On 19 December 2019, the Respondent requested a medical report from the Claimant's GP about the effects of her PTSD and said that they wanted to ensure that they were making reasonable adjustments. The Claimant was not sent a copy.

45. On 19 December 2019, Mr Wilkinson drafted a response to the Claimant's grievance but did not send it [p117], in which he set out the following: (1) It was clear that relationships had deteriorated and both parties were saying the other's behaviour was unacceptable.; (2) Without independent witnesses it was difficult to make a judgment; and (3) Team members were reminded to be respectful and courteous and they had taken steps to ensure that they were not in the same workspace by granting her request to work from home. Mr Wilkinson did not discuss the matter with the Claimant before making a decision, he accepted that there had been an incident and there

were two sides to the story and he did not see what more could be done. He had already been told what had happened. He accepted that in hindsight it would have been better to have a meeting. I accepted Mr Wilkinson's evidence that the only influence the Claimant's disability had, was on his decision to immediately agree homeworking.

46. Mr Wilkinson had previously said that an appointment to set up homeworking would be arranged. Mr Wilkinson intended to undertake the set up on 23 December 2019, however he was unable to because he was taken ill. Mr Wilkinson's intention to set up homeworking was not communicated to the Claimant and the Claimant was unaware that he had been taken ill.

47. Between 24 December 2019 and 5 January 2020, the Claimant was on annual leave. The Respondent sought to install the homeworking equipment on 3 and 4 January, however the Claimant was not available.

48. In an e-mail dated 4 January 2020 the Claimant asked for update on her grievance.

49. On 7 January 2020, the Respondent suggested that the home installation took place the following day.

50. On 8 January 2020, the Claimant e-mailed Mr Wilkinson and said she was raising a formal grievance against Mr Adebola. Mr Wilkinson did not see the e-mail until after he attended the Claimant's home.

51. On 8 January 2020, Mr Wilkinson and Ms Saunders, Mr Wilkinson's PA in a different company, attended the Claimant's home to set up homeworking. Ms Saunders attended to help the Claimant with some software and because Mr Wilkinson did not want to attend alone because he was aware of an unrelated incident, in which the Claimant had been involved with a male in her home, and he did not want her to feel threatened.

52. After some initial pleasantries, Mr Wilkinson gave the Claimant the grievance decision letter he wrote on 19 December 2019. The Claimant did not want to open it in case she became upset.

53. The Claimant asked a number of questions based on the ACAS Homeworking Checklist. The Claimant was abrupt in her questions and the discussion became heated. The Claimant asked about communication with the Respondent and Mr Wilkinson said that it would be primarily through him at a café or hotel lounge in Exmouth. Mr Wilkinson said that he could see no good reason why she would come to the office because she had no working relationship with Mr Adebola or Mr Carpenter and at the moment there was no need for her to go in. It was not put to Mr Wilkinson that he

said, ‘you’ve shown no sign of reconciliation’ and I make no finding that was said. I accepted Mr Wilkinson’s evidence that he and the Claimant both lived in Exmouth and that he considered Exmouth was a good location for meetings. The remark upset the Claimant and at the time she was unable to work in close proximity with Mr Adebola due to the effects of her PTSD. Mr Wilkinson did not intend the remark to be hurtful and thought it was a statement of fact.

54. Mr Wilkinson then suggested that the homeworking equipment was set up. Mr Wilkinson took into the house a desktop computer, monitor, Voice Over Internet Protocol (VOIP) phone, cabling and a fire extinguisher. The Claimant showed them an upstairs room and the internet router was downstairs. The length of cable brought by Mr Wilkinson was not long enough. Further the Claimant said that she had Air B&B guests and the computer would need to be moved when such guests were staying. Mr Wilkinson considered it was dangerous to have loose cables on the stairs and across the landing and was also concerned about data security. Mr Wilkinson told the Claimant that they would need to return with longer cables. Miss Saunders suggested that a Wi-Fi extender might solve the problem. The homeworking equipment was not set up at that time. The Claimant had not informed the Respondent where she was going to work nor the position of the router. Equally, the Respondent had not asked the Claimant such questions.

55. On his return to the office Mr Wilkinson saw the Claimant’s e-mail from earlier that day.

56. On 9 January 2020, Mr Wilkinson was taken ill, which was subsequently thought to have been Covid-19.

57. On 13 January 2020, the Claimant appealed against the grievance outcome [p124-125]. She complained about the lack of clarity as to whether the grievance had been formal or informal, the delay in setting up homeworking and the effects of the incident with Mr Adebola.

58. On 13 January 2020, there were further e-mails about setting up homeworking. The Respondent said it was still looking into a practical solution to set up home working, so far from the router, in a safe manner which could be removed when she had Air B&B guests. No further enquires were made by the Respondent into resolving the difficulties with homeworking. Although Mr Wilkinson was unwell, the Respondent accepted that Mr Carpenter could have looked into longer cables and wi-fi extenders. Mr Wilkinson gave evidence that he was unaware of wi-fi extenders for VOIP phones, however they did exist, and searches could have been made on the internet and it was accepted that it could have been

looked into. I accepted Mr Wilkinson's evidence that nothing really happened in relation to setting up homeworking after 8 January 2020.

59. On 16 January 2020, Mr Wilkinson e-mailed the Claimant acknowledging her appeal and proposed that it would be shared with their HR advisers, and they would respond to the appeal. The Claimant was asked if she agreed to the proposal. The Claimant responded by saying she was happy for the appeal to be shared with HR Dept and was sure they would say who should attend the appeal hearing. Mr Wilkinson sent the documents to HR Dept, who replied to him on 24 January 2020, following which he asked the Claimant to confirm whether she was happy for HR Dept to hear the appeal. The Claimant replied by saying that she thought she had agreed. HR Dept were instructed to act independently to make a decision on the grievance appeal.

60. On 23 January 2020, Mr Wilkinson e-mailed the Claimant. The GP report was still awaited. It was said that as an interim measure home working had been granted. I accepted Mr Wilkinson's evidence that the intention was that if homeworking was successful, it would continue and be rolled out to other employees. It was also confirmed he had not been able to set up homeworking, but the Claimant would continue to be paid her full salary. The Claimant was asked if there were any further adjustments she wanted them to consider.

61. At the end of January/beginning of February 2020, the Respondent asked the Claimant to chase her GP for the medical report.

62. There was delay in organising the Claimant's appeal. On 30 January 2020, the Claimant was told by HR Dept that Ms Olver would hear the appeal. Ms Olver then had to take a period of leave at short notice. Mr Wilkinson was asked what was happening. Ms Olver returned to work on 4 February 2020. There was confusion as to whether the Claimant had consented to HR Dept hearing the appeal. I accepted Mr Wilkinson's evidence that he had not involvement in arranging the appeal and he had left it to HR Dept to make arrangements and that they were to make an independent decision.

63. On 28 January 2020, the Respondent's largest client, accounting for more than 50% of turnover, gave notice that it was cancelling its contract. The Respondent was already making losses and was kept afloat by the directors injecting money. I accepted Mr Wilkinson's evidence that the client's funding for purchasing the Respondent's services had been withdrawn and that this was the reason for the contract cancellation. Mr Wilkinson and Mr Carpenter looked into whether the Respondent remained viable. After about 10 days they concluded that it was not viable and that if it continued trading it would become insolvent.

64. On 4 February 2020, Ms Olver wrote to the Claimant and said that she had sufficient information to decide the appeal without hearing from the Claimant. She had said that she did not want to cause additional stress. Mr Wilkinson and Mr Carpenter had no involvement or influence in that decision. The Claimant replied saying she wanted to attend a hearing.

65. On 5 February 2020, Ms Olver, HR Adviser, said that the ACAS guidance did not require a meeting in person. She also said that the appeal letter was detailed and she had enough information and did not think anything would be gained by arranging a meeting. She said she would consider the appeal and write to her. I accepted that the Claimant wanted to be heard and be able to discuss what had happened.

66. Mr Wilkinson had previously provided his account as to what happened. I was satisfied that the account he provided was his recollection of events. The Claimant did not cross-examine Mr Wilkinson about false statements to HR Dept.

67. On 7 February 2020, the Claimant was sent the outcome of her appeal [p153-157]. It was concluded that there were delays in setting up homeworking and there could have been better communication and this aspect was partially upheld. Mr Carpenter's comment on 2 December 2019 was inappropriate and this was partially upheld. Otherwise, the grievance was rejected.

68. On 13 February 2020, the Respondent received an invoice from the Claimant's GP, which it paid immediately so that the medical report could be provided. The Claimant said that the invoice was sent on 22 January 2020 and relied upon her GP notes. Mr Wilkinson denied that it had been received. The letter relied upon by the Claimant was unsigned and an invoice was not attached. The subsequent e-mail on 13 February made no mention of it being previously sent. I accepted Mr Wilkinson's evidence that the first invoice received by the Respondent was on 13 February 2020.

69. On 20 February 2020, the Claimant was invited to attend a meeting about the possibility of her employment ending. She was informed that due to the loss of a client the Respondent was no longer a viable company.

70. On 26 February 2020, the Claimant attended a meeting with Mr Wilkinson, she was accompanied by Mr Pearson. Ms Saunders attended the meeting as a note taker. At the start of the meeting, Mr Pearson wanted to discuss the Claimant's grievance. the Claimant wanted to conclude any grievance discussions before redundancy was considered. Mr Wilkinson wanted to discuss the serious financial position the Respondent was in and the redundancy situation. The Claimant wanted to return to issues relating to her grievance. The meeting became heated and unpleasant for all

concerned. Both parties acted hostilely during the meeting. It was confirmed that the current months' salaries would be met. Mr Wilkinson confirmed that a reference would be provided.

71. The Claimant asked how the last few months would be described. The Claimant alleged that Mr Wilkinson said we didn't stop you coming into the office, you self absented yourself. Mr Pearson corroborated the account and said he made a note of it, although the notes had not been disclosed. Mr Wilkinson denied saying the words alleged, however he accepted that something might have been said. He accepted that he possibly said that she was not sent home and that the Claimant said she was going home and put a question on that basis to the Claimant in cross-examination. Miss Saunders could not remember such a comment. On the balance of probabilities, the Claimant asked how the last few months would be described and was suggesting that she had been told to leave the office. Mr Wilkinson said that she was not told to leave and that she had left. I accepted that after the Claimant suggested that she was told to leave, Mr Wilkinson said that she self absented herself. He did not intend the remark to be hurtful, but he considered that it was the Claimant who had left the office. The Claimant found the remark hurtful and humiliating because she had suggested that she tried to go back into the office.

72. On 28 February 2020, the Claimant was given notice of redundancy [p175]. The Respondent ceased trading the same day.

73. On 9 March 2020, Dr Coakley provided the medical report on the Claimant [p197-199].

74. The Claimant was not paid her wages for February 2020, although this was subsequently remedied. The Claimant's employment ended on 31 March 2020.

75. The Claimant did not return the Respondent's computer and VOIP equipment nor the fire extinguisher. They had not been used. On 3 March 2020, Mr Carpenter e-mailed the Claimant, confirming that the office had been closed and the company was ceasing to trade, and arrangements would be made to collect the equipment. After collection and checking of the equipment, the pay held back from the Claimant would be released to her.

76. The Claimant took advice from a friend, who suggested that the equipment should be tested and the money paid before it was released. Mr Carpenter informed the Claimant that the equipment would be collected the following day and the courier was not in a position or authorised to test it. The Claimant responded by saying that she wanted the money to be paid to her before she released the equipment. The equipment remains unreturned.

The Respondent deducted £463.99 from her final pay. I accepted Mr Wilkinson's oral evidence that the value of the equipment was £463.99.

77. In terms of time limits, I accepted the Claimant's evidence that after her redundancy she struggled 'to get her head together', as far as the Respondent was concerned, and it took much energy to bring the claim. Throughout the material times the Claimant was undertaking work for other employers, albeit it was for friends and longstanding acquaintances. The only prejudice in not extending time, for any claim out of time, would be that it could not be brought. The Respondent was unable to adduce any evidence as to how it would be prejudiced if time was extended, and Mr Wilkinson fairly accepted that the oldest allegations were only about a month out of time.

The law

78. The claim alleged discrimination because of the Claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complained that the Respondent had contravened a provision of part 5 (work) of the EqA. The Claimant alleged there had been direct discrimination, discrimination arising from disability, harassment and a failure by the respondent to comply with its duty to make adjustments.

79. As for the claim for direct disability discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

80. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(20, this 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.

81. The provisions relating to the duty to make reasonable adjustments are found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable

adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

82. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

83. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

84. The remedies available to the tribunal are to be found in section 124 of the EqA. The tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; may order the respondent to pay compensation to the complainant (on a tortious measure, including injury to feelings); and make an appropriate recommendation. In addition, the tribunal may also award interest on any award pursuant to section 139 of the EqA.

85. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations"). Under regulation 2 the tribunal shall consider whether to award interest, and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. Under regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. All other sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation

Direct Discrimination

86. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably on the ground of her disability than an actual or hypothetical comparator was or would have been treated

in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

87. I approached the case by applying the test in Igen v Wong [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

> "*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*"

88. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. As to the treatment itself, I had to remember that the legislation did not protect against unfavourable treatment per se but less favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).

89. The treatment ought to have been connected to the protected characteristic. What I was looking for was whether there was evidence from which I could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others because of her disability.

90. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong [2005] IRLR 258 CA was also approved by the Supreme Court in Hewage v Grampian Health

Board [2012] IRLR 870. The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

91. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

92. "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

93. In every case the tribunal has to determine the reason why the Claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong), i.e., that the alleged discriminatory has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the claimant to less favourable treatment than others? The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

94. The test within s. 136 encouraged me to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. I was permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see Madarassy-v-Nomura International plc and Osoba-v-Chief Constable of Hertfordshire [2013] EqLR 1072).

95. I needed to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

96. Where the Claimant has proven facts from which conclusions may be drawn that the respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

97. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances. If there is any material difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon). It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably. It is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

98. When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see Fraser-v-Leicester University UKEAT/0155/13/DM).

Discrimination arising from disability

99. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England [2016] IRLR 170, EAT, at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment, but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the

chain there are 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.

100. When considering a complaint under s. 15 of the Act, I had to consider whether the employee was "*treated unfavourably because of something arising in consequence of his disability*". There needed to have been, first, '*something'* which arose in consequence of the disability and, secondly, there needs to have been unfavourable treatment which was suffered because of that '*something*' (Basildon and Thurrock NHS-v-Weerasinghe UKEAT/0397/14). Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been loose and there might be several links in the causative chain (Hall-v-Chief Constable of West Yorkshire Police UKEAT/0057/15 and iForce Ltd-v-Wood UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause (Pnaiser-v-NHS England [2016] IRLR 170), but the statutory wording ('in consequence') imported a looser test than 'caused by' (Sheikholeslami-v-University of Edinburgh UKEATS/0014/17).

101. In IPC Media-v-Millar [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

102. No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (Williams-v-Trustees of Swansea University Pension and Assurance Scheme [2019] ICR 230, SC).

Justification

103. In assessing the legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim (McCullough v ICI Plc [2008] IRLR 846).

104. In Hensman v Ministry of Defence UKEAT 0067/14/DM, Singh J held that when assessing proportionality, while and an Employment Tribunal must reach its own judgment, that must in turn be based upon a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

Proportionality in this context meant 'reasonably necessary and appropriate' and the issue required me to objectively balance the measure that was taken against the needs of a respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3) (see also Hampson v Department of Education and Science [1989] ICR 179. Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily render it impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT). It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter (Hardys & Hansons Plc v Lax [2005] IRLR 726 CA).

105. The test of proportionality is an objective one.

106. A leading authority on issues of justification and proportionality is Homer v Chief Constable of West Yorkshire Police [2012] ICR 704 in which Lady Hale, at paragraph 20, quoted extensively from the decision of Mummery LJ in R (Elias) v Secretary of State for Defence [2006] 1WLR 3213

> *20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213 para 151:*
> *"the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*
>
> *He went on, at para 165, to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 , 80:*
> *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"*
>
> *As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] ICR 1565 , paras 31, 32, it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.*

107. At paragraph 24 Lady Hale said

"24. Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer."

108. Pill LJ's comments in Hardy & Hansons plc v Lax [2005] IRLR 726 in relation to the Sex Discrimination Act 1975 at paragraph 32 also provide assistance in that the statute:

"Section 1(2)(b)(ii) [of the Sex Discrimination Act 1975] requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry v Midland Bank plc [1999] ICR 859) and I accept that the word "necessary" used in Bilka-Kaufaus [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary…"

And further at paragraph 33

"The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action."

109. If a respondent relied upon the rationale for a policy or practice, it had to justify the manner in which it was applied to a claimant in order to meet the defence in the section (*Buchanan-v-Commissioner of Police for the Metropolis* UKEAT/0112/16).

110. A tribunal will err if it fails to take into account the business considerations of the employer (see Hensman v Ministry of Defence), but the tribunal must make its own assessment on the basis of the evidence then before it.

Reasonable adjustments

111. In relation to the claim under ss. 20 and 21 of the Act, I took into account the guidance in the case of Environment Agency v. Rowan [2008] IRLR 20 in relation to the correct manner that I should approach those sections. The Tribunal must identify

(i) the provision, criterion or practice applied by or on behalf of the employer; or
(ii) the physical feature of the premises occupied by the employer,
(iii) the identity of the non-disabled comparators (where appropriate); and
(iv) the nature and extent of the substantial disadvantage suffered by the claimant;

before considering whether any proposed adjustment is reasonable.

112. It is necessary to consider whether the Respondent has failed to make a reasonable adjustment in applying the PCP and whether reasonable steps were taken to avoid the substantial disadvantage to which a disabled person is put by the application of the PCP (Secretary of State for Justice v Prospere UKEAT/0412/14/DA).

113. In relation to the second limb of the test, it has to be remembered that a Claimant needed to demonstrate that he or she is caused a substantial disadvantage when compared with those not disabled. It is not sufficient that the disadvantage is merely some disadvantage when viewed generally. It needs to be one which is substantial when viewed in comparison with persons who are not disabled and that test is an objective one (Copal Castings-v-Hinton [2005] UKEAT 0903/04).

114. Further, in terms of the adjustments themselves, it is necessary for them to have been both reasonable and to operate so as to avoid the disadvantage. There does not have to have been a certainty that the disadvantage would be removed or alleviated by the adjustment. A real prospect that it would have that effect would be sufficient (Romec-v-Rudham UKEAT/0067/07 and Leeds Teaching Hospital NHS Trust-v-Foster [2011] EqLR 1075).

Harassment

115. Not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (*Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17).

116. As to causation, I reminded myself of the test set out in the case of *Pemberton-v-Inwood* [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed

effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

117. It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in *Grant-v-HM Land Registry* [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

Time

118. Under section 123 of the Equality Act 2010 a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (s. 123 (1)(a)). For the purposes of interpreting this section, conduct extending over a period is to be treated as done at the end of the period (s. 123 (3)(a)) and this provision covers the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

119. The relevant law relating to early conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunals to hear relevant proceedings, is as follows. Section 18 of the Employment Tribunals Act 1996 ("the ETA") defines "relevant proceedings" for these purposes. This includes in Subsection 18(1) the discrimination at work provisions under section 120 of the Equality Act 2010.

120. Section 140B of the EqA provides: (1) This section applies where a time limit is set by section 123(1)(a) … (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under

subsection (4) of that section. (3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.. (4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

121. Where the EC process applies, the limitation date should always be extended first by s.140B(3) or its equivalent, and then extended further under s. 140B(4) or its equivalent where the date as extended by s. 140B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate to present the claim (Luton Borough Council v Haque 2018 ICR 1388, EAT). In other words, it is necessary to first work out the primary limitation period and then add the EC period. The ask, is that date before or after 1 month after day B (issue of certificate)? If it is before the limitation date is one month after day B, if it is afterwards it is that date.

122. It is generally regarded that there are 3 types of claim that fall to be analysed through the prism of s. 123;

a. Claims involving one off acts of discrimination, in which, even if there have been continuing effects, time starts to run at the date of the act itself;
b. Claims involving a discriminatory rule or policy which cause certain decisions to be made from time to time. In such a case, there is generally a sufficient link between the decisions to enable them to be joined as a course of conduct (e.g. *Barclays Bank-v-Kapur* [1991] IRLR 136);
c. A series of discriminatory acts. It is not always easy to discern the line between a continuing policy and a discriminatory act which caused continuing effects. In *Hendricks-v-Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal established that the correct test was whether the acts complained of were linked such that there was evidence of a continuing discriminatory state of affairs. One relevant feature was whether or not the acts were said to have been perpetrated by the same person (*Aziz-v-FDA* [2010] EWCA Civ 304 and *CLFIS (UK) Ltd-v-Reynolds* [2015] IRLR 562 (CA)).

123. In a claim under s.20, time starts to run for the purposes of s.123 of the Act from the date upon which an employee should reasonably have expected an employer to have made the adjustments contended for

(Matuszowicz-v-Kingston upon Hull City Council [2005] IRLR 288 and Abertawe Bro Morgannwg University Local Health Board-v-Morgan [2018] EWCA 640), which may not have been the same date as the date upon which the duty to make the adjustments first arose. Time does not start to run, however, in a case in which a respondent agreed to keep the question of adjustments open and/or under review (Job Centre Plus-v-Jamil UKEAT/0097/13)

124. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service IRLR 434 CA that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable - Pathan v South London Islamic Centre EAT 0312/13.

125. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

126. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.”

127. In exercising its discretion, tribunals may have regard to the checklist contained in s. 33 of the Limitation Act 1980 (as modified by the EAT in British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT). S. 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case and lists some of the factors.

128. In Department of Constitutional Affairs v Jones [2008] IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal did not regard it as healthy to use the checklist as a starting point and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to a very broad general discretion. The best approach is to assess all factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular the length of and reasons for the delay. If the Tribunal checks those factors against the list in Keeble, it is well and good, but it was not recommended as taking it as the framework for its thinking.

129. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other: Pathan v South London Islamic Centre EAT 0312/13 and also Szmidt v AC Produce Imports Ltd UKEAT 0291/14.

130. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, a claimant's failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice

Remedy

131. I had to assess the injury to the Claimant's feelings. I considered the original bands of awards set by the case of Vento-v-Chief Constable of West Yorkshire Police [2003] IRLR 102 CA, as uplifted by the case of Da'Bell-v-NSPCC [2010] IRLR 19 EAT and then the further case of Simmons-v-Castle [2013] 1 WLR 1239 (an uplift on all awards of general damages of 10% which has been held to have applied to Tribunal litigation (see for example De Souza-v-Vinci Construction (UK) Ltd EWCA Civ 879). Since then, in the

Presidential Guidance issued on 27 March 2020, the following bands were said to applied in respect of claims issued on or after 6 April 2020; £900 to £9,000 in respect of less serious cases, £9,000 to £27,000 the cases which did not merit in awarding the upper band and £27,000 to £45,000 for the most serious cases, with the most exceptional cases capable of exceeding £45,000.

132. When reaching a figure for injury to feelings, I remained aware that the award that I made had to be compensatory and just to both parties. It should have been neither too low nor too high, so as to avoid demeaning the respect for the policy underlying the anti-discriminatory legislation. I also tried to bear in mind the value in everyday life of the particular sum that I chose to award, particularly in the context of the Claimant's salary. I had an eye on the range of awards made in personal injury cases, although I did not find that yardstick particularly useful in this case. I also took into account the guidance at paragraph 36 of the EAT's decision in Base Childrenswear Limited v Otshudi UKEAT/0267/18.

Unlawful deductions from wages

133. The claimant claims in respect of deductions from wages which she alleged were not authorised and were therefore unlawful deductions from her wages contrary to section 13 of the Employment Rights Act 1996, which provides:

13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

Conclusions

Knowledge of disability

134. It was common ground that the Claimant did not inform the Respondent about her disability until 2 December 2019. The Claimant accepted that before she told the Respondent they ought not to have known about it. The Respondent knew or ought to have known that the Claimant was disabled from the time she informed Mr Wilkinson that she had PTSD on 2 December 2019.

Reasonable Adjustments

Did the Respondents generally apply a provision, criteria and/or practice ("PCP") namely requiring the Claimant to sit in close proximity to Mr Adebola when in the office"?

135. The Respondent accepted that it had such a PCP.

Did the PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

136. The Claimant had PTSD and the incident with Mr Adebola on 19 November 2019 provoked an anxiety response which caused high arousal, anxiety, sleeplessness, tenseness and flashbacks. As a consequence, the Claimant was physically and mentally unable to work in close proximity to Mr Adebola. This was something which a non-disabled person would not have experienced. The extent of the reaction required the Claimant to go home on 2 December 2019 and avoid seeing Mr Adebola. The office was the place of work and it was a small single room. The Claimant was put to a substantial disadvantage in comparison to non-disabled people by being required to work in close proximity with Mr Adebola.

137. The Respondent knew of the disability and the substantial disadvantage on 2 December 2019, as demonstrated by informing the Claimant the same day that they were urgently exploring options to enable homeworking.

Did the Respondents take such steps as were reasonable to avoid the disadvantage?

138. An adjustment not only has to be reasonable, but it must operate so to avoid the disadvantage of the PCP.

Did the Respondents fail to make a reasonable adjustment by failing to remove the room divider separating the Claimant from Mr Adebola?

139. The office was small, 7.28m x 4.8m. The Claimant suggested that removing the room divider would have enabled her to see Mr Adebola and enabled her to work in the office. Although there does not have to be a certainty that the disadvantage would be removed by the adjustment it must have a real prospect that the effect would be sufficient. The Claimant had felt intimidated and frightened by the experience and suffered from a high degree of anxiety. I was not satisfied that removing the divider would have reduced those effects of working in a small office with Mr Adebola to a significant extent so that the Claimant felt safe and able to properly work in the environment. The Claimant did not suggest such an adjustment to the Respondent during her employment, which tended to suggest that she did not think that it would have enabled her to return to work in the office either. Such an adjustment would not have operated to alleviate the disadvantage by any more than a negligible amount. There was not a failure to make reasonable adjustments in this respect.

Did the Respondents fail to make a reasonable adjustment by failing to permit the Claimant to sit at a different workstation, further away from Mr Adebola?

140. The Claimant suggested on 8 December and 16 December 2019, that she could try to work in the same office as Mr Adebola if they sat further apart. I accepted the Respondent's evidence that it would take about 2 seconds to walk across the office. The Claimant would have had to work in close confines with Mr Adebola wherever they were placed in that office. The Claimant had suffered from a significant anxiety reaction to the incident. Mr Adebola would still have been in close proximity to the Claimant and they would have had to be even closer should one of them wish to leave the room. The Respondent concluded that it was not possible to provide sufficient distance between the Claimant and Mr Adebola. Moving the Claimant would not have significantly increased the space between them. I was not satisfied that there was a real prospect that a small increase in space between the Claimant and Mr Adebola would have reduced the level of anxiety and perceived threat to the Claimant anymore than by a negligible amount. There was not a failure to make reasonable adjustments in this respect.

Did the Respondents fail to make a reasonable adjustment by failing to set up the necessary arrangements in a timely manner for the Claimant to work from home?

141. The Respondent agreed to investigate options to enable homeworking immediately. For a small business it would have taken some time to investigate what to do and how to set up homeworking. It was unfortunate that the Respondent did not inform the Claimant that it intended to install the equipment on 23 December and that Mr Wilkinson had been taken ill on that day. It became apparent on 8 January 2020, that the cables were not long enough to reach from the router to the desk upstairs, however the Respondent had not asked the Claimant any questions prior to this about the location of the desk and router, which was something in its power to do. The Respondent was setting up the equipment and it would be unreasonable to expect the Claimant to foresee what was needed without being asked. I accepted that loose cables would be dangerous and that a solution would be needed to deal with any issues of data security, should the Claimant have a paying guest. After 8 January 2020, the Respondent did very little to investigate how homeworking could be achieved. Mr Wilkinson was taken ill, with what is now suspected to have been Covid-19, however Mr Carpenter could have addressed the problem and installed the equipment. On 8 January 2020, Miss Saunders suggested that a wi-fi extender could be used. Although Mr Wilkinson said he was unaware of VOIP compatible extenders, no searches online were undertaken. I was satisfied that they existed. Longer lengths of cable could also have been used and the computer encrypted so that it could not be accessed by an unauthorised person. I was satisfied that a Wi-Fi extender or longer lengths of cable would have meant that there was a real prospect that homeworking could have been set up for the Claimant. It would have been reasonably expected that the Respondent had set up the homeworking equipment two

weeks after 8 January 2020, i.e. by 22 January 2020. The Respondent failed to make a reasonable adjustment in this regard.

What arose in consequence of the Claimant's disability?

142. The Claimant suffered from high arousal and anxiety, sleeplessness, flashbacks, night terrors, shaking, tearfulness and tenseness in her body. As a consequence, her symptoms increased after the incident on 19 November 2019 and the Claimant was unable to work in close proximity to Mr Adebola.

Allegations of discrimination and harassment

143. The Claimant relies on following matters as direct discrimination, and/or discrimination arising from disability and/or harassment.

By on 2 December 2019, Mr Carpenter said "Well you didn't get on too well with Alex either did you";

144. When Mr Carpenter made the comment, he did not know and could not have known that the Claimant was disabled. Accordingly, the Claimant would not be able to succeed in claims of direct discrimination and discrimination arising from disability in this respect.

145. In relation to harassment, the Claimant found the remark offensive and very upsetting, however there was no evidence to suggest that the remark was related to her disability. The claimant had minor disagreements with Ms Seagrave and had been involved in a dispute with Mr Adebola. The Claimant failed to adduce primary facts that tended to suggest the comment was related to her disability and this claim was dismissed.

By undertaking a grievance process which was confusing in terms of whether it was an informal or formal process, delayed and/or in which the Claimant did not have an opportunity to fully participate;

146. The Respondent did not invite the Claimant to a meeting to discuss her grievance before providing a conclusion. I accepted that Mr Wilkinson believed that he had all of the information and that a further meeting would not have made a difference, given that the incident involved competing versions of events and no one else witnessed it. There was a delay of about a month for Mr Wilkinson to give his decision, however he was also trying to arrange homeworking and had been taken ill during that time. There was a delay in arranging the appeal, however this was caused by confusion as to whether the Claimant had agreed that HR Dept could hear the appeal. Ms Olver refused the Claimant's request to have a hearing, however there was no evidence that this was on the instruction or suggestion of the

Respondent. I accepted that the Claimant did not have an opportunity to fully participate and that she would have welcomed an opportunity to explain what had happened, how it affected her and ask questions. Further I accepted that it might have assisted in processing what happened.

Direct Discrimination

147. The Respondent was faced with a situation where there was one word against another, and Mr Wilkinson reached a conclusion on 19 December 2019. The Respondent was in the process of arranging homeworking for the Claimant and had immediately agreed to explore the options. The Claimant did not prove primary facts that tended to suggest that Mr Wilkinson's failure to invite her to a meeting was due to her disability or that a non-disabled person who have been treated differently and she failed to discharge the initial burden of proof.

148. There was no evidence that Mr Wilkinson had any involvement in Ms Olver's decision to consider the appeal without a hearing, or the fact that the Claimant was disabled had any influence on that decision. The Claimant did not adduce any primary facts which tended to suggest that this was due to her disability or that a non-disabled person would have been treated differently and the Claimant failed to discharge the initial burden of proof.

149. It was never clearly said whether the process being adopted was formal or informal. Both parties considered it to be informal at the start and the Claimant requested that it was formal on 8 January 2020, the same day that she was given the decision. The Claimant did not adduce any evidence that tended to suggest that any confusion was because she was disabled or that a non-disabled person would have been treated any differently and she failed to discharge the initial burden of proof.

150. In terms of delay, Mr Wilkinson was trying to arrange homeworking and was taken ill. There was not any evidence to suggest that any delay by Mr Wilkinson was because the Claimant was disabled. Similarly in terms of arranging the appeal, although the Claimant was notified of the date after the date specified in the policy there was confusion as to whether she had consented to HR Dept hearing the appeal and the person identified to hear the appeal had to take leave at short notice. The Claimant did not adduce any primary facts which tended to suggest that the delay was because she was disabled or that a non-disabled person would have been treated differently.

151. Accordingly, the Claimant's claim of direct discrimination fails in this respect.

Discrimination arising from disability

152. The failure to invite the Claimant to discuss her grievance was unfavourable treatment. The Claimant wanted to be able to explain the effects of what happened with Mr Adebola on her and to ask questions as to how the situation could be improved. It would also have assisted the Claimant for the grievance to be resolved promptly because it was having an adverse effect on her mental health, and this was also unfavourable treatment.

153. The Claimant suggested in her closing submissions that the Respondent did not want to deal with her grievance and that they did not want to communicate with Mr Adebola either. I was satisfied that Mr Wilkinson was unsure how to deal with the grievance and was seeking advice from HR Dept about the grievance and the Claimant's disability. Any confusion about whether the process was formal or informal was caused by Mr Wilkinson not properly understanding the process. Mr Wilkinson was attempting to arrange homeworking, deal with the work situation at a time when he was also taken ill, I was not satisfied that the Claimant's anxiety reaction nor her inability to work in close proximity to Mr Adebola had any influence on the letters that Mr Wilkinson wrote or the decisions he made in the grievance process.

154. In relation to not inviting the Claimant to a meeting before making a decision, I accepted that Mr Wilkinson thought he had all of the information and that he thought he was undertaking an informal procedure. The Claimant had not asked him for a meeting. I was not satisfied that the Claimant's anxiety condition nor her inability to work in close proximity to Mr Adebola had any significant influence on Mr Wilkinson's decision to make a decision without a hearing.

155. In relation to the appeal, HR Dept had been told to act independently and make a decision. The Respondent did not have any influence in how they conducted the appeal or in relation to how the decision should be reached. Under s. 109(2) EqA, anything done by an agent for a principal, with the authority of the principal, must also be treated as done by the principal. HR Dept was conducting the appeal on behalf of the Respondent and was therefore acting as its agent. In relation to the delay in arranging the appeal, this was caused by confusion as to whether the Claimant had consented to HR Dept hearing the appeal and by Ms Olver needing to take some leave at short notice. I was satisfied that any delay was due to those factors and that the Claimant's anxiety and condition and inability to work in close proximity had no influence on the delay.

156. In relation to her attending an appeal on 4 February 2020, Ms Olver had referred to not wanting to cause the Claimant additional stress and said that there was sufficient evidence to consider the appeal without a hearing.

That was sufficient to discharge the initial burden of proof. After the Claimant requested a hearing, Ms Olver still proceeded without a hearing with the Claimant. I was satisfied that Ms Olver decision was significantly influenced by the Claimant's anxiety, however it was done with the best intentions to avoid further stress for the Claimant. The Claimant, however wanted an opportunity to be heard and she found this denial particularly upsetting. This aspect of the claim succeeded, albeit that it was caused by Ms Olver having the best of intentions.

157. It was suggested in the Respondent's skeleton argument that there was a defence of justification, however no evidence was adduced in relation to business aim or need. It was said that a legitimate aim was to resolve the Claimant's grievance and implement reasonable adjustments. The Claimant requested a hearing, which was denied. There was no explanation as to why after the Claimant requested it, it was denied. It would have been the Claimant's choice if she attended a hearing and HR Dept's actions were not reasonable or proportionate in the circumstances.

Harassment

158. In relation to harassment, for the above reasons the Claimant failed to adduce primary facts that tended to suggest that what occurred was related to her disability and this claim was dismissed. In relation to Ms Olver's decision not to have a hearing with the Claimant this would have been related to her disability, by reason of the reference to stress, however the Claimant would not be able to receive a separate award for the same incident.

By on 8 January 2020, Mr Wilkinson said, "you have no working relationship with Richard and Charles, and you've shown no interest in reconciliation so why would you want to go to the office;

159. On 8 January 2020, the Claimant suggested that she was not allowed back in the office. Mr Wilkinson said that he could see no good reason for the Claimant to go back into the office because she had no working relationship with Mr Adebola and Mr Carpenter. This was in the context of Mr Wilkinson suggesting that he could meet the Claimant in Exmouth where they both lived. The Claimant suggested on two previous occasions that she could try working in the office if she sat further away from Mr Adebola. I made no finding about any reference to reconciliation. Mr Wilkinson did not intend the remark to be hurtful.

Direct discrimination

160. The Claimant did not adduce any facts that tended to suggest that the remark was made because she was disabled or that a non-disabled

person would have been treated differently. There had been a dispute between two employees and that had caused a problem with the working relationship. The Claimant failed to discharge the initial burden of proof.

Discrimination arising from disability

161. I accepted the Claimant's submission that the remark was unfavourable treatment. She had been unable to work in close proximity to Mr Adebola due to her anxiety reaction, however she had sought to go back to the office to try and work in that environment. She found the reference to no working relationship upsetting and humiliating. I accepted that to tell the Claimant that she had no working relationship, in such circumstances was unfavourable treatment.

162. Mr Wilkinson did not intend the remark to be hurtful and he considered, that given what had happened it was true. However, he knew that the Claimant was suffering from PTSD and was having anxiety reactions to Mr Adebola and that she was unable to work in close proximity to him because of that. The Claimant discharged the initial burden of proof. Subconsciously there was a link between the effects of the Claimant's disability and why she was unable to work in close proximity when Mr Wilkinson made the remark, and it had a significant influence in what he said. The unfavourable treatment was caused by something arising from the Claimant's disability.

163. It was suggested in the Respondent's skeleton argument that there was a defence of justification, however no evidence was adduced in relation to business aim or need. It was said that a legitimate aim was to resolve the Claimant's grievance and implement reasonable adjustments. The Claimant was vulnerable in terms of her anxiety and she had sought to try and return to work with some adjustments, it was not reasonable to make the comment in such circumstances as it would not help resolve the grievance or effect reasonable adjustments. The Respondent was not availed of the justification defence. This claim therefore succeeded.

Harassment

164. In the alternative the comment was unwanted and it upset and humiliated the Claimant. It was not the intention of Mr Wilkinson to do this, however due to the nature of the Claimant's PTSD and that she had sought to go back to work in the office it was reasonable for it to have had that effect. The remark was related to the Claimant's disability in that the difficulty in her working relationship was partly caused by an effect of her PTSD, of which Mr Wilkinson was aware. If the Claimant had not succeeded in her claim of discrimination arising from disability, she would have succeeded in her claim of harassment. She is unable to receive two awards

in this respect.

By in January/February 2020 Mr Carpenter and/or Mr Wilkinson provided Debbie Olver of HR with incorrect/false information and thereby prejudiced the outcome of the Claimant's appeal.

165. I was not satisfied that the Respondent had provided false or incorrect information to Ms Olver. The Claimant suggested that conclusions reached by Ms Olver suggested that false information had been given. I was satisfied that the Respondent had provided information as to its recollection of events and did not provide false information. In any event Mr Wilkinson was not cross examined in this respect.

166. There was no evidence that what was provided was because the Claimant was disabled, was due to something arising from her disability or was related to her disability. Therefore, in any event the Claimant would have failed to discharge the initial burden of proof. The claims of direct discrimination, discrimination arising from disability and harassment were dismissed.

By in January/February 2020, the Respondent chased the Claimant for a medical report from her GP when it was responsible for any delay because it had failed to pay for it.

167. The Respondent first received an invoice for the medical report on 13 February 2020, which it paid that day. It had not received the letter dated 22 January 2020 and therefore could not pay the invoice. The factual basis for the allegation was not made out and the claims were dismissed.

168. In any event it was reasonable for the Respondent to ask the Claimant to chase her GP for the report. In the circumstances the Claimant failed to adduce primary facts that a non-disabled person would have been treated differently. Further the treatment was not unfavourable because the Respondent was seeking to obtain the report as soon as possible. The request was unrelated to the Claimant's disability in that it was solely related to obtaining the report as soon as possible from the GP.

By in January/February 2020, the Respondent gave contradictory messages to the Claimant as to whether a medical report from her GP was required for the purposes of reasonable adjustments.

169. The Claimant submitted that contradictory messages were given as to whether the report was necessary for reasonable adjustments in that she was told that a report was required, but that homeworking would be set up and later that homeworking was an interim measure. The Respondent always maintained that it needed a medical report. I accepted the

Respondent's submission that although homeworking had been granted, that was no inconsistency with wanting a medical report to assist with how best to manage the Claimant and that it was trying to set up homeworking before it was obtained. I was not satisfied that there were contradictory messages. As such it was unnecessary to consider whether the Claimant had been discriminated against on this basis.

<u>By On 26 February 2020, in the redundancy meeting, Mr Wilkinson said "We didn't stop you coming into the office, you self absented yourself."</u>

170. It was found that Mr Wilkinson did say, 'we didn't stop you coming into the office you self absented yourself', however he did not intend the remark to be hurtful or humiliating.

Direct Discrimination

171. The remark was not intentional. The Claimant did not adduce any primary facts that the remark would not have been made to a non-disabled person or that it was said because she was disabled. There had not been any adverse comments referring to disability. It was said in the context of the Claimant suggesting she was prevented from coming into the office and was a statement according to what Mr Wilkinson saw had happened. The claim was dismissed.

Discrimination arising from disability

172. The Claimant's case was that it was unfavourable treatment because she had been seeking to go back into the office if she could sit further away from Mr Adebola. She had been unable to work in close proximity to Mr Adebola due to her anxiety reaction, however she had sought to go back to the office to try and work in that environment. She found the reference to self-absenting in such circumstances as upsetting and humiliating. I accepted that to tell the Claimant that she had absented herself, in such circumstances was unfavourable treatment.

173. Mr Wilkinson did not intend the remark to be hurtful and he considered, that given what had happened it was what occurred. However, he knew that the Claimant was suffering from PTSD and was having anxiety reactions to Mr Adebola and that she was unable to work in close proximity to him because of that. The Claimant discharged the primary burden of proof. Subconsciously there was a link between the effects of the Claimant's disability and why she was unable to work in close proximity to Mr Adebola when Mr Wilkinson made the remark and it had a significant influence in what he said. The unfavourable treatment was caused by something arising from the Claimant's disability.

174. It was suggested in the Respondent's skeleton argument that there was a defence of justification, however no evidence was adduced in relation to business aim or need. It was said that it would be a legitimate aim to resolve the Claimant's grievance and implement reasonable adjustments. The Claimant was vulnerable in terms of her anxiety and she had sought to try and return to work with some adjustments, it was not reasonable to make the comment in such circumstances as it would not help resolve the grievance or effect reasonable adjustments. The Respondent was not availed of the justification defence.

Harassment

175. In the alternative the comment was unwanted and it upset and humiliated the Claimant. It was not the intention of Mr Wilkinson to do this, however due to the nature of the Claimant's PTSD and that she had sought to go back to work in the office it was reasonable for it to have had that effect. The remark was related to the Claimant's disability, in that the difficulty in her working relationship was partly caused by an effect of her PTSD, of which Mr Wilkinson was aware. If the Claimant had not succeeded in her claim of discrimination arising from disability, she would have succeeded in her claim of harassment. She is unable to receive two awards in this respect.

<u>By in January/February 2020,Mr Carpenter and Mr Wilkinson failed to make reasonable adjustments with regard to the office or homeworking in a timely manner</u>

176. It was concluded that there was a failure to make reasonable adjustments in terms of not effecting homeworking and that homeworking should have been enabled by 22 January 2020.

Direct discrimination

177. The Respondent was trying to enable homeworking, however it was relevant that it was a small business and that Mr Wilkinson was taken ill. Mr Carpenter could have taken over, however it does not appear that this occurred to the Respondent. I was not satisfied that the Claimant had adduced primary facts which tended to show that the failure was because she was disabled or that a non-disabled person would have been treated more favourably. In any event the Respondent was attempting to provide home working and I accepted that it thought it was doing the best it could and the fact that the Claimant was disabled formed no part of its decision making process. This claim was therefore dismissed.

Discrimination arising from disability

178. There was no evidence that delays were caused by the Claimant's anxiety or inability to work in close proximity to Mr Adebola. The Respondent was attempting to set up homeworking, but delayed in doing so. The Claimant failed to adduce primary facts that tended to suggest that the cause of the delay was due to something arising from her disability and the claim was dismissed.

Harassment

179. The Claimant failed to establish primary facts that the failure to set up homeworking was related to disability. The Respondent had been making attempts to set it up. There were delays caused by trying to understand what to do and illness and not considering whether Mr Carpenter could take over the responsibility. Therefore, this claim was dismissed.

Time

180. The only proven allegation which was presented out of time was the incident on 8 January 2020. As agreed at the Case Management Hearing on 14 January 2021, any claims before 20 January were out of time. This claim was therefore presented 12 days out of time. The Claimant had to summon energy to bring a claim against the Respondent. The Claimant considered that there had been a series of events. The Respondent very fairly could not point towards any prejudice if time was extended, and it was able to put forward its defence to all matters and call evidence in relation to them. The Claimant would be prejudiced by not being able to bring her claim. The delay was short and she had not taken professional advice.

181. In all the circumstances it was just and equitable to extend time.

Wages

Was the Claimant paid all wages due to her under her contract?

182. The Respondent withheld £463.99 from the Claimant's final pay because the Claimant had not returned the computer and VOIP equipment and the fire extinguisher. I accepted that the market value of the equipment was the amount deducted. The Claimant's contract of employment permitted the respondent to deduct the market value of any unreturned equipment from her final pay.

183. The Claimant argued that she wanted the equipment checked and tested before she returned it and that she wanted to be paid first because she had lost trust in the Respondent. The contract provided that the equipment should be returned and was silent as to its condition. The

Claimant, for understandable reasons failed to return the equipment, however under the contract of employment the Respondent was entitled to make the deduction.

184. Accordingly, there was not an unlawful deduction from wages and the claim was not well founded.

Remedy

185. The Claimant set out in her witness statement the effects of what happened on her, which I accepted. She had found that after the events on 19 November her anxiety had increased, however that reached such extent that on 2 December 2019 she needed to go home. There had been delays in the process which had not helped her. The Claimant was acutely aware of the comments made by Mr Wilkinson. Mr Wilkinson might not have intended the comments to have been received in the way that they were, but she still found them hurtful and she was already vulnerable. The failure to allow her to attend an appeal further added to her distress and adversely affected her symptoms of anxiety.

186. I accepted that her mental health was affected to some extent, albeit that there was no medical evidence to support that. It seemed apparent from the GP records that there had been an effect, but without a psychiatric report it was impossible to say by how much it had been exacerbated, although I accepted there had been an impact. She found the meetings particularly distressing, as was reliving the events. I accepted that there had been an injury to feelings.

187. The Respondent submitted that the way in which the Claimant had valued her injury to feelings at £7,500 was on the basis of the totality of her pleaded claim and she had put it within the lower Vento band. The Respondent accepted that I was not constrained by the amount the Claimant had suggested in the Schedule of Loss, and if I considered a higher band was appropriate I was permitted to make such an award.

188. The Respondent submitted that the findings were based on a couple of unintended comments by Mr Wilkinson. However, I found that they caused upset and the Claimant felt humiliated. That had to be considered in the light of a person who was already unwell and that the impact on the Claimant was high. There was a failure by HR Dept to arrange an appeal at which the Claimant could attend and that had a significant effect on the Claimant, in that it was not being heard in the first place that was causing a significant amount of distress.

189. There was a failure to make reasonable adjustments. There were some extenuating circumstances for the Respondent, particularly in relation

to the illness of Mr Wilkinson and in relation to the delays when trying to work out how to achieve homeworking. There was a failure in that respect and it was important to the Claimant for her to get back to work, particularly because the failure to do this increased her sense of isolation and there was an injury to feelings.

190. Taking into account the guidance, an award needs to be compensatory and not punitive. The lower band is normally appropriate for an incident involving a one off occurrence. There were a couple of comments by Mr Wilkinson, the incident with HR Dept and the failure to make reasonable adjustments. The Respondent suggested that the award should be £3,000. The top of the lower band is set at £9,000. I reminded myself that awards of less than £500 should be avoided because they do not recognise a significance of injury to feelings at all. The Claimant suggested the award should be £7,500. In my view that was a reasonable figure at which to quantify injury to feelings. Two allegations were proven against Mr Wilkinson, one allegation against HR Dept. and a failure to make reasonable adjustments. It was just and equitable for that amount to be awarded in the circumstances of this case. An award of £7,500 was made in respect of injury to feelings. The Claimant did not pursue her other heads of loss within the Schedule of Loss.

191. The Respondent agreed that the appropriate figure for interest was £976.43.

Employment Judge J Bax
Dated: 6 December 2021

Reasons sent to parties: 21 December 2021

FOR THE TRIBUNAL OFFICE