EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms C Anderson	**v**	**(1) Kelly Marie Limited t/a Shout Hair** **(2) Miss K M McClymont**

Heard at: London Central

On: 11 - 14 April 2022
In chambers: 27 April 2022

Before: Employment Judge Lewis
Ms S Keating
Ms P Slattery

Representation

For the Claimant: Represented herself

For the Respondents: Miss K M McClymont

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that:

1. The claimant was disabled. She was dismissed because of something arising from her disability contrary to section 15 of the Equality Act 2010. The dismissal was by the 1st respondent contrary to section 39(2)(c) and the decision to dismiss was taken by the 2nd respondent contrary to section 39(2)(d) of the Equality Act 2010.

2. The claimant's dismissal was not direct disability discrimination.

3. The claimant's dismissal was not indirect sex discrimination. In any event, we do not allow amendment of the claim to include indirect sex discrimination.

4. The claims for disability discrimination during employment prior to dismissal are not upheld.

5. The claim for sexual harassment is not upheld.

Remedy hearing

6. A remedy hearing has been fixed for **27 June 2022** on CVP video. It will start at 10 am and has been fixed for the day. The tribunal will send out a separate letter regarding preparation for that hearing.

REASONS

The two claims and the correct respondents

1. Miss Anderson (the claimant) presented her first claim (2203932/20) on 3 July 2020. She completed box 2.1 (the name of the employer or person against whom she was making a claim) as 'Kelly McClymont' and the address as 'Shout Hair, 342 Streatham High Road' etc. The response form named 'Shout Hair' as the organisation claimed against and Miss McClymont as the contact there. The letter confirming the telephone preliminary hearing on 19 May 2021 statess that Shout Hair was named as the respondent and that as Shout Hair no longer exists, the claimant should seek advice because she had not named Miss McClymont as a respondent. This is puzzling since it is incorrect. In any event, because of that advice, the claimant presented a further, essentially identical claim (2302061/21), on 12 June 2021. In box 2.1 it named 'Kelly Marie McClymont' and the address simply stated 342 Streatham High Road etc. The response was entered as 'Miss Kelly Marie McClymont t/a Shout Hair'.

2. The claimant's contract of employment was with Kelly Marie Limited. This company traded as Shout Hair. It still exists but it no longer employs anyone.

3. It was agreed that the two claims, which were for practical purposes the same, would be heard together. It was further agreed that the claims should be against (1) Kelly Marie Limited t/a Shout Hair and (2) Miss Kelly Marie McClymont.

4. We gave permission for the first claim to be amended so as to be against those two respondents.

5. In our view, the first claim was already made against Miss McClymont individually. However, if we were wrong about that, we alternatively gave permission to amend the first claim to add Miss McClymont as an individual respondent. She was already fully aware of the claim. It is all about her own conduct. She completed the response form. She attended the telephone preliminary hearing. She owned the salon. She owned the company. If she was not an individual respondent, the claimant faced the risk of winning her case but

finding that matters had been arranged such that the company no longer had any money to pay compensation.

6. We also gave permission for such amendment (should it be needed) to take effect as at the date of presentation of the first tribunal claim form. The claimant was representing herself. She promptly issued a further claim after having been advised by the tribunal in the telephone preliminary hearing (we think wrongly) that Miss McClymont was not a named respondent.

7. Alternatively, the claim against Miss McClymont as an individual is contained in any event in the second claim.

Claims and issues

8. Unfortunately both sides came to this hearing with a lack of clarity over the law, claims and issues. Although they had both done their best to explain their position, this was not by reference to any legal structure.

9. We therefore needed to start by identifying the intended causes of action and then make a list of issues in language which we hoped Miss Anderson and Miss McClymont, being unrepresented, could understand.

10. To put it in legal terms, the claims were as follows:

10.1. Direct disability discrimination contrary to s13 of the Equality Act 2010: dismissal and certain treatment during work (see list of issues).
10.2. Discrimination arising from disability contrary to s15 of the Equality Act 2010 in relation to the same matters.
10.3. Indirect sex discrimination contrary to s19 of the Equality Act 2010 in relation to the claimant's dismissal.
10.4. Harassment related to sex or sexual harassment contrary to s26 of the Equality Act 2010 in relation to remarks made to her.

11. We put the issues in writing and emailed them to the parties on day 2. They are as attached to the end of this decision.

12. Issue 10.3 is subject to being granted leave to amend as the claim forms only referred to sexual harassment and did not refer to childcare.

Reasonable adjustments

13. The claimant was a vulnerable witness. A few months after her dismissal, she was diagnosed with Post Traumatic Stress Disorder and Emotionally Unstable Personality Disorder. She told us that she has suffered from anxiety and depression for most of her life and has been on medication for some time. She has had two long-term relationships with the fathers of her children which involved domestic abuse towards herself and her children. She was

abused herself as a child. Her dismissal affected her vey badly, although she has stabilised more recently and has been helped by finding a new job.

14. The tribunal asked the claimant whether she wanted us to consider making a rule 50 order, eg for anonymity. We explained that press or public could attend the hearing and also that the decision would go onto the public register. The claimant did not want such an order.

15. We agreed with the claimant that useful measures would be 15 – 20 minute breaks mid morning and mid afternoon; a full 1 hour lunch break; finishing no later than 4 pm; 5 minute quiet breaks roughly every half an hour; and she could ask for a break any other time that she wished, as could Miss McClymont.

16. We appreciated that Miss McClymont also had a degree of vulnerability, having a family with a history of mental illness and sometimes being affected herself, as well as feeling very stressed about the hearing. At her request, we allowed her to switch off her camera while Ms Davey gave evidence and the Judge asked Ms Davey the questions which Miss McClymont had prepared.

17. We reassured both parties that we were used to having parties who represented themselves and we would talk them through the procedure, answer all questions including repeat questions, and help if asked with formulating questions for cross-examination.

18. We suggested that the claimant and Miss McClymont put up their hand if they wanted to interrupt and ask a question at any point.

19. Regarding cross-examination, we said that if the claimant or Miss McClymont felt uncomfortable asking or answering questions directly towards each other, they could ask questions through the Judge. They did not in fact take up that offer.

20. We also reassured the parties that we would not rush, and that although our preference would be to finish evidence in time for us to reach a decision within the allocated four days, we were willing to use all the time to listen to the evidence if necessary and make another date to meet together as a panel for the decision. However, we would do everything possible to complete the evidence on time. There had already been several postponements of this case and both parties were very anxious now to get it over with.

21. At one stage on day 2, both parties broke down in tears. We paused the hearing for 30 minutes. We then offered the parties the option of converting the hearing to a judicial mediation with the Judge, although we explained that if it did not succeed, they would have to start again with a new tribunal panel. Alternatively we were prepared to offer some extra time out if they wanted to negotiate direct on an off the record basis. Neither party wanted to take up these offers and they were able to compose themselves and focus on the hearing for the rest of the day.

22. Finally we would mention that because of various difficulties we mention below in terms of finding documents, lack of preparation of questions, and occasional connection difficulties on CVP, our breaks regime could not be precisely followed, but we consulted as we went along. In fact, there were more frequent and longer breaks.

23. At 8.45 am on the fourth day of the hearing, Miss McClymont emailed the tribunal (with a copy to the claimant) to say that she could not get out of bed with headaches, weakness and depression. She wanted the case to continue and finish without her attendance. Her witness, Beth Davey would still be attending. We asked whether Miss McClymont was wanting us to fix another day to complete the hearing or to go ahead without her. We also suggested that Miss McClymont might feel able to attend with her camera switched off and that the Judge would take a note of the claimant's questions and relay them to Miss McClymont. Miss McClymont initially thought she would be able to attend on that basis, but ultimately decided not to.

Other procedural matters

24. Neither side was represented during case preparation or the hearing. They were both very anxious to go ahead after so many previous postponements.

25. We heard evidence from Miss Anderson, Miss McClymont, Natalie Davey and Jenny Marreiros on behalf of the claimant, and Beth Davey on behalf of the respondents. Our references to 'Ms Davey' below all refer to Natalie Davey.

26. The claimant's witness statement was her statement dated 6 October 2021 (part of a 41 page document with attachments). Miss McClymont's witness statement was called 'Statement of defense'. There were also witness statements from the claimant's two witnesses and from 11 witnesses for Miss McClymont, only one of whom attended. We did read all the statements, but we could not give a lot of weight to those from witnesses who had not been present to answer questions.

27. In procedural terms, the hearing was extremely difficult. There was no one file of all the papers, electronic or hard copy, despite the order at the preliminary hearing. Each side had sent in numerous single and grouped documents with no list or index. Several documents which would not open had to be resent. Neither side had a clear idea where important documents were located, so we spent literally hours trying to track down documents like the dismissal letter.

28. The documents which the tribunal was given, file by file, were:
    28.1. Claimant's evidence 'lot 1'
    28.2. Claimant's evidence 'lot 2'
    28.3. Claimant's evidence 'lot 3'

28.4. Screen shots of the claimant's medical evidence subsequent to her dismissal (IMG 2725-7, 2729-30)
28.5. Other screen shots: IMG 2599, 2600, 6261 – 3, 7060 – 3, 7069, 2819 - 2826
28.6. Letter from the claimant's GP 4.10.21
28.7. Section 3.5.0 respondent and applicant text conversation (parts 1 and 2)
28.8. Section 3.6.0 respondent and manager jenny conversation
28.9. Section 3.7.0 respondent and manager natalie conversation
28.10. A batch of universal credit letters
28.11. Section 1.3.0 formal warning letter dated 22.1.20
28.12. Section 1.2.0 appraisal dated 15.1.20
28.13. Reference Paul and Jane
28.14. Summary of evidence (R)
28.15. Exbit Z reviews (in a zip file)
28.16. Each ET1 and ET3

29. We were also given 3 audio recordings of one side of a Whats App conversation between Miss McClymont and Ms Davey (what Ms Davey was saying, which Miss McClymont had recorded). Rather than listen to these, Miss McClymont prepared a transcript which the claimant agreed was accurate.

Fact findings

30. The respondents owned two hair salons: 'Shout Hair' in Streatham and another salon, 'Shout House', fairly close by in Tulse Hill.

31. The claimant started working for Shout Hair on 3 May 2019 as a hair stylist. She worked at the Streatham salon. She was taken on by the owner, Kelly McClymont. She was told it would be a 6 month probationary period.

32. Miss McClymont owned the salons and had built a successful business. She was also a sole parent, and the burden of running two salons became increasingly difficult for her. She had been thinking about selling Shout Hair for some time and concentrating on a single larger salon. Ms Davey told us, and we also had the impression from listening to Miss McClymont herself, that over time, running two salons was becoming too much and she was struggling.

33. The claimant told Miss McClymont at the interview that she was a sole parent with 4 children, the youngest of whom was 9 years old. The claimant could therefore work three days/week – Thursday – Saturday, with a brief period around December working four days and alternating Sundays. From January 2020, she worked four days, Wednesday – Saturday and no Sundays. Her hours were 10 – 7 Wednesdays and Thursdays; 11 – 8 Fridays; 9 – 6 Saturdays and an 11 am start when she did work Sundays.

34. The claimant did not tell Miss McClymont at her interview that she had mental health difficulties because she was anxious to get the job. Nor did she mention any difficulties with childcare.

35. There was no official manager of each salon, but a long-standing stylist, Jenny Marreiros, acted as manager in Miss McClymont's absence. She broadly divided her time between both salons. From 2019, Natalie Davey also came in to help. Ms Davey was a very old friend of Miss McClymont and was initially brought in on an unpaid basis to advise on social media management. Then gradually she also took on a paid role of advising generally on running the business, given her lengthy experience in hospitality.

36. Shout Hair was open plan. The claimant worked with two or three other part-time stylists.

37. Everyone agreed that the claimant is a very good stylist. That is not what this case is about.

Did the claimant have a disability at the relevant time

38. We explained to Miss McClymont that there were two separate issues: (1) whether the claimant was in fact disabled during her employment and particularly at the dates of the alleged discrimination and (2) whether Miss McClymont knew or ought to have known.

39. Miss McClymont said she never knew at the time that the claimant was disabled.

40. We were not sure whether Miss McClymont understood that question (1) was a different question from question (2). Although explained to her several times, she conflated question (1) with whether the claimant was able to function, whether it impacted her work and whether Miss McClymont had done anything wrong. We therefore worked on the basis that Miss McClymont did not accept that the claimant was disabled at the relevant time.

41. Miss McClymont has a number of close family members with serious mental health issues and has spent time with psychiatric doctors on their behalf. She feels that she recognises 'when things are happening'. She accepts that the claimant has 'some medical history' but because the claimant had a happy social life and was able to function, she now feels that the claimant was a 'chancer'.

42. We accept the claimant's evidence that she has had mental health difficulties throughout her life. This was also consistent with the medical history she told Wandsworth SPA on 26 February 2021. Although this was after her dismissal, it referred to long-standing issues.

43. The claimant has been suffering with depression for many years. The claimant was subjected to domestic abuse in two previous long-term

relationships, and events which trigger memories of the abuse can cause trauma. The latest of the two relationships ended with her ex-partner going to prison in 2013. Her mood became increasingly volatile after that. There were instances of triggers during her employment, eg the incident on 1 November 2019, described below, when she had 'a bit of a meltdown' when speaking to her ex-partner about being cyber-bullied, and the incident on 23 November 2019, also described below, when she was unable to come into work because she had a 'meltdown' triggered by the 7 year anniversary of getting out of her traumatic relationship.

44. The claimant has extreme mood swings, either feeling on top of the world, or feeling very down and shutting herself away, sometimes staying in bed all day. When her mood is low, she experiences insomnia, low motivation, slower thought processes, guilt, and she becomes socially reclusive. The claimant used to be prescribed sleeping tablets, although her GP has stopped that after the claimant took an overdose after she had let the job.

45. At times when she feels more positive, the claimant's sleep improves and she is more outgoing and social. The claimant has experienced this fluctuation as long as she can remember. She says 'I don't know any other way'.

46. The claimant also experiences significant anxiety, particularly over work, finances and the future of her family. Towards the end of her employment, this led to two panic attacks as described below, when she was unable to work.

47. The claimant has been on medication for anxiety and depression since 2016. Throughout her employment with Shout Hair, she was still taking medication and was seeing her GP once/month by way of counselling. Following her dismissal, the claimant's anxiety about her finances and being able to take care of her family reached such a pitch that she attempted to take her own life.

48. After a referral to Wandsworth SPA (South West London and St George's Mental Health Trust) in February/March 2021, as a result of taking an overdose, the claimant was given a working diagnosis of probable (1) Emotionally Unstable Personality Disorder and (2) Post-traumatic stress disorder. These reached crisis mid 2020 after her dismissal and subsequently stabilised to some extent.

49. The claimant loved her job and it helped her mental health. For most of her employment, her mood was good, albeit with the help of medication and GP counselling. She used to refer to it as her 'happy ever after job', until the relationship breakdown with Miss McClymont which caused stress and gradually worsened her mental health and ended in her dismissal.

Subs

50. At the beginning, the claimant was paid monthly. The claimant told Miss McClymont that she would struggle with that because she had always been paid weekly and she was not good with money. Miss McClymont agreed to make advance payments ('subs') to tide her over whenever she wanted. The claimant made regular requests for subs, and we saw a series of requests by text message, often explaining that she could not afford her groceries or to take the children on holiday. Miss McClymont paid the subs when requested, although she found it demanding and stressful because she felt responsible for the claimant's finances. Eventually Miss McClymont moved the claimant to weekly pay.

November 2019

51. On 1 November 2019, the claimant was having a conversation on the pavement outside the shop with her ex-partner about being cyber bullied by a woman he had cheated on the claimant with. The claimant was very upset. When she returned to the salon, she was brisk with her male client and this led to him putting up a bad review of the salon. Subsequently the claimant called the client, who was a regular, apologised, explained the situation and gave him a complimentary haircut. He returned many times after that.

52. On 6 November 2019, the claimant had a meeting at a café with Miss McClymont and Ms Davey. Miss McClymont bought everyone breakfast. She gave the claimant her contract and confirmed she had passed her probation. The claimant was told she was promoted to Salon Director Hairstylist, which meant she could now charge the highest stylist rate to her clients.

53. The claimant explained what had happened on 1 November 2019. This led to a discussion about her experience of abusive partners in past relationships. Miss McClymont shared similar experiences of her own. It was an emotional and supportive conversation. The claimant says that she also discussed her mental health difficulties. Ms Davey agrees that this was discussed. The claimant says she and Ms Davey discussed anti-depressants and how they were both on Sertraline. She says the general conversation was to the effect that there would be down days and up days, and Miss McClymont said, 'We are here to support you. If you have any issues, you can come to me'.

54. Miss McClymont says that she does not recall any conversation about mental health or anti-depressants, and that maybe such conversations took place when she was away from the table ordering more food and drink or when the claimant and Ms Davey had moved away to smoke. The claimant says that they were sitting at an outside table, so it was not necessary to move away to smoke, and that Miss McClymont was not going in and out all the time as she suggests.

55. We accept the claimant's account of the meeting. We believe that Miss McClymont was party to the whole conversation including the discussion

around mental health and anti-depressants. It is just that she did not understand that it might affect work in any way.

56. The conversation about mental health and anti-depressants would have been a logical extension of the discussion about abuse and the general heart to heart. Moreover, we were struck by the fact that every time Miss McClymont talked in the tribunal about what she knew from the 6 November meeting, she tended to evade the direct question about what was said, and to say that she had not understood there was a work issue and that she did not remember any 'serious' conversation about it. We therefore believe that the claimant did mention mental health difficulties and that she was taking anti-depressants, but, as Miss McClymont says, there was nothing which made Miss McClymont feel the claimant needed particular support at that time. Indeed she was giving her extra responsibility. We believe Miss McClymont's perception of mental health was shaped by her experience of very serious matters in her own family, in one case almost requiring a relative to be sectioned.

57. At 8.37 am on 23 November 2019, the claimant texted Miss McClymont saying: 'Sorry not coming in today been up most of the night had a bit of a meltdown not in a good place right now sorry x' Miss McClymont replied that the claimant needed to call the salon. On Monday 25 November 2019, Miss McClymont texted 'Hope you got things sorted out?'. The claimant replied by explaining the context: 'It's 7 years this time I got out of my hell home relationship and moved to Scotland all my timeline kept putting up shit on my Facebook and I had a bit of a meltdown with my big boys just been under a lot of stress I'm sorry to let you down I just lost it'

<u>Other occasions</u>

58. On 26 December 2019 at 20.17 the claimant texted Miss McClymont 'Babes can I take tomorrow off and work another day after new year babes I'm going out tonight x'. Miss McClymont replied, 'Babe … please asking at this time is a bit stressful as you have bookings. Ive managed to text your client but its boxing day at 9.30 pm so it's a bit unprofessional for me …. But all done! Have tomorrow off … please communicate with me prior next time .. have a good night. I'll ask you to work when we need xx'. The claimant answered, 'Sorry I promise I will but been with the family all day prosecco taken hold we all going out love ya your the best'.

The claimant was subsequently asked to make up the days in January, including for 3 days off sick and New Years Day, which she agreed.

59. On another occasion, we don't have the date, the claimant texted at 9.04 am 'Babes I've got no one to look after the kids I can't work today I'm going to take them to my mums later she will have them for me sat so I can work they are back to school next week so I will be okay sorry hun x'. Miss McClymont replied, 'OK. We need to meet to discuss this as I'm worried about all the other holidays. Jodie work sat&sun in holiday time to make up her x1 day.

Obviously your holidays are all used so I'll have to not pay you….How do you normally manage? Isn't there friends? Like Olivia or others you can ask if desperate? She can come with me today if you want I'm with my two but she doesn't know me?'

22 January 2020 warning

60. On Saturday 18 January 2020, the claimant called Ms Davey at 10.45 am on her way into work. Her shift was due to start at 9 am. She was late because she had got very drunk the night before at a friend's house. She had then been sick at the bus stop and thought she was still drunk. The claimant was very upset and apologetic. Ms Davey told the claimant off, and then told her to 'Get your arse to bed and sleep it off'. The claimant agreed to work the Sunday to make up the hours. Ms Davey told her not to stress but not to do it again.

61. The claimant did regularly socialise and go to parties, but she says this is the only occasion when anything like this had happened. We were not told of any other specific occasions when the claimant was late for work because she was drunk or hung over.

62. The written warning of 22 January 2020 stated:

> 'This letter is given to you as a formal reprimand regarding your lack of discipline whilst on the job. This written warning is being issued to you for such unacceptable personal conduct. The incident referring to the lack of communication and none showing to work as an employee on Saturday 18 January 2020. The first communication with management was at 11.21 when your shift to work started at 9.00 am in the morning. The customers were left wondering where you were and other colleagues were left to burden this stress. This was highly unprofessional and not acceptable.
>
> Please note that further violations of a similar nature will lead to immediate discharge.'

Universal credit problem

63. On 10 February 2020, the claimant discovered that she had not been awarded any Universal Credit because her earnings had been reported by her employer as £4,509.86 for the previous month whereas her usual monthly wage was £1,495.69. As a result, the claimant could not get support for paying her rent, which made her extremely anxious as she was under a court supervision order, having previously been in a women's refuge when fleeing from domestic violence. The stress brought back negative memories of her past.

64. The claimant tried to call Miss McClymont several times, but she only received voicemail. She then sent texts. Miss McClymont told the claimant

that it was not her (Miss McClymont's) mistake. On 11 February 2020, Miss McClymont sent a screenshot from the accountant, which showed taxable pay to date in the employment, and said that the claimant should contact HMRC. This was of no help to the claimant because HMRC would only accept a correction from the employer. The claimant received no housing benefit for two months. She had very little money left to support herself and her family. Some days she did not have the bus fare and had to get a lift home from Ms Marreiros.

65. Miss McClymont did not telephone HMRC. In the tribunal, she did not know whether or how the matter as resolved.

66. The claimant repeatedly told us that their relationship broke down over this matter.

Toner incident and verbal warning: February 2020

67. On or about Monday 17 February 2020, on the claimant's non-working day, she was colouring the hair of her best friend Leyah at home as a birthday present. Leyah had come to the salon to be a model on its training day the previous week. The toner which the claimant had bought turned Leyah's hair grey. The claimant therefore took Leyah straight into the salon to put it right.

68. The claimant knew that the salon would be open and that Ms Marreiros was working there before going on holiday. The claimant told Ms Marreiros that she had messed up her friend's hair and asked if she could put a toner on it. Ms Marreiros was uncomfortable because it had not been cleared in advance with Miss McClymont. However, others had brought in friends on their own time before. She said she supposed so.

69. Unexpectedly, in the middle of this, Miss McClymont came into the salon. She was surprised and annoyed as it had not been cleared with her in advance. She asked the claimant in front of the others whether she often brought in clients from home. The claimant said this was the first time, and she had not thought it would be a problem. She said she would pay for the toner, which she did a few days later. Miss McClymont then went on to discuss the Universal Credit situation in front of Leyah, Ms Marreiros and a client of Ms Marrieros. The claimant said her finances were a private matter and she was not happy to discuss them in front of others. She said she had tried numerous times to discuss the matter with Miss McClymont. The claimant washed off Leyah's hair and left while it was still wet. She was in tears on the way home.

70. Later that evening Miss McClymont texted Ms Marreiros to find out more. Ms Marreiros told her that the claimant 'knew I was working coz its been booked in for time – I don't think she planned it but it was convenient that I was there and she fucked up the colour so didn't want to pay just thought she'd use shout but she didn't know you were gonna be there – I said it out loud and she was shocked'.

71. Ms Marreiros told the tribunal that it was generally accepted that stylists could bring friends into the salon in their own time, provided they paid for the products and let someone know. She says she would herself always have obtained authorisation in advance because she thought that was the correct thing to do. She also says, which we accept, that Miss McClymont has approved it on occasions in the past when she has been asked in advance. There does not seem to have been any formal policy, written or otherwise, on this. Miss McClymont told the tribunal that she only allowed self-employed stylists to bring friends into the salon in their own time. She says she would not allow paid employees to do so, because that would lose the salon payment. The claimant says it was not unusual in her experience in the industry to allow this practice, and she had not thought she was doing anything wrong. She had done it openly and she had even asked Ms Marreiros's advice about the colour. She says she had keys to the salon and had she wanted to do anything dishonestly, she could have brought in her friend when no one was there.

72. It does seem that the policy on this was unclear. We agree that the claimant should have asked authorisation in advance, but this situation was unplanned. She could have texted Miss McClymont, even if it was an emergency, but she did ask the effective salon manager. Although we think the claimant should have attempted to contact Miss McClymont, and perhaps was aware she did not have clear permission for this, we think it harsh to characterise it as 'theft', which was repeatedly said by Miss McClymont. Nevertheless, this is how Miss McClymont viewed it at the time, strongly encouraged by Ms Davey when she discussed it with her.

73. Miss McClymont provided audio recordings of Ms Davey's side of conversations she had with Miss McClymont. We were shown a transcription which the claimant accepted as accurate. We think that Miss McClymont may have wrongly noted the date of the conversation, since there is no doubt it is referring to the toner incident.

74. Ms Davey expressed herself extremely forcefully. She stated repeatedly that this was gross misconduct and that the claimant was effectively stealing, because products were used and no permission was asked. We need to quote some parts of the conversations to convey their tenor:

> 'Personally she needs sacking, I'm sorry just not about giving people more chances, when she has had 3 million chances, she is taking the piss olivia did the same, she can fuck off, and if anyone has anything to say about me, they can say it to my face. its not a knock out season, they will just get hurt by what i have to say because they are all fucking shit, anyway they are not even making money, so fuck them … these human beings are wasting time and air and money…. kelly just empower yourself as me for the day, an then tomorrow ill be there to support you, you either need to sack her, final warning and put her on a probation period that she works for it and she has to do extra, that means days over in tulse hill, late nights, what ever it is, they have got no fucking respect kelly and as far as

> I'm concerned its been a bag of things, so anyones got anything to try and blame on me they can fuck off, as far as I'm concerned carla has to be dealt with because respect has been lost, she is stealing, end of.'

Ms Davey concluded:

> 'its down to you how you want to move forward but what i will say is no more chicken shit stuff, its hardball now babes we've started this, and it just shows why we did as some people are just taking the piss and its to happening, thats my advice to you baby.'

75. On Wednesday 19 February 2020, Miss McClymont came into the salon while Olivia and the claimant were on their shifts. By this time, both Olivia and the claimant were feeling demoralised and unwanted since products were being run down and only ordered for the other salon. Miss McClymont sat with the claimant in the reception area. She then talked fairly loudly about the incident, accusing the claimant of 'taking the piss' by bringing in her friend. She would not let the claimant fully explain the situation. She told the claimant that she was getting another verbal warning. After she left, the claimant burst into tears. She felt very stupid and very upset.

76. Miss McClymont must have discussed the claimant's reaction with Ms Davey. In texts on 22 February 2020, Ms Davey said to Miss McClymont: 'Carla is always going to be pissed off cause she thinks she knows better. It will eventually push her out … if you don't entertain her behaviour. She has taken the piss and that's it so she will be treated like a child.

<u>29 February 2020</u>

77. On Saturday 29 February 2020, the claimant was at work when she suffered what she did not then realise was a panic attack, never having had one before. She thought maybe it was a bug. She felt sick, dizzy and hot, and she kept going to the toilet. She kept crying. She tried to keep doing her clients' hair, but by about 1 pm, she could not continue. The other stylists, Molly and Sylvia, advised her to go home and said they would look after her clients for the rest of the day.

78. Ms Marreiros was on holiday and Miss McClymont was away at a festival. Ms Davey was acting manager. At 13.23 the claimant texted her to say: 'Babe I had to go home I've been throwing up and feel really dizzy I stayed as long as I could but feel faint sorry'. Ms Davey immediately forwarded the claimant's message to Miss McClymont, saying that she had told the claimant to go home and 'girls are covering 2 appointments' Miss McClymont immediately assumed it was a hangover. She asked, 'Did she go out? Not good.' Ms Davey answered, 'I don't know details babes.'

<u>4 March 2020: dismissal</u>

79. The claimant's next working day was Wednesday 4 March 2020. She had what she describes as a 'complete meltdown'. She was due in at 10 am. At 9.24 am she texted Miss McClymont as follows: 'I'm not going to be in today I'm not feeling great today I've not been sleeping right my head is not in a good space right now I'm going to go doctors today feeling really down and stressed.

80. Miss McClymont was driving into the Tulse Hill salon for a full day of bookings when she received this message. She was already feeling very stressed because Ms Marreiros had just gone on holiday for two weeks, and generally she felt the situation with the claimant was deteriorating. She replied to the claimant at 9.30 am: '30 mins before you start you text? Stay home. That's your last warning'.

81. The claimant took this as a dismissal. Miss McClymont was unclear in her evidence regarding whether this was a dismissal, mainly on the ground that it was not a formal letter. On balance, we find that although her language was fudged, she was intending to convey that the claimant was dismissed.

82. At 10.59 am, the claimant texted, 'It's all good. I've not been happy for the last month or so I've tried to get past it but I can't today I just could not bring myself to go to work like I said its effecting my mental health and my family. I am always stressed to do with work I feel undervalued its been coming for a while But I have to look after myself and put myself and my kids first !!!!!' Miss McClymont answered, 'That's fine. You can go today and leave your keys? Olivia and Beth are there until 7pm. Wish you all the best and hope your mental health gets better.'

83. At 11.08 am the claimant posted on Facebook 'Feels like relief time to move on'. Ms Davey forwarded this post to Miss McClymont. Miss McClymont responded 'Please'. Ms Davey answered, 'We knew it would happen. Especially whilst Jenny is away'.

84. At 13.31, Ms Davey forwarded Miss McClymont's dismissal letter. Ms Davey had drafted it. It states as follows:

'This letter is to inform you that today on the 4th of March, I have terminated your employment with Shout Hair Ltd.
Your conduct failed to follow salon procedure to inform the salon that you are sick in enough time which has resulted in the appropriate protocol.
A text message 30 mins before stating you were not feeling well has effected business and let our customers down. This is not the first misconduct.
Repeatable occasions of misconduct and unreliability to Tattend the hours contracted on multiple occasions is now the result in termination within a probation period.
We understand company property has been returned, thank you for your hard work. We hope you can maintain company information. We wish you well and hope your life and career are successful.
Kind regards
Kelly McClymont.'

85. On 7 March 2020, Miss McClymont directly emailed a slight expanded dismissal letter. The extra content she had added herself to Ms Davey's original draft. The letter covered issues of notice (she paid one week in lieu), holidays (all taken in advance of the holiday year) and some cash subs from the start of employment still owed. Miss McClymont said she would however forget the money owed. There were two other extra elements in the second dismissal letter which did not appear in the first, ie

'The occasion when you facilitated a home customer of yourself in the salon which was not authorised using salon property and materials, at the costs of the salon resulted in another verbal warning which you admitted you would pay full costs. The salon has not been reimbursed by yourself but that until date.'

And 'You left the salon on the Saturday prior without any phone call to the owner or any permissions granted'.

86. The claimant saw her GP on 10 March 2020. There was no longer any urgency to get a medical certificate for work, but she did need one for Universal Credit. Her GP told her that the symptoms she described to him as having occurred on 29 February 2020 sounded like a panic attack. He told her what to do in future if she experienced that again. He issued a certificate for the period 29 February 2020 to 24 March 2020 saying she was not fit for work because of 'depression'.

87. The relationship between Ms Davey and Miss McClymont later broke down. Ms Davey felt Miss McClymont was not supporting her during the pandemic. In a text on 30 March 2020, Ms Davey told Miss McClymont that she felt totally betrayed after everything she had done for Miss McClymont.

<u>The evidence of the claimant's witnesses</u>

88. In her evidence to the tribunal, Ms Davey said she had initially not thought the claimant was right for the business, but later that she had viewed her as an asset. When asked when she changed her mind, she said January 2020. We were doubtful about this because Ms Davey was speaking to Miss McClymont against the claimant right up to the point of dismissal. Ms Davey told the tribunal that we had only been provided with her side of the audio WhatsApp conversations between herself and Miss McClymont and that essentially she was reflecting back Miss McClymont's views. Neither party was able to produce both sides of the conversation or clearly explain why not.

89. Both Ms Marreiros and Ms Davey emphasised that their main concern was that Miss McClymont did not follow proper procedures when dismissing the claimant and that she did not manage her properly during employment. Indeed they felt that Miss McClymont was rather chaotic regarding procedures generally as an employer (eg delayed pay, lack of payslips, organising who answered the phone, stock was always short, telling

employees important things by text, failing to give proper disciplinary warnings etc). They both felt what had caused the breakdown was the claimant being outspoken and challenging. Ms Marreiros said that other staff had become used to Miss McClymont's procedural inefficiencies, but the claimant would be very vocal about the way the salon should be run, and Miss McClymont became increasingly irritated about this.

Sexual harassment

90. The clients were nearly all aged 20 – 40. The general atmosphere was lively, with music, chat and laughter.

91. At one point, Miss McClymont and Ms Davey held a meeting with the claimant about her language. She had been overheard discussing the size of male genitalia. This had been thought inappropriate. The claimant told Ms Davey that she did not understand the culture of hairdressing. It was not like hospitality, where Ms Davey had experience. Some customers come into a salon and want to offload or gossip. Different customers have different relationships with their hairdresser. The claimant said she moderated her language and topics according to who she was with. Ms Marreiros agreed the claimant was careful to choose who she had this sort of conversation with.

92. The claimant says that she was quite open amongst the staff about how she talked about her sexuality, but that Miss McClymont made unwanted little remarks about her being promiscuous. The claimant said that Miss McClymont would make comments every now and then about who the claimant was sleeping with and laugh about it. Apart from the Christmas work event, the claimant could not remember the exact occasions or words. However, she felt the comments were sarcastic and belittling rather than friendly. She says she told Miss McClymont that she would rather Miss McClymont did not make such 'jokes' and that she did not find it funny. Especially in front of other people, it was embarrassing and belittling.

93. The claimant says that at the Christmas work event, she was being joked about because of what she was wearing at the dinner table. She says Miss McClymont asked her who she 'would be fucking tonight'. The claimant says maybe Miss McClymont said it because she was drunk, but the claimant told her later that she did not find it funny.

94. We accept that some remarks of this nature may have been made by Miss McClymont. We are unable on the evidence, which – apart from the Christmas occasion - was vague and general, to identify what was said and its tone. We accept Miss McClymont did make that remark at the Christmas event dinner table and that the claimant later said it was not funny, but we have no detail of the wider conversation or context.

Law

Definition 'disability'

95. The protection against disability discrimination is contained in the Equality Act 2010. There is also 'Guidance on matters to be taken into account in determining questions relating to the definition of a disability'. This Guidance must be taken into account if relevant, but it does not impose any legal obligations in itself and it is not an authoritative statement of the law.

96. A person has a disability if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. 'Substantial' means more than minor or trivial (s212).

97. Conditions with effects which recur only sporadically or for short periods can still qualify as long-term impairments (Guidance, para C5). If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If they are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. (Guidance, para C6).

98. By virtue of Sch 1 para 5, an impairment is to be treated as having a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities if measures are being taken to treat or correct it, and but for that, it would be likely to have that effect. 'Likely' means 'could well happen'. (Guidance, para C3; SCA Packaging Ltd v Boyle [2009] IRLR 746, HL.)

99. Sch 1 para 5(2) says that relevant measures include, in particular, medical treatment and the use of a prosthesis or other aid. The Guidance states that in this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatment with drugs. (Guidance, para B12.)

100. In J v DLA Piper UK LLP [2010] ICR 1052, the EAT gave this guidance:

> The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal… between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or -if the jargon may be forgiven - "adverse life events". We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians … and

> which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If … a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived.

Direct disability discrimination

101. Under s13(1) of the Equality Act 2010 direct discrimination takes place where, because of disability, a person treats the claimant less favourably than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. Under s23(2), where the protected characteristic is disability, the circumstances relating to a case include a person's abilities.

Discrimination arising from disability – s15

102. Section 15 of the Equality Act 2010 prohibits discrimination arising from disability. This occurs if the respondents treated the claimant unfavourably because of something arising in consequence of the claimant's disability. The respondents have a defence if they can show such treatment was a proportionate means of achieving a legitimate aim.

103. The respondents will not be liable under section 15 if they show that they did not know, and could not reasonably have been expected to know, that the claimant had the disability.

104. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. (Pnaiser v NHS England and another [2016] IRLR 170; Baldeh v Churches Housing Association of Dudley & District Ktd UKEAT/0290/18.)

Sexual harassment

105. Under s26, EqA 2010, a person harasses the claimant if she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

106. In Grant v HM Land Registry [2011] EWCA Civ 769, Elias LJ pointed out that the words 'violating dignity', 'intimidating, hostile, degrading, humiliating, offensive' are significant words. 'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'

107. Where the conduct was not done with the purpose of violating dignity etc, the question is whether it had that effect. The EHRC Employment Code says at paragraph 7.18:

> 'In deciding whether the conduct had that effect, each of the following must be taken into account:
> (a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.
> (b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.
> (c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.'

Indirect sex discrimination

108. Under s19 of the Equality Act 2010, indirect sex discrimination occurs if the respondents applied to the claimant a provision, criterion or practice which (a) the respondents applied or would have applied to men, (b) put, or would have put women at a particular disadvantage when compared with men, (c) put, or would have put the claimant at that disadvantage, and (d) the respondents cannot show it to be a proportionate means of achieving a legitimate aim.

Burden of proof under Equality Act 2010

109. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

110. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

Discrimination: relevant time-limits

111. The relevant time-limit is at section 123(1) Equality Act 2010. Under section 123(1)(a), the tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. A series of different acts, especially where done by different people, does not (without some assertion of link or connection), constitute conduct extending over a period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the CA held that ‘an act extending over a period’ can comprise a ‘continuing state of affairs’ as opposed to a succession of isolated or unconnected acts

112. Under s123(1)(b), if the claim is presented outside the primary limitation period, ie the relevant three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable.

Amendment

113. The principles relevant to the granting of an amendment are set out in particular in Selkent Bus Co Ltd v Moore [1996] ICR 386. As confirmed and expanded by subsequent cases, these essentially are as follows. In exercising its discretion whether to allow an amendment, the employment tribunal should take into account all the circumstances and balance the injustice / hardship to each party of allowing or refusing the amendment. The relevant circumstances include

114. The nature of amendment, ie whether it is a minor relabelling or, on other hand, new facts and a new cause of action are involved.

115. The timing of application and why it was not made earlier, particularly if the claimant knew all the relevant facts.

116. Where a new complaint or cause of action is proposed, the tribunal must consider whether the complaint is out of time and if so, whether the time-limit should be extended under the applicable statutory provisions. This is not the only consideration, but it is important in respect of a new cause of action. It is far less important where only a minor relabeling is involved.

117. The balance of hardship from the viewpoint of the respondents could entail, for example, more costs, especially if these are unlikely to be recovered; witnesses having disappeared or documents disposed of; faded memories and concessions made on the basis of the case as previously pleaded.

118. In the case of Vaughan v Modality Partnership UKEAT/0147/20/BA the EAT reminded parties and Tribunals that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequences of allowing or refusing the amendment. That balancing exercise is fundamental. The Selkent factors should not be treated as if they are a list to be checked off.

Conclusions

119. We now apply the law to the facts to decide the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

Was the claimant disabled?

Issue 1: At the dates of the alleged disability discrimination, was the claimant disabled under the legal definition? She says her disability was anxiety and depression and/or Post Traumatic Stress Disorder (PTSD) and/or Emotionally unstable personality disorder.

120. We find that the claimant had the disability of anxiety and depression throughout her employment including at the dates of the alleged discrimination. Going through the stages of the definition:

121. The claimant had the mental impairment of anxiety and depression. This was an impairment which she had had for many years.

122. The impairment had a substantial adverse effect on her ability to carry out the normal day-to-day activities of sleeping, socialising, working and even getting out of bed. Although the effects fluctuated in that she had regular mood swings, when she was low, her activities were affected in this way. That happened frequently enough to amount to a substantial effect.

123. The substantial adverse effects were not constant, but they were always likely to recur. As the claimant said, she knew no other way. Even during the claimant's employment, when she was for the most part happy, there were occasions when she had what she describes as 'meltdowns', when she was not able to concentrate at work and when she was not able to come in at all. At the end of her employment and shortly before her dismissal, she experienced two panic attacks (29 February 2020 and 4 March 2020) when she was entirely unable to work.

124. We note also that throughout the claimant's employment she was taking Sertraline and receiving counselling from her GP. We accept the claimant's evidence that without the medication and GP support, her ability to function would have been further reduced.

125. We also find that the claimant had the disability of PTSD. This was diagnosed by the Wandsworth SPA in Spring 2021. The diagnosis did not suggest this was recently acquired. The PTSD appears to relate to abuse the claimant had been subjected to for lengthy periods in the past. At times during her employment, certain events such as anniversaries acted as triggers causing flashbacks, and affected her ability to work, eg on 1 and 23 November 2019. Both taken alone, and together with her anxiety and depression, this impairment had a substantial adverse effect on her ability to carry out normal day-to-day activities which lasted more than 12 months, with fluctuating effects which were always likely to recur.

126. We note that the claimant was also diagnosed with Emotionally unstable personality disorder. We do not have sufficient information about this condition or the effects on the claimant to say that this was also a disability.

Did the respondents know the claimant was disabled?

Issues 2 and 3: Did (1) the company and/or (2) Miss McClymont know at the time of those actions that the claimant was disabled? If they did not know, ought they reasonably to have known?

127. The claimant did not tell Miss McClymont on her interview that she had any mental health issues. However, the claimant did tell Miss McClymont and Ms Davey at their meeting on 6 November 2019 about her past abusive relationships, that she had mental health issues and that she was taking Sertraline.

128. The question then is whether Miss McClymont knew or ought reasonably to have known, at the time of the alleged disability discrimination (ie particularly from 22 January 2020 onwards), that the claimant's mental health issues amounted to a disability.

129. As we have said, Miss McClymont understood mental health disability in a particular way because of her family's experiences. She was also was looking at it from the viewpoint of ability to hold down a job. The fact that the claimant

appeared perfectly able to work from the outset led her to the conclusion that she was not disabled. However, Miss McClymont ought reasonably to have known from the claimant's 23 November 2019 text ('up most of the night had a bit of a meltdown … I just lost it') combined with what she had been told on 6 November 2019 about ill health and anti-depressants, and the 1 November 2019 incident which was discussed on 6 November, that the claimant had a mental health disability. By 23 November 2019, Miss McClymont knew the claimant had a long-term mental health impairment which had non-trivial effects even when controlled by medication. She knew or ought to have known from then that the claimant was disabled.

130. Further, by 29 February 2020, Miss McClymont had further information from which she ought to have known this. She knew what had happened on that day. She assumed it was caused by a hangover and asked Ms Davey whether the claimant had gone out, but Ms Davey told her she did not know. On 4 March 2020, the claimant texted Miss McClymont to say 'I've not been sleeping right my head is not in a good space right now I'm going to go doctors today feeling really down and stressed.' This clearly did not relate to a hangover. After her oral dismissal, the claimant texted to say her mental health was being affected. Miss McClymont nevertheless confirmed the dismissal formally at 13.31.

Issue 4: Why did the respondents dismiss / make a decision to dismiss the claimant?

131. We find that the reason for the dismissal was a combination of factors. Miss McClymont had become increasingly unhappy with the claimant over time. This started particularly with the late request on Boxing Day not to come in the following day. That was followed by the claimant's absence due to being hungover on 18 January 2020, which she did not notify until a long time after the start of her shift. This was against a backdrop where Miss McClymont was herself stressed by the workload of running two salons, and had for many months also felt the stress of dealing with the claimant's constant requests for subs, albeit that was agreed at the outset.

132. We also believe that Miss McClymont had become unhappy at the claimant's (reasonable) demands for proper process and in particular, that she sort out the Universal Credit problem. Miss McClymont did not like dealing with procedural matters and did not like being pressed to do so. The claimant attributed their relationship breakdown to the Universal Credit issue several times during the tribunal hearing. Her two witnesses attributed the relationship breakdown to the claimant being the only person who challenged Miss McClymont on her management lapses.

133. The Universal Credit issue was followed shortly by the toner incident, during which the argument about Universal Credit continued. We believe that had the claimant not upset Miss McClymont in the ways we have just described, she would not have been given a formal warning over the toner incident. However, Miss McClymont's response was indicative of the

relationship breakdown and her feeling that the claimant was taking advantage. She felt the claimant had lost respect for her as a manager. Ms Davey's comments to Miss McClymont were encouraging this viewpoint. By the time of the claimant's two panic attacks of 29 February and 4 March 2020, Miss McClymont had a fixed view of her and interpreted her absences as more of the same. Her reaction to being told on 29 February 2020 that the claimant had had to go home was to ask whether she had been out. The 7 March 2020 termination letter says 'You left the salon on the Saturday prior without any phone call to the owner or any permissions granted'. However, this was incorrect. The claimant had received permission from Ms Davey.

Issue 5: Was the reason for dismissal that the claimant had a mental health disability? (Direct disability discrimination)

134. The dismissal was not direct disability discrimination. If the claimant had not been disabled, but had behaved in the same way, had left the salon on 29 February 2020 and failed to come in on 4 March 2020 for another legitimate reason (not to do with mental health), we believe Miss McClymont would still have jumped to the wrong conclusion and would still have dismissed her.

Issue 6: Was the reason that the claimant had not attended work on that particular occasion (4 March 2020) because of something arising from her disability, ie a mental health 'meltdown'? (Section 15 disability discrimination)

135. The reason for dismissal was partly because the claimant had left the salon on 29 February 2020 and because she did not inform the salon that she could not come in on 4 March 2020 until 30 minutes before the start time. This was far from the only reason, as we have already stated. It was against a background of reasons which were to a large extent nothing to do with the claimant's disability. However, the final straw which caused the dismissal was two occasions where the issue arose from the claimant's mental ill health. The claimant's mental disability was therefore a significant influence on the dismissal and an effective cause of it.

136. Therefore we find that the 1st respondent discriminated against the claimant by dismissing her contrary to s15 and s39(2)(c) of the Equality Act 2010. The 2nd respondent (Miss McClymont) discriminated against the claimant by deciding to dismiss her contrary to s15 and s39(2)(d) of the Equality Act 2010.

137. Had the claimant not been dismissed on this occasion, for these reasons, we believe another absence for a different reason, or another aspect of her conduct which Miss McClymont did not like, would have led to her dismissal in the not too distant future. Matters were going downhill, and the relationship had broken down. This does mean that compensation will be limited.

Issue 7: And/or was the reason for dismissal that the claimant had not attended work on several occasions because of something arising from her disability, ie a mental health 'meltdown'? (Section 15 disability discrimination)

138. We have already discussed 29 February 2020. The only other occasion we are aware of that the claimant did not attend work because of her mental health was 23 November 2019. There was also the incident on 1 November 2019, when it affected the claimant's treatment of her client. We do not believe these incidents played any part in the dismissal. There was no breakdown of the relationship at the time – indeed the claimant was promoted after the 1 November incident. There was no reference back to these incidents at the time of dismissal.

Issue 8: And/or was the reason that the claimant had not attended work on certain occasions because of childcare? (Indirect sex discrimination)

139. First we have to decide whether to allow the claimant to amend her claim to include indirect sex discrimination. The claimant had not referred to being dismissed because of childcare absences in either of her claim forms. The sex discrimination issue she had referred to in her claim form and in the preliminary hearing was the sexual harassment claim. We appreciate that the claimant was not represented. But on the other hand, neither was Miss McClymont. It concerns us that the childcare claim was only made clearly at the start of this final hearing. Given that the claimant was able to bring all her other claims, we think that on balance it would not be fair to allow such a late amendment, when Miss McClymont would not have proper time to prepare a defence on those points.

140. Having said that, we did listen to the claimant's argument about childcare and the evidence presented. We do not believe any absences for childcare were a factor in the claimant's dismissal. Any such absences were not part of the breakdown of the relationship from Boxing Day onwards. The evidence does not suggest that this was a notable issue. It was not mentioned in the dismissal letters.

Issue 9: If the answer to any of 6, 7 or 8 is yes, can the respondent(s) justify the dismissal decision by proving it was a proportionate means of achieving a legitimate aim?

141. We have decided that the claimant's mental health absences on 29 February 2020 and 4 March 2020 were a significant influence on her dismissal. The next question is whether Miss McClymont can defend the dismissal by proving it was a proportionate means of achieving a legitimate aim.

142. Miss McClymont's aim was to provide a reliable service to the salon's clientele and to maintain the salon's reputation and income. This is obviously a legitimate aim.

143. The real question is whether dismissal was 'proportionate'. The result of dismissal was that the claimant lost a job which until the end, she had loved. This was a serious matter or her. The claimant was a vulnerable person and her job was important to her. The claimant's mental health worsened considerably to the point she took an overdose.

144. Bearing in mind the impact on the claimant of losing her job, we find the dismissal was not proportionate. Miss McClymont did not investigate the cause of the claimant's absence on the two occasions. She jumped to conclusions. She wrongly assumed the claimant had gone home without permission on 29 February and suspected she was simply hungover. She was suspicious again about the claimant's absence on 4 March. She should have found out the true position, obtained medical advice if the claimant asserted it was mental health related (as indeed she did before the formal letter of dismissal) and then considered whether she could feasibly accommodate ill-health related absences going forward. At that point, as we have said, there had only been a few occasions when the claimant had not attended work to some extent because of mental ill health.

Other disability discrimination

Issue 10: Did the respondent(s) treat the claimant in the following ways because she had a mental health disability (direct disability discrimination):

10a: Giving her a verbal warning on 22 January 2020

145. In fact, this was a written warning. The claimant was given the warning because she did not attend work on 18 January 2020 because she was hungover and in particular, because she did not inform the salon until well after the start of her shift. This was not direct disability discrimination. It was not surprising that a warning should have been given for this, and especially the late notification that the claimant could not come in. We are sure that an employee without a mental health disability would equally have been given a warning if they had done the same thing.

10b: Failing to correct the position promptly with the authorities over her Universal Credit in February/March 2020

146. This was poor behaviour by Miss McClymont, but it was not direct disability discrimination. There was substantial evidence that Miss McClymont was generally disorganised regarding pay and payslips and poor at procedures with all staff. Miss McClymont did not fail to resolve the matter because the claimant had a mental health disability.

10c: Giving the claimant a verbal warning on 19 February 2020 over bringing a friend into the salon to do her colour ('the toner incident')

147. This was not direct discrimination. We do not believe the reason Miss McClymont gave the claimant a warning was that she had a mental health disability. She gave her a warning because she did not get prior authorisation from Miss McClymont. With other staff, we think that would not have led to a formal warning, and maybe would only have led to an informal reprimand at most. However, the relationship between Miss McClymont and the claimant had broken down by then and there was a lack of trust.

10d: Generally insisting on texting rather than speaking by phone, and when speaking, doing so in a hostile manner.

148. Miss McClymont's way of communicating with everyone was largely by text. We saw numerous text exchanges between Miss McClymont and Ms Davey or Ms Marreiros. Ms Marreiros had even told Miss McClymont that she should not convey important messages by text. The claimant was not being treated differently in this regard. As for being spoken to in a hostile manner, the examples given were essentially those we have dealt with under the specific events 10 a – 10c, and only really happened when the relationship started breaking down.

Issue 11: And/or did the respondent(s) treat the claimant in those ways because she was absent on occasions because of her disability? (Section 15 disability discrimination)

149. The question under section 15 is whether the reason for the employer's actions was something arising from the claimant's disability.

11a: Giving her a verbal warning on 22 January 2020

150. As we have said, the warning was written, not verbal. The reason for the warning was that the claimant was hungover and had to miss work as a result, and the fact that she did not notify the salon until late. The claimant being hungover and notifying the salon after her shift started was nothing to do with her mental health disability. She had simply drunk too much the night before. The section 15 claim therefore fails.

11b: Failing to correct the position promptly with the authorities over her Universal Credit in February/March 2020

151. The reason that Miss McClymont failed to correct the Universal Credit position promptly was her lack of organisation over such maters. It was not a reason which had anything to do with the claimant's mental health disability. The section 15 claim therefore fails.

11c: Giving the claimant a verbal warning on 19 February 2020 over bringing a friend into the salon to do her colour ('the toner incident')

152. The reason the claimant was given a warning was that she had brought in her friend and used the salon's toner without seeking prior authorisation from

Miss McClymont. That may have been a little harsh, but it had nothing to do with the claimant's mental health disability. The section 15 claim therefore fails.

11d: Generally insisting on texting rather than speaking by phone, and when speaking, doing so in a hostile manner.

153. Miss McClymont tended to speak to everyone predominantly by text. That was the way she operated. It had nothing to do with the claimant's mental health disability. In so far as she spoke to the claimant in a hostile manner towards the end of the claimant's employment, that was because of the breakdown of the relationship and the particular incidents we have just described, none of which were anything to do with the claimant's mental health disability. The section 15 claim therefore fails.

Issue 12: If so, can the respondent(s) justify the actions by proving they were a proportionate means of achieving a legitimate aim?

154. Issue 12 therefore does not arise, because none of the treatment in 11a – 11d was something arising from the claimant's disability.

Sexual harassment

Issue 13: Did Miss McClymont make little remarks to the effect that the claimant was promiscuous?

155. At the Christmas work event, Miss McClymont asked the claimant who she 'would be fucking tonight'. She may have made similar remarks on other occasions, but we were not given any details, so we are unable to make any findings about those.

Issue 14: Was this unwanted conduct?

156. The remark at the Christmas work event was unwanted and similar remarks at any other time would have been unwanted. Although the claimant talked openly about her sexuality, she was embarrassed at the suggestion that she was promiscuous and found it belittling. She told Miss McClymont later on the Christmas event that she did not like it.

Issue 15: Did the comments relate to sex or were they of a sexual nature?

157. The comment was self-evidently of a sexual nature.

Issue 16: Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

158. We can only consider the Christmas comment, because that is the only one we have described to any extent. We do not believe that Miss McClymont intended her comment to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. It seems very unlikely that back in December 2019, after her supportiveness on 6 November 2019, that she would have intended to do so. We think a possible explanation is that she was socialising, the staff were informal, there were few boundaries between staff and management, and she knew the claimant was happy to speak about her sexuality. It is also possible that she was, as the claimant suspects, says a little drunk.

159. Although we do not think Miss McClymont intended to harass the claimant, we do think she should have known better as an owner and manager of the business. However friendly and informal the relationship, the comment was ill-advised and it was not good practice.

Issue 17: If the conduct did not have that purpose, but did have that effect, was it reasonable to have that effect, taking into account the claimant's perception and other circumstances of the case?

160. We accept that the claimant was upset and that she felt belittled and embarrassed. However, the case law says that the words 'violate' dignity and create an intimidating, hostile, degrading, humiliating or offensive 'environment' are very big words. We are not convinced that the claimant felt as strongly as that. She sent no texts complaining about the comments at the time. She did not have a severe reaction to the Christmas comment comparable to the other incidents described above. Her concerns about the working environment were not to do with the Christmas comment, but with the warnings and other maters described above. The claimant hardly spoke about the alleged sexual harassment during the tribunal hearing and had to be prompted on the subject. It is only one sentence in one of her two claim forms.

161. If we are wrong and the claimant did feel that her dignity was violated by this one remark or that an intimidating, hostile, degrading, humiliating or offensive environment was created for her, we would say it was not reasonable to have that effect. That is, again, because 'violating dignity' is strong language, as is creating 'an intimidating, hostile, degrading, humiliating or offensive environment'. The claimant was working in an environment where she happily engaged in chat with some customers about male genitalia. She talked openly in front of staff about her sexuality. She would have been aware that it was no secret that she did not mind such discussions. The relationship between staff, customers and management was generally informal. In that context, Miss McClymont might not have been aware that her remark was out of register and insensitive. Before January 2020, the claimant's relationship

with Miss McClymont was friendly and Miss McClymont was supportive. The remark made at the Christmas event, probably when Miss McClymont was drunk, needs to be seen in that general context.

162. The claim for sexual harassment is therefore not upheld. However, we would like to say again that Miss McClymont should have known better than to take the risk of making such a remark, even if she thought that the claimant was happy to talk and joke around the subject. We can understand why the claimant would not have liked it. Employers need to be careful about what discussions they engage in, in the workplace. This does not only apply to what other customers might overhear, but also as to conversations between management and staff.

Time-limits

Issue 18: Were the claims brought in time?

163. Claim form 2203932/20 was presented to London Central tribunal on 3 July 2020. It ticked boxes for unfair dismissal, disability discrimination and sex discrimination. The unfair dismissal claim was subsequently dismissed because the claimant did not have 2 years' service. The attachment to the form did not describe the sex discrimination referred to. At the preliminary hearing on 19 May 2021, the claimant complained of sexual harassment, which she described as a number of comments made about her sexual preferences. There was no mention of any childcare issue.

164. Claim form 2302061/21 was presented to London South tribunal on 12 June 2021. The claimant ticked boxes for disability discrimination and sexual orientation discrimination. The words 'sexual orientation' were a mistake. The claimant was referring to sexual harassment, ie remarks she says were made to her about being promiscuous. The attachment to this form said 'I find it hard to form new relationships with men due to my past and having trust issues and being raped by my ex-partner so I have been quite promiscuous in the past this is something that the respondent has picked fun at me in front of staff members ' The remainder of the form referred to the disability discrimination claim.

165. The dismissal took place on 4 March 2020. The first claim was presented on 3 July 2020. Amendment was allowed, if needed, to add the two respondents with effect from 3 July 2020. This claims regarding dismissal against both respondents were therefore in time.

166. There were also claims for disability discrimination in incidents prior to dismissal. We did not uphold any of these claims. It would an artificial exercise for us to consider time limit issues on these.

167. The last alleged sexual harassment comment was at the Christmas work event. We were not given a date for this, but we will take it as no later than

December 2019. The sexual harassment claim was therefore substantially out of time even in relation to the first claim form.

Issue 19: If any were out of time, did they form part of a continuing discriminatory state of affairs?
Issue 20: If not, is it just and equitable to allow them as late claims?

168. We did in fact listen to the claim about sexual harassment and make a decision. We will not go on to decide the time-limit issue regarding that claim, as it did not succeed. It would be an artificial exercise.

Employment Judge Lewis - 29th April 2022

Sent to the parties on:
30/04/2022

..OLU.....
For the Tribunals Office

LIST OF ISSUES

1st respondent – Kelly Marie Limited
2nd respondent – Miss Kelly McClymont

Was the claimant disabled and did the respondent(s) know?

1. At the dates of the alleged discrimination, was the claimant disabled under the legal definition? She says her disability was anxiety and depression and/or Post Traumatic Stress Disorder and/or Emotionally unstable personality disorder.

2. Did (1) the company and/or (2) Miss McClymont know at the time of those actions that the claimant was disabled?

3. If they did not know, ought they reasonably to have known?

Dismissal

4. Why did the respondents dismiss / make a decision to dismiss the claimant?

5. Was the reason that the claimant had a mental health disability? (Direct disability discrimination)

6. And/or was the reason that the claimant had not attended work on that particular occasion because of something arising from her disability, ie a mental health 'meltdown'? (Section 15 disability discrimination)

7. And/or was the reason that the claimant had not attended work on several occasions because of something arising from her disability, ie a mental health 'meltdown'? (Section 15 disability discrimination)

8. And/or was the reason that the claimant had not attended work on certain occasions because of childcare? (Indirect sex discrimination)[1]

9. If the answer to any of 6, 7 or 8 is yes, can the respondent(s) justify the dismissal decision by proving it was a proportionate means of achieving a legitimate aim?

Other disability discrimination

10. Did the respondent(s) treat the claimant in the following ways because she had a mental health disability (direct disability discrimination):

    a. Giving her a verbal warning on 22 January 2020

[1] This is subject to permission to amend

b. Failing to correct the position promptly with the authorities over her Universal Credit in February/March 2020
c. Giving her a verbal warning 19.2.20 over bringing a friend into the salon to do her colour
d. Generally insisting on texting rather than speaking by phone, and when speaking, doing so in a hostile manner.

11. And/or did the respondent(s) treat the claimant in those ways because she was absent on occasions because of her disability? (Section 15 disability discrimination)

12. If so, can the respondent(s) justify the actions by proving they were a proportionate means of achieving a legitimate aim?

Sexual harassment

13. Did Miss McClymont make little remarks to the effect that the claimant was promiscuous?

14. Was this unwanted conduct?

15. Did the comments relate to sex or were they of a sexual nature?

16. Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

17. If the conduct did not have that purpose, but did have that effect, was it reasonable to have that effect, taking into account the claimant's perception and other circumstances of the case?

Time-limits

18. Were the claims brought in time?

19. If any were out of time, did they form part of a continuing discriminatory state of affairs?

20. If not, is it just and equitable to allow them as late claims?