EMPLOYMENT TRIBUNALS

Claimant: **Mrs Stephanie Nelson**

Respondents: **(1) Hoggies Food Ltd (in voluntary liquidation)**
(2) Jane Chadwick

Heard at: **Sheffield** **On: 19-22 April 2022**

Before: **Employment Judge Maidment**
Members: **Ms M Cairns**
Mr M Brewer

Representation
Claimant: **In person**
First Respondent: **Did not attend**
Second Respondent: **Mr R McLean, Counsel**

JUDGMENT having been sent to the parties dated 26 April and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The claimant initially commenced proceedings against Hoggies Food Limited (the first respondent, but hereinafter in these reasons referred to simply as the respondent), Mrs Jane Chadwick (the second respondent, but hereinafter simply referred to by her name) and Mr Chris Brown as third respondent. References to the respondents in the plural encompass both the respondent and Mrs Chadwick. The respondent has subsequently entered into a voluntary creditors' liquidation and, whilst the claimant's complaints are not admitted by the liquidators, they have chosen to take no further part in the proceedings. The claimant has also subsequently withdrawn her claim against Mr Brown.

2. The claim has not had the benefit of a straightforward case management process, not least in circumstances where Mrs Chadwick failed to present a

response, but where an extension of time was ultimately granted in the interests of justice to allow her to do so.

3. The issues were definitively identified by Employment Judge Smith at a preliminary hearing he held on 30 September 2021.

4. The claimant complains of disability discrimination. Mrs Chadwick accepts that the claimant was at all material times a disabled person by reason of her suffering from epilepsy, anxiety and depression. No such admission has, however, been made by the respondent.

5. Firstly, the claimant complains of discrimination arising from disability relying on the unfavourable treatment of her dismissal. It is then said that her dismissal was because of her sickness absence and/or memory difficulties which resulted in her making minor mistakes, both of which are said to arise in consequence of her disabilities. In submissions, the claimant withdrew any complaint based upon her request for contractual breaks and her allegation that she had been treated unfavourably in the respondents declining to address the harassment to which she was allegedly subjected by Mr Brown.

6. The claimant then brings a complaint alleging a failure to make reasonable adjustments by the respondents. In that, she maintains that they applied the following PCPs:

    6.1. permitting/allowing unacceptable behaviour from managers towards staff members
    6.2. requiring employees to engage in conversation by way of telephone calls and/or face-to-face meetings (rather than by text and/or email)
    6.3. requiring grievances to be submitted to an employee's immediate line manager
    6.4. requiring employees to attend meetings without prior confirmation of the purpose of such meetings
    6.5. only allowing employees to be accompanied at meetings by colleagues
    6.6. requiring employees to complete their shifts without a full rest break
    6.7. confirming employee's shifts to them by way of a rota contained within the office

7. In terms then of substantial disadvantage, the claimant alleges the following:

    7.1. that she experienced stress related epileptic seizures and had been diagnosed with anxiety and depression, all of which were exacerbated by behaviour of the nature permitted by the respondents, who took no action, thus placing the claimant's health at risk of deterioration
    7.2. that the claimant found it difficult to communicate over the telephone due to difficulties with her memory and the panic that this caused and therefore needed to communicate in alternative formats which the respondent did not allow
    7.3. the claimant was told by Mrs Chadwick that her grievance would be addressed by Mr Brown despite the claimant informing Mrs Chadwick that she did not feel comfortable discussing a grievance with Mr Brown as her grievance was in respect of Mr Brown's behaviour and she had told Mrs Chadwick that his conduct towards her was exacerbating her disabilities

7.4. the claimant required advance notice of the purpose of any meetings as well as confirmation of what would be discussed in order to minimise her stress levels as far as possible, yet the respondent refused to provide the claimant with confirmation of the reason for any meetings meaning that the claimant felt unable to attend the meeting due to her anxiety and due to the risk that this would cause her to experience stress-related seizures, as she would not have time to prepare

7.5. the claimant suffers from anxiety and stress-related seizures and she therefore informed Mr Brown that she would prefer to attend a meeting with somebody of her choice, who would not be an employee of the respondent, to ensure that she had the support that she required by way of reasonable adjustment. However, the claimant was told by Mr Brown, applying the respondent's policies, that this would not be permitted and no reasonable adjustment was provided

7.6. the claimant required a rest break to be allocated to her during her shift to provide her with time to manage her anxiety and attempt to control the same, subsequently reducing the risk of a stress-related seizure, yet this was not permitted

7.7. the claimant's conditions caused her to experience difficulties with her memory and concentration, yet she was penalised and subjected to inappropriate conduct by the respondent's staff requesting confirmation of her shifts.

8. The claimant maintains that the following reasonable adjustments ought to have been implemented:

8.1. referring the claimant to occupational health for an assessment in order to assess how best she could have been supported within the workplace

8.2. putting provisions in place to ensure that the claimant was not placed under additional stress and pressure unnecessarily as a result of her job role and/or the conduct of her manager

8.3. providing the claimant with an uninterrupted rest break of at least 20 minutes when doing her shift without the necessity of the submission of a request

8.4. providing the claimant with written confirmation of her scheduled shifts

8.5. allowing the claimant to communicate by text message and/or email to avoid the requirement to communicate via a telephone call which she finds difficult due to her disabilities and the panic that this can cause

8.6. assigning someone other than Mr Brown to deal with the claimant's grievance

8.7. providing the claimant with prior notice of the purpose of any meetings that she would be required to attend

8.8. allowing the claimant to be accompanied by a friend/relative at any meetings that she would be required to attend

8.9. not taking her performance concerns/disability-related absences into consideration when making the decision to terminate her employment?

9. The claimant then brings complaints of victimisation. The first protected act was clarified in evidence as her raising concerns to Mrs Chadwick regarding Mr Brown's conduct, including notification that he was exacerbating her disability, verbally on 9 November 2020. Secondly, she relies on a formal grievance raised on 31 December in which she referred to "unprofessional and bullying

way that [she] and other staff have been treated". The third protected act is said to be her raising of a formal grievance with Mrs Chadwick on 2 and 8 January 2021, which made specific allegations that she had been discriminated against. It is not accepted that these amounted to protected acts.

10. The detriments the claimant maintains she suffered because of all or any of the protected acts were then as follows:

    10.1. having her hours of work reduced
    10.2. the respondent failing to offer training opportunities to the claimant when they were offered to her colleagues
    10.3. Mrs Chadwick acting for and on behalf of the respondent instructing and/or permitting Mr Brown to suspend the claimant from work (by informing her not to attend on 2 and 3 January 2021, without reason) and confirming the claimant's suspension to her
    10.4. her dismissal

11. The claimant brings an entirely separate complaint pursuant to Regulation 12(1) of the Working Time Regulations 1998 that the respondent failed to provide her with adequate daily (20 minute) rest breaks.

12. Finally, in the event that any relevant complaints are successful, the claimant seeks additional compensation arising out of the respondent's failure to provide her with a written statement of particulars of employment.

13. The question may arise of Mrs Chadwick's potential individual liability for any acts of discrimination. Prior to this final hearing, Mrs Chadwick's representatives had written to the tribunal asking that it deal with the question, essentially, of whether or not Mrs Chadwick was an employee or agent of the respondent so as ultimately to be potentially personally liable for any acts of discrimination as a preliminary issue. Detailed written submissions on such preliminary issue were presented to the tribunal at the commencement of this hearing together with copies of relevant authorities. The claimant provided the tribunal with her own written submissions on the issue of her status as an employee/agent. On consideration, the tribunal was of the view that in order to determine such issues it was necessary to hear evidence and make appropriate factual findings, in particular regarding Mrs Chadwick's involvement in the respondent business. In such circumstances and given the difficulty of separating out evidence relevant to status and the potential acts of discrimination, the tribunal considered it impractical and disproportionate to deal with the question of Mrs Chadwick's status as a preliminary issue. It would hear the evidence on all issues and determine all issues together.

Evidence

14. The tribunal had before it an agreed bundle of documents. After identifying the issues with the parties, the tribunal took time to privately read into the witness statements exchanged between the parties and relevant documentation. The tribunal heard firstly then from the claimant. On behalf of Mrs Chadwick, the tribunal then heard her own evidence followed by that of Mr Peter Chadwick, her husband and former director of the respondent and Ms Cheryl Cook, who had been employed as a counter assistant at the same time as the claimant.

15. Having considered all relevant evidence, the tribunal makes the findings of fact set out below.

Facts

16. The claimant commenced employment with the respondent on 28 September 2020 as a catering assistant in its takeaway sandwich bar. Mr Chris Brown had been recruited as head chef to manage the respondent business and the claimant reported to him on a day to day basis.

17. The respondent business was a limited company with its sole director being Mr Peter Chadwick. The shareholding was split equally between him and his wife, Jane Chadwick. Mrs Chadwick told the tribunal that she was unaware of her own shareholding until after these tribunal proceedings had been commenced. She has never been employed by the respondent nor received any remuneration from it or arising out of her shareholding.

18. Mr Peter Chadwick ran a separate business known as Cool Cube Logistics Limited which has been described as his full-time occupation. He worked in adjacent premises to the location of the respondent's business, whose premises were owned by Cool Cube Logistics Limited. However, certainly by September 2020, Mr Chadwick had become involved in a separate building project away from the site. Mrs Chadwick told the tribunal that whilst he had been previously able to keep an eye on the respondent given his physical proximity to it, this was now less easily achieved and he asked her to do the same on his behalf. Thereafter she attended the respondent's premises regularly, around 3 times each week spending typically around 2 hours on site each visit, albeit a significant part of that time would be spent chatting to the staff.

19. The claimant had been diagnosed with severe depression and anxiety in 1988 and 1989 and with epilepsy in December 1995. She regularly takes medication for her epilepsy, lamotrigine, which helps to control her seizures. However, she also suffers from stress related epileptic seizures which can only be prevented by reducing stress. The claimant's depression and anxiety can cause her energy levels to vary and she often suffers from panic attacks or adrenaline rushes in stressful situations. This in turn can lead to confusion, lack of concentration, difficulty memorising information and a potential increase in the number of epileptic seizures she experiences. To manage her mental health impairments, has taken trazodone on a daily basis.

20. The claimant applied for her employment position with the respondent through a job website called "Indeed". She was then telephoned by Karen Vickers, employed by the respondent on a casual basis from time to time. Ms Vickers asked a number of brief questions as to whether the claimant had prior experience in catering.

21. Mrs Chadwick maintains that that was the extent of the claimant's job interview and that she then attended work for a trial shift. The claimant maintains that Ms Vickers in fact told her that the next stage would be for her to be interviewed by Mrs Chadwick. The tribunal has seen a text from Ms Vickers to the claimant asking her to attend the respondent's premises at 10am on the following Monday which she duly did.

22. Mrs Chadwick in her witness statement gave no evidence as to what occurred when the claimant attended the workplace. The claimant in contrast gave a detailed and convincing account that she was in fact met there by Mrs Chadwick who proceeded to ask her, albeit relatively briefly, for more details of her prior experience. She told the tribunal that Mrs Chadwick described herself as the wife of the owner saying that the business was "her husband's little baby". The tribunal accepts that at this meeting the claimant was offered employment by Mrs Chadwick. Mrs Chadwick explained that her manager would be Chris Brown who she described as being "a bit of a handful" but that "his bark is worse than his bite". This caused the claimant concern regarding how that type of behaviour might increase her stress levels and impact on her aforementioned impairments. She therefore told Mrs Chadwick that such behaviour could have a detrimental impact on her health. She told Mrs Chadwick about her suffering from epilepsy, stress-related seizures, anxiety and depression disclosing also personal information regarding a history of domestic violence which had caused her to leave and then only recently return to Rotherham where she was attempting to move forwards with her life. Mrs Chadwick said that she was confident the claimant would be the best candidate for the role and said that she would explain to Mr Brown the risks to the claimant's health. She also said that if the claimant ever had any problems with Mr Brown, she was to go to Mrs Chadwick. It was discussed that the claimant would work between 16 – 20 hours per week with her shifts normally being between 8am to 3pm. The claimant never received a written statement of particulars of employment.

23. The tribunal accepts the claimant's account and rejects Mrs Chadwick's evidence that the conversation never occurred at all. Mrs Chadwick was a wholly unconvincing witness, whose evidence was deliberately vague. The main thrust of her evidence was that she knew nothing much about the business and what went on in it, with the context being that she wished the tribunal to accept that she had no decision-making involvement as regards the claimant's employment. Her evidence became more and more untenable in circumstances where she was referred by the claimant to various documents, often text messages, where she clearly had had involvement in, for example, giving the claimant instructions regarding not needing to wear a uniform when she was coming in to clean, agreeing changes in shifts and allowing staff time off, her making a decision that the respondent would not open, her having full day-to-day knowledge of what the shop was selling and answering customer queries, shopping on behalf of the shop, referring to the office there as hers, knowing how long a staff meeting was likely to last, seeking out information regarding epilepsy and ordering a first aid kit (in October 2020, due to the claimant's epilepsy), telling the claimant that she would be paid for 2 shifts she was not required to work, referring to herself as doing the wages where, whilst the physical task was done by staff within Cool Cube Logistics, she was accepting responsibility and writing to the claimant confirming her dismissal.

24. The claimant worked a taster shift either immediately after the interview or on the following day, 29 September. Her recollection was unclear on the point, but the discrepancy is not material, there being no dispute that the claimant continued thereafter working as a catering assistant for the respondent.

25. The tribunal has not heard any evidence from Mr Brown, but Mrs Chadwick clearly did not dispute that he was a volatile character. Ms Cook, giving evidence on behalf of the respondent, was clear that he behaved inappropriately. The claimant's account of his behaviour is accepted. She described most of the staff members as feeling that they were "walking on egg shells" in his presence. She described that he would often shout and swear at her in an angry manner saying for example "it's not fucking hard" when she went to him with a query. He would shout instructions and swear habitually. She described staff members as not taking breaks during the shift as they were neither scheduled nor offered. The claimant had to approach Mr Brown to ask for breaks and he would expect them to be brief and acted as if the claimant was a burden on the business. During the coronavirus pandemic, customers were not permitted to enter the restaurant and the claimant took orders at the door. In mid-October she purchased a notepad to assist her remembering those orders which resulted in Mr Brown making comments that she did not need a pad to write a simple thing down, saying: "you don't need a fucking pad to remember a fucking sandwich". This caused the claimant to feel uncomfortable and to tell Mr Brown that she experienced issues with her memory due to her disability and that she had found that the notepad helped. Nevertheless, Mr Brown continued with comments of the type described until several of the claimant's colleagues also said that a notepad might benefit them, following which Mrs Chadwick purchased notepads for all staff.

26. The claimant raised the cold temperature she was required to work in and that it was causing her discomfort.

27. The claimant was absent due to sickness on 28 and 29 October. She informed Mrs Chadwick by text that she would be absent due to an upset stomach. The claimant told the tribunal that this was a symptom arising from stress which was exacerbated her disabilities (she referred to herself as suffering from IBS), albeit she did not disclose this to Mrs Chadwick at the time. She told the tribunal she always texted Mrs Chadwick if she had a query regarding work or needed to inform the respondent of something. Mrs Chadwick did not tell her to desist.

28. Following the claimant's return to work, Mr Brown's behaviour did not change. On 7 November he shouted at her stating: "I don't want it fucking doing like that, I want it fucking doing my way" which exacerbated her feelings of anxiety. On 9 November she told Mrs Chadwick about her concerns relating to Mr Brown's behaviour. She was not, she said, the only member of staff who raised such concerns regarding Mr Brown. She told Mrs Chadwick that she felt that she was losing her confidence and that the environment in the workplace was impacting on her health making her feel extremely nervous and frightened. She said that Mrs Chadwick did not take her concerns seriously referring to Mr Brown being "at it again" and saying that she would have words with him. The tribunal accepts that this is what occurred. Whilst her witness statement suggested no knowledge of Mr Brown's behaviour, Mrs Chadwick told the tribunal that he did shout and swear.

29. After she had spoken to Mr Chadwick, the claimant felt that Mr Brown's behaviour towards her worsened. She noticed that as soon as she arrived at work he would begin to shout and swear at her and would criticise her work in an angry and confrontational manner causing her to feel extremely anxious and

panicked. She also believed that Mrs Chadwick would not speak with her in the same way as she did with other colleagues leaving her feeling ignored whilst Mrs Chadwick was in attendance at the shop.

30. The claimant described Mr Brown's behaviour being particularly poor towards her on 18 December and this being witnessed by Mrs Chadwick who did not intervene. The claimant, however, gave no details. Mrs Chadwick said she witnessed nothing, which is unlikely given the evidence of Mr Brown's behaviour and the amount of time Mrs Chadwick spent at the shop. After this shift, the claimant felt extremely unwell and woke up the following morning feeling the continuation of a migraine which is a trigger of her seizures. She therefore took the day off work and informed Mr Brown by way of text on 19 December referring to the risk of migraines triggering a seizure. Mr Brown asked her to confirm whether she would be fit to work the following day, but, before she got back to him, sent another message saying that he had covered her next shift and she would not be required to attend work that day. The claimant told Mr Brown that she was feeling better, but received no response until very early the next morning saying that she could attend work. The claimant received this too late to be able to get into work which caused her to experience additional stress.

31. On 23 December Mr Brown shouted and swore at the claimant regarding her wearing an alternative facemask to the visor which was by then being provided by the respondent. The claimant was significantly affected by his outburst and started to become forgetful and made some mistakes by that day.

32. On 31 December the claimant sent a text to Mrs Chadwick asking when she would receive a contract of employment. On the same day she also messaged Mr Brown querying the start time of her future shifts which she had forgotten. She learned that she had only been scheduled for 2 shifts the following week as opposed to her usual 3 shifts and queried this again in a text to Mr Brown. Mr Brown responded saying that her hours had been reduced to accommodate a new supervisory role and that some staff would be allocated 2 shifts one week and 3 shifts the next so that he could keep all of the staff in jobs. Mr Brown also stated that she should be checking the rota herself instead of messaging him. She responded saying that she was experiencing issues with her memory and that sometimes she would forget things if they were not written down. She also asked Mr Brown whether she would receive a written contract confirming her hours. She was concerned that her hours had been reduced. Mr Brown responded ignoring the issue regarding the contract, but saying that the rota was simple and it was her responsibility to check it.

33. This caused the claimant to send a text to Mrs Chadwick that day complaining of the "unprofessional and bullying way that [me] and other staff have been treated." She asked that this message be treated as her formal grievance. Mr Brown subsequently contacted the claimant by telephone, in what she described as a confrontational manner, saying that he did not want her to attend work for the next 2 allocated shifts as he was not due to be at work those days and didn't want the claimant to be "tickle tackling" with the staff in his absence.

34. On 1 January 2021 the claimant texted Mrs Chadwick asking for her email address and explaining what she had been told by Mr Brown and that she was

confused as to why she had been told not to attend work on 2 and 3 January. She asked whether she would be paid for the shifts. Mrs Chadwick responded to say that she would. She also stated that she had passed the claimant's message to Mr Brown as he was in charge and would give her a call. The claimant responded saying that she did not feel comfortable discussing a grievance with Mr Brown which was in respect of his own behaviour. The claimant said that the situation was having a detrimental effect on her health. Mrs Chadwick responded that the claimant should ask Mr Brown for his email and send him the full details as he was the manager.

35. On 2 January 2021, the claimant left in the office on the respondent's premises a letter of grievance focusing on Mr Brown's behaviour towards her. She said that she felt that she was being made to feel like she was stupid and incompetent "clearly knowing of my protected characteristics, you know that I am affected by certain triggers that can have a detrimental effect on my health in fact both of you yet you clearly choose to ignore it or penalised me for it." She concluded that she would not tolerate "this discriminative behaviour".

36. On 4 January the claimant received a voicemail message from Mr Brown asking that she attend work for a meeting the following Monday, 11 January. The claimant texted him querying the nature of the meeting and again requesting a copy of her employment contract. Mr Brown replied that the claimant was still currently on a trial basis and not under any contract. The claimant texted Mr Brown saying that she would rather not speak over the phone due to anxiety of her concerns not being heard. She said that she been informed by ACAS that she should have received a contract of employment. Mr Brown texted the claimant on 6 January saying that he was not willing to continue correspondence by text. He said that if he did not hear from the claimant by telephone by 8 January he would assume that she had resigned. The claimant responded on 7 January saying that she did not wish to resign and would agree to attend a meeting if she had it in writing what the meeting was to be about. Mr Brown responded saying that he did not wish to cause the claimant additional stress and she should contact him when she was well. He also said that he would expect a doctor's note from the start date of her sickness absence.

37. On 8 January, having now received Mrs Chadwick's email address, the claimant provided a further letter of grievance to her referring in some detail to aspects of her treatment which she considered to amount to disability discrimination. She set out a list of adjustments she said that the respondent failed to make for her. She also said that the treatment she had received had caused an increase in her depression and anxiety medication. Having tried to speak to Mrs Chadwick by telephone on 13 January she did then telephone Mr Brown on that date. Wanting to have a clear record of the discussion she decided to record it.

38. The claimant explained that she was not feeling great. She elaborated that this was "really bad depression, really bad anxiety". Mr Brown said that he had had a meeting with Mrs Chadwick and they were going to have another discussion. He said that the claimant was welcome to have another member of staff with her. The claimant on her request was then told that it couldn't be anyone outside of work. The claimant explained that it was more for health reasons,

saying that she was concerned that if she went into a state of panic, she might have a seizure. Mr Brown said he understood.

39. The claimant said that she wanted to know if she was facing a disciplinary or otherwise what the purpose of the meeting might be. She said that it had not been clarified why she wasn't able to do her 2 earlier shifts. Mr Brown responded that it was a continuation of him and Mrs Chadwick being bombarded with text messages "… that we're getting rather out of hand to be fair, the comments you were making… We've got them all on…" He went on that this is what the meeting was about. Mr Brown referred to matters having "got ridiculously out of hand, you just going on about and just sending me all these texts, then you got on to Jane about this stuff…" He said that the claimant hadn't given them a chance to explain "where her position might lie" because she wouldn't talk to them. He referred to himself stepping back in the business and then employing a new supervisor. He referred to having to reduce staff hours and there weren't the hours there. He said: "the decision was made between myself and Jane prior to Christmas but that "we" didn't have time over Christmas. He referred to the claimant having been left out of the loop because she had not wanted to talk to them. Mr Brown stated: "Steph, at the end of the day, we're unable to offer you a position that's where we are, we haven't got the hours, I can't give you 16 hours a week and we can't give you a contract and that's as simple as it is, it's not a nice thing to say unfortunately the way the business is going forward we are reducing staff, we have reduced hours, and that's where we are." The claimant queried whether she was being told that she didn't have a job anymore Mr Brown stated that the decision had been taken that "we won't be offering you the hours or the position, and unfortunately we don't have the hours, so unfortunately because we've had to reduce hours again with the new Covid that come in …" The claimant then referred to her having been employed longer than other members of staff.

40. The conversation continued with Mr Brown referring again to the claimant's "constant texting which is unacceptable". The claimant again raised that people who had started after her had kept their job, but she had lost hers. Mr Brown responded: "it's not about that Steph, it's also about your attendance and performance as well so you know." The claimant said that her attendance had only been poor because of how he had been treating her.

41. The accuracy of the transcript the claimant made for her recording of this conversation is not disputed. Mrs Chadwick told the tribunal that she had had no discussions with Mr Brown or could not recollect any and did not understand that a decision had been made to terminate the claimant's employment. In the face of the clear transcript, there being no discernible reason why Mr Brown would misrepresent the situation and Mrs Chadwick's lack of decisiveness and credibility as a witness generally, her evidence is not accepted.

42. On 14 January the claimant messaged Mrs Chadwick asking to have her decision in writing. Mrs Chadwick's evidence to the tribunal was that she was provided with a form of words from Mr Brown. She did nevertheless incorporate those words within a letter from herself to the claimant which she signed. She stated: "Further to your discussion on Wednesday 13 January with Chris. After addressing the topics that you brought forward as well as taking into consideration the upcoming rota restructure and reduced hours at Hoggies, due

to the new regulations with the Covid 19 pandemic I am writing to confirm our mutual decision to end your employment with Hoggies Foods Limited." She thanked the claimant for her service. In evidence, Mrs Chadwick was unable to explain what these words meant and why/how she understood that employment had ended. The claimant cross-examined her regarding this being a mutual decision of herself and Mr Brown. She denied that she had had anything to do with the decision-making. It having been raised by Mr McLean on behalf of Mrs Chadwick that the natural meaning of the phrase "mutual" was that the claimant had agreed with Mr Brown to end her employment, Mrs Chadwick said that she understood that the claimant had herself decided that employment should end.

43. Such assertion was wholly unconvincing. The tribunal cannot accept that the claimant agreed to the ending of her employment. There is no indication that this is what she was seeking and the transcript is conclusive of her being told that she was being dismissed.

44. It is noted that Mr Brown left the business around January - March 2021. Around May/June 2021 the respondent went into liquidation. A new company was formed of which Mrs Chadwick is the sole director. That company purchased the assets and name of the respondent. Mrs Chadwick told the tribunal that the business continues to trade as before through this new company. When asked about her own involvement in the new company, she said that it was much the same as her involvement had been with the respondent during the period of the claimant's employment. When Mr Chadwick gave evidence, he was directed to the insolvency practitioner's statement of affairs which indicated that except for a very nominal amount owed to HMRC and the claimant's tribunal complaint, the respondent had no creditors beyond Cool Cube Logistics Limited. When asked why the company had been put into liquidation, he could not provide any cogent response. He referred to the business as not making any money, but that Jane Chadwick had decided to then give it a further go. He did not explain why that necessitated the formation of a new company or why she would want to continue a business which was not viable. The tribunal cannot avoid the conclusion on the balance of probabilities that the liquidation was to seek to avoid any liability arising from the claimant's tribunal complaint.

45. Mr Wilson was as vague in his evidence as his wife. He could not tell the tribunal anything about his wife's day-to-day activities within the business after he had asked her to keep an eye on it. He did not accept, however, that she was authorised to undertake any management responsibilities saying that she was not capable of taking on those responsibilities. He did then confirm to the tribunal that his wife would tell him what she had been doing within the business on a night which included telling him about her going shopping for sandwich ingredients. He said that he knew nothing about the claimant's dismissal in advance of it and thereafter simply understood that it had been all amicable. He said he did not know about any issues such as those arising in this tribunal complaint. He said he was completely unaware of the grievances his wife had received. His evidence is simply not credible. If he knew about his wife going shopping for the business, he would have been told about the grievances the claimant had raised – Mrs Chadwick was being "bombarded" according to Mr Brown.

Applicable law

46. In the Equality Act 2010, discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) 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 treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability"*

47. As with all the claims of discrimination, the tribunal bears in mind the burden of proof provisions at Section 136(2) as follows:-

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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".*

48. The Equality Act makes employees and agents personally liable for acts of discrimination where they do something which is treated as having been done by their employer in contravention of the Act. Pursuant to Section 109 employees are personally liable for their acts of discrimination in the course of their employment and agents for acts authorised by their principals.

49. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions and the first stage of showing facts from which an inference of discrimination could reasonably be made. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear, however, that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence as to the employer's reason (otherwise the second stage, where the burden has shifted to the employer) one way or the other.

50. The tribunal must determine whether the reason for any unfavourable treatment was something arising in consequence of the claimant's disability – this involves an objective question in respect of whether "the something" arises from the disability which is not dependent on the thought processes of the alleged discriminator. Lack of knowledge that a known disability caused the

"something" in response to which the employer subjected the employee to unfavourable treatment provides the employer with no defence – see **City of York Council v Grosset 2018 ICR 1492 CA**.

51. Any unfavourable treatment must be shown by the claimant to be as a result of something arising in consequence of the claimant's disability, not the claimant's disability itself. The EHRC Code at paragraph 5.9 states that the consequences of a disability "include anything which is the result, effect or outcome of a disabled person's disability". It has been held that tribunals might enquire as to causation as a two-stage process, albeit in either order. The first is that the disability had the consequence of "something". The second is that the claimant was treated unfavourably because of that "something". In **Pnaiser v NHS England 2016 IRLR 170 EAT** it was said that the tribunal should focus on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought process of that person, but keep in mind that the actual motive in acting as the discriminator did is irrelevant.

52. Disability needs only be an effective cause of unfavourable treatment - see **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893**. The claimant need only establish some kind of connection between his or her disability and the unfavourable treatment. In that case sickness absence was as a result of stress and a heart condition. A tribunal had held that the cause of the unfavourable treatment was the police force's genuine but erroneous belief that the claimant was falsely claiming to be sick. The EAT considered nevertheless that disability had a significant influence on or was an effective cause of the unfavourable treatment. On the other hand, any connection that is not an operative causal influence on the mind of the discriminator will not be sufficient to satisfy the test of causation. If an employee's disability-related absence, for instance, merely provided the circumstances in which the employer identified a genuine non-discriminatory reason for dismissal, then the requisite causative link between the unfavourable treatment and the disability would be lacking. The authorities are clear that a claimant can succeed even where there is more than one reason for the unfavourable treatment. As per Simler J in the Pnaiser case: "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 or cause for it".

53. The duty to make reasonable adjustments arises under Section 20 of the 2010 Act which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

54. The Tribunal must identify the provision, criterion or practice applied, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the Claimant. 'Substantial' in this context means more than minor or trivial. In **Ishola v Transport for London EWCA Civ 112, CA** it was said that as a matter of ordinary language, it was difficult to see what the word "practice" added if all one-off decisions and acts necessarily qualified as PCPs. To test whether the PCP is discriminatory or not it must be capable of being applied to others. However widely and purposively the concept of the PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case will be treated if it occurred again.

55. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

56. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which, as well as the employer's size and resources, will include the extent to which taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

57. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the respondent to have to take in order to prevent the PCP creating the substantial disadvantage for the claimant. This is an objective test where the tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

58. Pursuant to section 27 of the Equality Act 2010:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *B does a protected act; ….*
>
> Sub-paragraph (2) of this section provides:
>
> *(2) Each of the following is a protected act –*
>
> *…. (c) doing any other thing for the purposes of or in connection with this Act*
> *(d) making an allegation (whether or not express) that A or*

another person has contravened this Act

59. To succeed in a complaint of victimisation, the detriment must be "because" of the protected act.

60. In the case of **Chief Constable of West Yorkshire Police –v- Khan [2001] 1 WLR** Lord Nicholls put forward that the "by reason that" element *"does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in* ***Nagarajan –v- London Regional Transport****, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases "on racial grounds" and "by reason that" denote a different exercise: Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

61. It is clear from the authorities that a person claiming victimisation need not show that the detrimental treatment was meted out solely by reason of the protected act. If protected acts have a "significant influence" on the employer's decision making, discrimination would be made out. It is further clear from authorities, including that of **Igen**, that for an influence to be "significant" it does not have to be of great importance. A significant influence is rather *"an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial."*

62. On the question of agency, the tribunal has given consideration in particular to the extracts from Bowstead and Reynolds on Agency referred to by Mr McLean and to the report of the Court of Appeal's judgment in **Ministry of Defence** -v- **Kemeh [2014] EWCA Civ 91**. Paragraph 2-001 of Bowstead and Reynolds refers to an agency relationship being constituted by the conferring of authority by the principal on the agent, which may be express or implied from the conduct or situation of the parties and may or may not involve a contract between them.

63. Taking as a starting point a comment within the judgment of Elias LJ in **Kemeh** (paragraph 46), the agency concept in the provision being considered in **Kemeh** (the Race Relations Act 1976), but equally it appears in the Equality Act, "must at least reflect the essence of the legal concept".

64. The tribunal takes this to mean that the strict ingredients necessary to find the existence of agency in a commercial context do not necessarily need to be present when considering liability for the statutory tort of discrimination. Moreover, the position at common law set out by the authors of Bowstead and

Reynolds indicates a certain fluidity in what will be required to establish an agency relationship in any context.

65. Returning to what was said in **Kemeh**, Elias LJ notes that the concept of agency at common law is not one which can be readily encapsulated in a simple definition. He goes on to note that the authors of Bowstead and Reynolds recognise that someone might quite properly be described as an agent even if the feature of having power to affect the principal's legal relations with third parties is missing. That feature is described by the Court of Appeal as not being an essential element in a common law definition of agency (see paragraph 38 of the report). It is noted however that the agent must be acting on behalf of the principal with that principal's authority.

66. Even then, according to Bowstead and Reynolds, there may be a subsequent ratification by the principal of acts done on the principal's behalf and a person may act with apparent authority in circumstances where the principal is estopped from denying the existence of an agency relationship.

67. Applying the legal principles to the facts as found, the tribunal reaches the conclusions set out below.

Conclusions

68. Mrs Chadwick accepts that the claimant was at all material times a disabled person by reason of her suffering from epilepsy, anxiety and depression. No such admission is made by the respondent, but the tribunal accepts on the claimant's evidence that she had indeed been diagnosed with these conditions and that they had a substantial and long-term effect on her ability to carry out normal day-to-day activities, as described above. The claimant habitually took medication in respect of all of her conditions and the tribunal accepts that, but for this medication, the effects on her of the conditions would have been yet more severe.

69. The tribunal notes that Mrs Chadwick accepts that she had knowledge of the claimant suffering from epilepsy in October 2020 and of her anxiety and depression from receipt of the claimant's grievance of 2 January 2021. The tribunal's findings are that she in fact had such knowledge throughout the claimant's employment and from the claimant's statements to her at their first meeting on 28 September 2020.

70. Turning to the question of Mrs Chadwick's potential liability, the tribunal can not conclude on the evidence that Mrs Chadwick was at any point an employee of the respondent. Liability depends on whether or not she was the respondent's agent.

71. In submissions, Mr McLean raised a point, which was contained in his written submissions on the potential preliminary issues presented at the outset of the hearing, that the claimant had in her pleaded case been unclear as to the basis upon which she was asserting that Mrs Chadwick was potentially liable. It was

suggested that in a situation where the claimant was aware of the insolvency of her employer, she was attempting to attach liability elsewhere. It is noted nevertheless by the tribunal that Mrs Chadwick has been a named respondent in these proceedings from the outset. Mr McLean refers to the claimant having been required during the case management process to address within her witness statement the basis upon which each individual respondent was pursued. No further evidence he said should be allowed to be heard on this point. He noted that the claimant had stated that she believed that Mrs Chadwick was employed by the respondent.

72. The claimant had indeed addressed in her witness statement the issue of Mrs Chadwick's involvement with the respondent setting out which facts she maintained showed that such involvement was significant. She then put forward, on the basis of those purported facts, her opinion that Mrs Chadwick was an employee "or at the very least an agent" of the respondent at all material times. It seemed to be being suggested by Mr McLean that a lack of clear particularisation of her case was a material consideration in preventing the tribunal from concluding an agency relationship. However, the tribunal notes that there has been from the outset a clear dispute by Mrs Chadwick that there is any basis for her being named as an individual respondent in these proceedings. It is then clear from the written submissions prepared in advance of this hearing and the application that the issue be dealt with as a preliminary one, that those representing Mrs Chadwick were well aware of the two potential routes towards personal liability in this case, i.e. Mrs Chadwick possessing the status of an employee or agent. The tribunal has been addressed in detail with reference to the legal authorities on the definition of an agent and its lack of applicability in Mrs Chadwick's case. Mrs Chadwick has come to this hearing knowing that one of the live issues she needed to address was of her personal liability in circumstances where she was clearly aware of the claimant's position, not least as expressly stated in her witness statement. In no sense can the tribunal said to be estopped from considering the issue of her personal liability or any arguments advanced by the claimant in this regard. Nor is the lack of any alleged earlier particularisation of the claimant's position material in the determinations which the tribunal can and must make.

73. On the facts of this case, as found, the tribunal concludes that at all material times Mrs Chadwick acted as the respondent's agent. She had the express authority of the respondent, derived from its sole director, Mr Chadwick, to act on the respondent's behalf in keeping an eye on the business. Of course, she was already a 50% shareholder in it. Mrs Chadwick's conduct is illustrative of the authority given. The tribunal was referred to a number of examples of her involvement with the respondent and would note in particular Mrs Chadwick entering into a contract of employment made between the respondent and the claimant, agreeing to pay the claimant 2 days wages for shifts she was not required to work and writing to the claimant confirming the termination of her employment. In addition she referred to 'her' office within the respondent's premises, gave instructions regarding the requirement not to wear a uniform, authorised changed shifts and times off, described a personal decision not to open the respondent's shop and answered queries regarding the respondent's services. She knew how long a staff meeting was likely to last, indicating that

she was more than a mere attendee and was proactive in acquiring goods for the respondent including the aforementioned epilepsy information and safety kit. Then, albeit it is recognised post termination of the claimant's employment employment, there is corroborating conduct in replying to the claimant's subject access request on the respondent's headed notepaper. The overall context then includes her becoming the sole director of a successor company to the respondent operating the same business in circumstances where Mr Peter Chadwick described the claimant as thinking she could make a go of the business and wanting to do so. Mrs Chadwick described what she was doing in the new company as the same as what she had been doing in the respondent business. The attempted portrayal of the claimant as a passive or casual visitor does not represent the reality of the situation. Mr and Mrs Chadwick's evidence deliberately sought to diminish her involvement in the context then of a willingness to liquidate the respondent in order to avoid liability for the claimant's complaints.

74. Certainly, Mrs Chadwick told her husband of everything she had done within the business and there is no indication of him considering that she had overstepped her remit. He certainly by his acquiescence ratified her actions. The tribunal did not believe his protestations that he knew nothing about the claimant's grievances and how it was proposed that the respondent deal with the claimant's employment.

75. In the alternative, Mrs Chadwick certainly had ostensible authority and was allowed to be held out by the respondent as a person who could make decisions and who indeed stood above the shop manager Mr Brown, being a person who could be spoken to in an attempt to resolve issues unresolvable with Mr Brown.

76. The claimant maintains that her dismissal was an act of unfavourable treatment because of something arising in consequence of her disability. The tribunal concludes that the claimant was dismissed. In no sense whatsoever did the claimant reach a mutual agreement with Mr Brown or anyone else that her employment would end. It is clear from the transcript of her conversation with Mr Brown on 13 January 2021 that this was an express dismissal which the claimant indeed objected to.

77. In terms of the respondent's liability, it is certainly liable for the actions of Mr Brown as the shop manager. The tribunal has from the transcript a clear statement from him that at least part of the reason for the claimant's termination was her sickness absence and performance. The claimant had effectively two periods of sickness absence. The first related to a stomach upset which was in turn related to her suffering from irritable bowel syndrome. That is not a disability relied on in these proceedings and, whilst there may be a complex linkage and overlap between the effects of the claimant's various impairments, the tribunal does not have evidence before it which would enable it to conclude that this first absence arose in consequence of her anxiety, depression and or epilepsy. Her second absence, however, followed abusive treatment she had received from Mr Brown where the resulting stress and migraines impacted

upon her by reason of her epilepsy, there being a risk of seizures which rendered her unable to attend work. Certainly, that second absence arose in consequence of her disability. The tribunal was also satisfied that any performance issues referred to by Mr Brown related to his perception that she could be forgetful and make mistakes – the claimant accepts that she did. The tribunal accepts the evidence that her requiring a notepad arose out of her memory difficulties and her admitted mistakes arose out of Mr Brown's behaviour which caused her additional stress and exacerbated her anxiety. The claimant's dismissal by Mr Brown and therefore the respondent in such circumstances amounts to unlawful discrimination arising from disability. No attempt has or could be made to say that the respondent was, in dismissing the claimant, acting proportionately in pursuit of a legitimate aim.

78. The tribunal also concludes that Mrs Chadwick was a decision-maker in the claimant's dismissal. It is clear from the transcript that she and Mr Brown had discussed the claimant's continued employment and had determined that they would meet with her to inform her of its termination. Mr Brown may have delivered the message and did so, as the claimant herself put it, in the heat of the moment but it was a message which had already been agreed would be given by both Mr Brown and Mrs Chadwick acting again as agent of the respondent. The tribunal recognises that in the context of a complaint of discrimination it must look into her mind to ascertain her reason for the claimant's dismissal. Given what was said by Mr Brown on 13 January 2021 and the tribunal's rejection of Mrs Chadwick's assertion of knowledge only of an agreed parting of the ways, the burden certainly shifts to require her to provide an explanation that the reason for the dismissal was in no sense whatsoever because of something arising from the claimant's disabilities. Mrs Chadwick was not capable of providing any cogent explanation. Her belief that this was a mutual parting of the ways is not accepted, was not credible, nor can the tribunal accept that she was seeking to convey that meaning in the letter she put her name to confirming the reasons for the claimant's termination. She could not tell the tribunal what that letter was seeking to convey. In the absence of such explanation, the tribunal must conclude that Mr Brown's expressions of frustration with the claimant were reflective of her own or shared by her and that she also had decided to terminate the claimant's employment because of the somethings arising from her disability. As with Mr Brown, her actions make the respondent liable for unlawful discrimination but also render her personally liable.

79. It is noted that the claimant is no longer relying on her request for contractual breaks as arising in consequence of her disability and is not pursuing the separate complaint of detrimental treatment in declining to address the harassment she was subjected to by Mr Brown.

80. The tribunal then considers the separate complaints of victimisation. The first protected act relied upon is the raising of concerns with Mrs Chadwick regarding Mr Brown's conduct on 9 November 2020. The tribunal on balance does not consider the claimant's comments on that day to encapsulate an allegation of discrimination or anything done with reference to the Equality Act.

She is complaining of Mr Brown's behaviour, but not as an act of discrimination. The complaint is that the behaviour is causing her to be ill. That is the stated consequence of the treatment only. The claimant does not for instance go on to say that this is in circumstances where the respondent has failed to, for instance, make any accommodation for her by reason of her disabling impairments to protect her from this type of behaviour. Similarly, the tribunal cannot conclude that the claimant's grievance sent by text on 31 December was a protected act. The complaint is of unprofessional and bullying treatment of her and other members of staff. There is no suggestion that the treatment complained of was discriminatory. Indeed, the reference to other staff would suggest the opposite. The tribunal does however conclude, as is not denied on behalf of Mrs Chadwick, that the claimant's grievances of 2 and 8 January were protected acts in that specific reference is made to the claimant's disability, to protected characteristics and to her being discriminated against.

81. Turning to the complaints of detriment, the claim in respect of her hours being reduced must fail in that this decision and the removal of some shifts predated the claimant's protected acts as found. The claimant complains of the respondent failing to offer her training opportunities which were offered to other colleagues. There is, however, no evidence to support this allegation. Indeed, on the evidence, the claimant was keen during her employment to remain away from Mr Brown and any training opportunities would have involved working closely with him in the kitchen. There is, in any event, no specific reference to any particular training opportunity or when that might have arisen. It is unlikely to have post-dated the 2 and 8 January 2021 grievances.

82. The complaints regarding the claimant being suspended in the sense of being told not to attend on 2 and 3 January again pre-dated the protected acts.

83. This then leaves the claimant's dismissal. This certainly came shortly after the claimant had raised the 2 grievances which do amount to protected acts and only 5 days after the second grievance which was clearly written with legal advice and made extensive references to the respondent being in breach of the equality legislation. The respondent failed to address these grievances. The evidence is that it was not going to. The meeting which Mr Brown was seeking to arrange with the claimant was, on balance, to terminate her employment not to answer her grievances. Furthermore, whilst the aforementioned would be sufficient to shift the burden of proof to require the respondent and Mrs Chadwick to provide a non-discriminatory explanation, Mr Brown certainly refers to him and Mrs Chadwick being bombarded with texts and shows displeasure at issues being raised including through Mrs Chadwick. The tribunal, in the circumstances, can only conclude that his decision to terminate the claimant's employment was by reason of the 2 and 8 January grievances – it was a material influence.

84. As regards Mrs Chadwick, again there is a burden upon her to provide an explanation for the decision which the tribunal has found she was part of to terminate the claimant's employment. She has again completely failed to do so.

The tribunal can on the evidence conclude that she was significantly influenced by the claimant's grievances which she was clearly struggling to address. The claimant's dismissal was an act of unlawful victimisation for which the respondent and Mrs Chadwick are both responsible.

85. The tribunal next deals with the complaints alleging a failure to make reasonable adjustments. Whilst it seems strange to state, the evidence is supportive of the respondent adopting a practice of permitting unacceptable behaviour from managers to all staff members. Mrs Chadwick effectively confirmed that practice with the claimant on their first meeting. The tribunal has seen ample evidence of this being the practice then continued throughout the claimant's employment, including from Ms Cook. Mr Brown's behaviour did then put the claimant at a particular disadvantage when compared to a non-disabled person in that her anxiety and depression were likely to be triggered and exacerbated by the stress and upset which would be caused by this type of behaviour. Those in turn might also impact on her condition of epilepsy. The respondent therefore was under a duty to make a reasonable adjustment to protect the claimant from Mr Brown's behaviour. Mrs Chadwick herself came up with the adjustment whereby the claimant could go to her if she had concerns regarding Mr Brown -that was obviously considered by Mrs Chadwick a reasonable departure from the normal chain of line management. The claimant did so on a number of occasions. The evidence is not that Mrs Chadwick then took any meaningful decisive action to protect the claimant. Indeed, the situation had arisen in the last days of the claimant's employment where the claimant's concerns were not being addressed. In this quite unusual context, the tribunal must conclude that the respondent and Mrs Chadwick personally failed to make a reasonable adjustment of allowing the claimant to obtain redress and protection from Mrs Chadwick.

86. The claimant's remaining complaints of failures to make reasonable adjustments must however fail. For such a claim to succeed it is insufficient that there is treatment in an individual situation detrimental to a single employee. There must be evidence of a practice applied, or which would be applied, more generally and widely. There is no evidence of a general practice requiring employees to engage in conversation by way of telephone calls and/or face-to-face meetings rather than by text or email. In any event, the claimant was able to engage in conversations face-to-face or by telephone. The issue for her was the way in which such conversations were or might be conducted in particular by Mr Brown, but that is a different matter.

87. Nor is there any evidence of requiring grievances to be submitted to an employee's immediate line manager. The respondent did not have a grievance procedure. There is evidence of on one occasion Mrs Chadwick referring the claimant back to Mr Brown. That is insufficient to constitute a practice. Nor can the tribunal conclude that the claimant was disadvantaged as a disabled person in particular, by any such requirement had it existed. The issue was Mr Brown.

88. Again, the claimant was being asked to attend a meeting without confirmation of the purpose of the meeting, but there is no evidence of this being a more

general practice. Nor can the tribunal conclude that employees would be allowed to be accompanied at meetings by colleagues only, without a willingness to make an adjustment in appropriate circumstances. When the claimant raised her wish to have someone else with her because of her health reasons, that suggestion was not dismissed by Mr Brown and obviously matters did not progress to a meeting where his position on the matter would have been clear.

89. There is also a lack of evidence allowing the tribunal to conclude that employees were required to complete their shifts without a rest break.

90. The tribunal has no evidence from which it could conclude that confirming employee shifts then by way of a rota contained within the office put the claimant at a disadvantage.

91. The claimant indeed makes a separate complaint of a failure to offer adequate rest breaks in accordance with the Working Time Regulations. It is clear to the tribunal that the claimant was able to take breaks, not least smoking breaks, during her shifts. It has no evidence of specific dates upon which the claimant was not able to take breaks up to the 20 minutes which ought to be granted in the case of employees working continuously for 6 hours or more. In such circumstances this complaint must fail.

92. It is however not denied that the claimant was never provided with a written statement of particulars of employment. It has been said, on behalf of the respondent effectively, that the Covid pandemic was an impediment to the provision of such contracts but it is clear that prior to Covid no written contracts were provided and this cannot form the basis of an excuse not to issue a brief written statement in any event. The claimant will be entitled to a further award of compensation to reflect this failure which will be a liability of the first respondent only.

Remedy and costs

93. Having given its Judgment, the tribunal heard further evidence from the claimant in respect of the remedies she sought and her submissions in support of a separate costs application. The claimant was cross examined by Mr McLean who made further submissions. The claimant relied on a further written submission document as to remedy.

94. Awards of compensation in claims of discrimination are governed by section 124 of the Equality Act 2010 which gives to the Tribunal the same power to grant any remedy which could be granted in proceedings in tort before the civil courts. Compensation based on tortious principles aims to put the Claimant, so far as possible, into the position that she would have been in had the discrimination not occurred - see **Ministry of Defence v Cannock** above – essentially a “but for” test in causation when assessing damages flowing from discriminatory acts.

95. As regards injury to feelings arising out of the detriments found to be proven, according to **Prison Service and others v Johnson [1997] ICR 275** the purpose of an award for injury to feelings is to compensate the claimant for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. In accordance with **Ministry of Defence v Cannock [1994] ICR 918** the aim is to award a sum that, in so far as money can do so, puts the claimant in the position he or she would have been had the discrimination not taken place. Pursuant to **Corus Hotels Plc v Woodward [2006] UK EAT/0536/05**, an Employment Tribunal should not allow its feelings of indignation at the employer's conduct to inflate the award made in favour of the claimant.

96. The Tribunal was referred to the Vento guidelines (derived from **Vento v Chief Constable of West Yorkshire 2003 ICR 318**) and to the guidance given in that case where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. Nevertheless, the tribunal considers that the decisive factor is the effect of the unlawful discrimination on the claimant.

97. The bands originally set out in **Vento** have increased in their value due to inflation and, a further uplift of 10% given to general damages pursuant to the case of **Simmons v Castle [2012] EWCA Civ 1039**. This had given rise to Presidential Guidance which re-drew the bands for claims brought on or after 11 September 2017. That Guidance has since been revised and the sums uprated in respect of later claims. The Tribunal should apply the bands in the Presidential Guidance dated 27 March 2020 applying to claims presented on or after 6 April 2020. This gives a lower band of £900 - £9,000, a middle band of £9,000 - £27,000 and a top band from £27,000 - £45,000.

98. In the context of the potential to make an award for aggravated damages, the Tribunal refers, for the principles to be applied, to the decision of Underhill J in **Commissioner of Police of the Metropolis v Shaw [2012] ICR 464**.

99. Aggravated damages are not ordinary damages for injury to feelings in consequence of discriminatory acts – that would be mere duplication. They may be awarded in appropriate cases in respect of the manner in which the wrong was committed. In this regard a Tribunal might be looking to see whether there has been behaviour of *"a high-handed, malicious, insulting or oppressive manner"*. Secondly the motive for the conduct of the employer may be relevant, if the employee was aware of it, in circumstances where spiteful, vindictive or deliberately wounding conduct is considered likely to cause more distress than conduct which results from ignorance or insensitivity. Under both these heads this Tribunal is mindful of the need to avoid duplication if indeed such factors are already compensated for within the award of injury to feelings.

100. The third head under which aggravated damages may be available is where an award is warranted by the Respondent's subsequent conduct after the discriminatory action. For instance, an award may be appropriate in the case of an employer who has deliberately refused to investigate a clear complaint of discrimination, failed to apologise when discrimination was patent or used its superior power and status to cause further distress. Conduct in the course of litigation may aggravate injury in a manner which can properly result in compensation, albeit respondents are allowed to defend themselves and an adversarial approach to a claimant's evidence is not in itself a ground for an aggravated award.

101. An employment tribunal may make "a recommendation that within a specified period the respondent takes specified steps the purposes of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate" (see Section 124(3) of the Equality Act 2010.

102. The Tribunal has the power to make an award of costs by virtue of Rules 76 of the Employment Tribunals Rules of Procedure 2013, which provide, so far as material, as follows:

> *"76 When a costs order or a preparation time order may or shall be made*
>
> *A Tribunal may make a costs order …, and shall consider whether to do so, where it considers that –*
> *a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
> *any claim or response had no reasonable prospect of success….."*

103. The Tribunal must identify the unreasonable conduct, say what was unreasonable about it and say what its effect was: see ***Yerrakalva v Barnsley MBC* [2012] ICR 420 CA**.

104. The claimant described that she had been unable to secure alternative employment since her dismissal. She was already in receipt of universal credit but received an increase in this benefit as a result of the termination of her employment, account for which is made in her schedule of loss. She has, since 2 months after her dismissal, searched for jobs online, particularly in the catering industry at a wage level similar to that enjoyed with the respondent. She had got to the point of applying for 4- 5 positions for which she could have been interviewed, but had not been in a sufficiently robust mental state to attend those interviews and pursue those opportunities. She described herself as terrified at the prospect of attending any interviews and her having to cancel each one at the last minute due to what she described as her immense anxiety. She had been advised, including by medical professionals, that, due to the continued impact of the situation on her mental health, it would not be of benefit for her to commence new employment as she was still in the process of

improving her mental health. She feared that her mental health would significantly deteriorate if she returned to work before she was ready. She described herself as being very nervous about the prospect of returning to employment due to a fear of being treated in the way in which she had been during her employment with the respondent. She was hopeful that she would eventually be able to overcome this, however did not anticipate that it would be in the immediate future.

105. The claimant told the tribunal that as a result of her treatment at work she had attended her GP in January which had resulted in an increase in her antidepressant medication. She had also experience increased seizures. She described her confidence as being hugely negatively impact upon and her anxiety being at an all-time high due to the treatment she had suffered. She said that she did not feel comfortable leaving the house, did not do so alone and felt that she did not have the energy to participate in everyday tasks. Prior to commencing employment with the respondent, she had been extremely excited and proud to start a new role and believed that this would be a positive step to help her improve her mental health. She considered that her job had given her a purpose and "a true sense of being". This had made the impact of her dismissal all the more substantial. She said that she had felt distraught on her dismissal as she knew that she had not done anything wrong and that her dismissal was undeserved. This instantly affected her pride and returned her back into a downwards spiral in terms of her depression. She said that she lost confidence in herself and no longer felt as though she was a functioning member of society.

106. Certainly, she recognised that a significant amount of distress had been caused by the behaviour of Mr Brown. This had brought back past traumas experienced in the context of domestic abuse. She said, however, that, when this wasn't addressed by Mrs Chadwick, it made her feel isolated. The claimant described feelings of dread during the course of and preparation for these tribunal proceedings. She described experiencing extreme depression which had included self-destructive and suicidal thoughts. She felt as though a year and half of her life had been taken away from her and her family. She had become extremely irritable and constantly on edge feeling as if she was pushing away the people most important to her.

107. The tribunal accepts the claimant's evidence which could not be materially challenged.

108. Mr McLean maintained that the question of injury to feelings was complicated by the claimant having suffered upset from a lot of treatment which had not been found to be acts of discrimination. Ultimately, he said there were a limited number of instances of discrimination found and that any award ought to sound in the lower Vento band - the sum he suggested was of £2,500. Furthermore, the claimant's situation was complicated by a pre-existing condition which was difficult to separate in terms of causation. As regards loss of earnings he maintained there was no medical evidence of an inability to work.

109. As regards loss of earnings, but for the discriminatory acts as found, the tribunal considers that the claimant would have continued to work for the respondent. The claimant had pre-existing conditions and was more fragile as a result, but the respondent must take its victim as it finds them. The claimant has, on the evidence, been unfit to take up employment due to the discrimination she suffered. It was a significant positive step for the claimant to be able to start work with the respondent in terms of a recovery of her confidence. The failure to safeguard her at work and her dismissal has severely damaged that confidence and effectively put the claimant back. She has not acted unreasonably in failing to mitigate her losses. Had the respondents not caused the further breakdown in her health, she would have been able to pursue alternative employment opportunities. Her losses are attributable to the respondents' discriminatory conduct.

110. The period from dismissal on 13 January 2021 until the date of the hearing was of 66 weeks. In this period the claimant had received an additional amount of universal credit of £63.63 per week (£173.49 - £109.86). The claimant's net weekly earnings were an average of £160.85. There is no evidence that if she had remained with the respondent her hours of work would have reduced. This gave net weekly loss of £97.22 per week. The figure therefore for immediate loss was the sum of £6,416.52. The tribunal determined it appropriate to award continuing future loss over a period of 12 weeks only. This is on the basis that the tribunal considers that after the claimant has been able to put these proceedings behind her she is likely to regain confidence sufficient to be in a position to commence new employment. Employment in a catering position at the rate of pay the claimant previously enjoyed ought not in the current job market be otherwise difficult to obtain. The amount awarded in respect of this future loss was therefore in the total sum of £1,166.64. Interest is payable on the immediate loss figure only at the midpoint of 33 weeks from dismissal and at the rate of 8% giving a further amount awarded of £325.76.

111. As regards compensation for injury to feelings, the tribunal has accepted the claimant's evidence as to how the discriminatory treatment made her feel. It is careful to assess those feelings by reference to how they can be attributed to the failure by Mrs Chadwick to deal with her concerns and protect her from Mr Brown and particularly to her dismissal. The tribunal does not consider these to be minor instances of discrimination such as, in accordance with the Vento guidelines, to classify any award as appropriately falling within the lower band. Indeed, those guidelines would suggest an award in the mid-band. More important, however, is an assessment in monetary terms of the effect the discriminatory acts had on the claimant. The claimant was clearly affected by other acts, including the behaviour of Mr Brown himself, but was distinctly still caused significant injury to feelings by the acts found to be discriminatory. Again, the egg shell skull principle applies – the claimant may have suffered more greatly than someone who had no pre-existing mental health condition, but that does not absolve the respondent. The tribunal considers the effect on the claimant, on the evidence, to have been significant and that an award in the sum of £18,000 to be appropriate - in the middle of the mid Vento band. To this

must be added an award in respect of interest for the 66 week period from dismissal in the sum of £1,827.69.

112. The tribunal considers an award at this level to be reflective of the monetary value which ought to be attributed to the injury to feelings suffered. It does not consider it just and equitable to make any uplift due to any unreasonable failure to comply with the ACAS code of practice on disciplinary and grievance procedures. This is in circumstances where the only failure relevant to the acts of discrimination was to not hear the claimant's grievance. This relates to the reasonable adjustment complaint only. The claimant was not in reality dismissed for a reason relating to culpable conduct such that the respondent ought reasonably to have followed the recommended form of disciplinary procedure under the code. The tribunal considers also that the level of award reflects the entirety of the discriminatory treatment of the claimant including any aggravating element such that no additional award ought to fall to be made under this head. There is no evidence before the tribunal of psychiatric injury or of causation in relation to the discriminatory acts such as would allow it to make an award for additional damages for personal injury.

113. The tribunal declines to make any recommendation that is sought by the claimant in circumstances where her employment has ended and the recommendation would not obviate or relate to any continuing acts of discrimination she might experience at work.

114. The respondent clearly failed to provide a written statement of particulars of employment or any statement of terms and conditions. It is therefore appropriate to make a further award on the basis of 4 weeks gross pay of £161.04 which gives a further amount ordered to be paid by the respondent as her employer (but not Mrs Chadwick) in the sum of £644.16.

115. In advance of the final hearing, solicitors who had been acting for the claimant made an application for costs which the claimant has repeated today day and provided further submissions in support of. The application relates to Mrs Chadwick's conduct which is said to been abusive and disruptive but with a focus on her earlier lack of participation in the proceedings and her submission of a late response in respect of which an extension of time was ultimately granted by the tribunal. This can be categorised as unreasonable and did result in a need for an additional preliminary hearing which was attended by the claimant, but at which she was not legally represented. The tribunal has seen no evidence of additional costs having been occurred because of this further preliminary hearing. The main result of Mrs Chadwick's behaviour was of a delay in preparation of the case and of this final hearing. The tribunal is ultimately not persuaded from what it has seen of the need for an extensive amount of additional work resulting from a failure to respond at an earlier stage. The nature of the claims have not altered since the initiation of proceedings, nor the scope of documentation or evidence which the claimant was required to provide herself or otherwise engage with. Whilst a schedule of costs incurred has been provided, the tribunal was unable to relate this to actions resulting

from the late submission. The claimant's costs would have been relatively contained had her claim simply proceeded against the respondent company in liquidation. The need for this final hearing and an examination of the evidence in the depth which has occurred has resulted from Mrs Chadwick's participation in proceedings, but not from the late stage at which she chose/was able to participate. Ultimately, an Employment Judge determined that it was in the interests of justice to allow Mrs Chadwick's response to be accepted, a decision which must have been made weighing the respective balance of prejudice. Whilst it was said in granting such an extension that it was open to the claimant to apply for costs, it was also suggested that any element of delay may be compensated in the event of a successful complaint by an award of compensation which would involve an additional element in respect of interest. Indeed, the tribunal has made an award of interest and considers that delay is the material disadvantage to which the claimant has been put by Mrs Chadwick's conduct. Awards of costs within the tribunal system remain the exception rather than the rule and there is nothing particular in this case and how it has been conducted which causes the tribunal to change its mind in terms of the exercise of its discretion whether or not the award costs. Unreasonable conduct, even if found, does not necessarily lead to an award of costs. The claimant's application for costs is refused.

Employment Judge Maidment

Date 29 April 2022