EMPLOYMENT TRIBUNALS

Claimant: **Mrs K Farrow**

Respondents: **1) Mrs N Foster**
2) Foster Clay Law Ltd

Heard at: **Leeds (by Cloud Video Platform)** **On:** **8, 9 and 10 February 2022**

Before: **Employment Judge Bright**
Ms J Lee
Mr J Rhodes

Representation
Claimant: Mr Proffitt (Counsel)
Respondents: Mr Sellwood (Counsel)

WRITTEN REASONS

Background

1. These are the written reasons for the judgment sent to the parties on 1 March 2022, pursuant to the respondent's request dated 9 March 2022. Unfortunately, due to ill-health, there has been a substantial delay in the promulgation of these reasons, for which Employment Judge Bright offers her sincere apologies.

2. The hearing was held by Cloud Video Platform, with the consent of the parties. There were no difficulties with communication or connection during the hearing.

3. By its judgment, delivered orally at the hearing on 10 February 2022 and sent to the parties in writing on 1 March 2022, the Tribunal held that the claimant's complaint of discrimination arising from disability (section 15 Equality Act 2010 ("EQA")) was well-founded. The Tribunal held that the complaint of harassment related to disability (section 26 EQA) was not well founded. A remedy hearing was subsequently listed.

Complaints and Issues

4. The claimant originally presented complaints of:

4.1. Discrimination arising from disability against three respondents (the two named here and also Ms H Garnett in respect of a reference she provided); and

4.2. Indirect discrimination (section 19 EQA).

5. Prior to the hearing, the claimant withdrew her claim against Ms Garnett and, on 7 February 2022, withdrew her complaint of indirect discrimination (section 19 EQA) and made an application to amend her claim. Her application was to re-label her complaint that Mrs Foster withheld the real reason for the withdrawal of the offer/decided not to proceed with employment as harassment (section 26 EQA) in the alternative to discrimination arising from disability. We heard the claimant's representations and the respondent's objections to the amendment at the outset of the hearing on 8 February 2022. Applying the principles in **Selkent Bus Co Ltd v Moore** [1996] ICR 836, we determined that the amendment was a re-labelling of an existing complaint. It required the same areas of inquiry and there were no new primary facts to be established.

6. The timing of the application was clearly a relevant factor weighing against the amendment and this was the respondent's primary pillar of objection; the application was very last minute and it was not explained why the application could not have been made earlier. However, we considered that the prejudice to the claimant in refusing the application in this case outweighed any prejudice to the respondent in having to respond to the change in label at this late stage. There were measures (costs, time allowances etc) which could be taken to alleviate any prejudice to the respondent, if the respondent was minded to make any such applications. The claimant's representative clarified that the harassment argument was made out on the basis of the effect of the treatment, rather than its purpose, and there was therefore no impact on the respondent's witness evidence or change to the areas of inquiry or facts to be established, other than the effect of the treatment on the claimant. The respondent would have the opportunity to cross examine on that issue and there was anyway substantial overlap with the discrimination arising from disability complaint presented on the same facts. The prejudice to the claimant of disallowing the amendment would be to deprive the claimant of the opportunity to succeed on the proposed claim. In our judgment it would be unjust to refuse the amendment.

7. The issues for the Tribunal to decide at the hearing on 8, 9 and 10 February 2022 were therefore:

<u>Discrimination arising from disability (section 15 EQA)</u>

7.1. Did the respondents treat the claimant unfavourably by:

7.1.1. withdrawing the offer of employment or deciding not to further consider the claimant for employment (first and second respondent);

7.1.2. withholding of the real reason for the withdrawal of the offer of employment or refusal to progress employment (first respondent only)

7.2. Did the following things arise in consequence of the claimant's disability:

7.2.1. the claimant's sickness absence record;

7.2.2. the claimant's requirement for flexibility regarding her place of work and hours?

7.3. Was the unfavourable treatment because of any of those things?

7.4. Was the treatment a proportionate means of achieving a legitimate aim?

7.5. In particular:

7.5.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;

7.5.2. could something less discriminatory have been done instead;

7.5.3. how should the needs of the claimant and the respondent be balanced?

7.6. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

Harassment

7.7. Did the second respondent withhold the real reason for the withdrawal of the offer of employment or refusal to progress employment?

7.8. If so, was it unwanted conduct?

7.9. If so, was it related to disability?

7.10. Did it have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for her?

7.11. If so, was it reasonable for it to have that effect?

Evidence

8. The claimant gave evidence on her own behalf and called no further witnesses.

9. The first respondent gave evidence on her own account and on behalf of the second respondent and both respondents also called:

9.1. Miss Hayley Garnett, Solicitor and Partner at Pinkney Grunwells; and

9.2. Mrs Hilary Truefitt, Solicitor with second respondent.

10. The parties presented an agreed electronic file of documents of 396 pages, of which we read those pages to which we were directed. References to page numbers in these reasons are references to the page numbers in the

electronic file of documents.

Findings of fact

11. The Tribunal made the following findings of fact. Where there was a dispute of fact, we determined it on the evidence before us, applying the balance of probabilities, in accordance with these findings.

12. The claimant completed her Legal Practice Course in 2011. She worked for Kitching Walker (KW) from 1 December 2014 as a legal secretary and left in June 2018. It was not disputed that KW were not licensed by the Solicitors Regulation Authority to provide training contracts for trainee solicitors. Miss Garnett agreed that her implication that the claimant's attendance at KW had something to do with the failure to obtain a training contract was therefore wrong. The claimant worked for Pinkney Grunwells (PG) from 9 July 2018 until 29 November 2019 as a conveyancing assistant and latterly as a trainee solicitor.

13. The respondent conceded that the claimant was disabled at the relevant time by virtue of her irritable bowel syndrome (IBS). She had a long period of intermittent sick leave in February 2019 relating to her IBS and her employment relationship at PG became strained. We accepted the claimant's evidence that PG's lack of flexibility around hours and place of work resulted in absences and timekeeping issues. Miss Garnett's evidence in cross examination regarding the claimant's lateness and absences on Monday mornings because she had 'eaten the wrong things' over the weekend supported the claimant's evidence that her timekeeping issues and absences were IBS-related. In October 2019 the claimant raised a grievance against the partners and her manager, Miss Garnett, regarding being treated unfairly because of her condition. The claimant left PG and transferred her training contract to Williamsons in December 2019. She was furloughed from March 2020 and, although she qualified as a solicitor on 15 July 2020, we accepted that Williamsons were unable to offer her a position. The claimant changed her profile on LinkedIn to read 'Newly qualified solicitor seeking employment'.

14. The first respondent, Mrs Natalie Foster, of the second respondent, Foster Clay Law (FCL), first contacted the claimant on LinkedIn on 21 June 2020, wanting to get in touch with her by telephone. FCL was at that time a recently formed limited company. Mrs Foster is one of FCL's two statutory directors. We accepted Mrs Foster's evidence that FCL was not authorized by the SRA at that stage and she and Mr Clay were still in the process of securing premises, staff, insurance etc. We accepted that FCL was a newly established law firm which would need to recruit staff who were able to "hit the ground running". We accepted that, with their limited operational and/or managerial resources they would need to recruit an individual who was able to produce accurate work, able to operate effectively as part of a team and who was sufficiently capable and experienced and who would require a minimum level of day-to-day supervision. Nevertheless, FCL must have been prepared to take someone who was newly qualified, or Mrs Foster would not have contacted the claimant based on her LinkedIn profile.

15. The claimant and Mrs Foster had a conversation on 22 June 2020 regarding

the claimant's possible employment, once the firm was up and running. The claimant says she discussed her IBS in detail with Mrs Foster. Mr Sellwood submitted that, if that were the case, the claimant would have recorded that conversation in her notes. However, we accepted the claimant's plausible evidence that, when in a conversation about prospective employment, one records what one is being told, not what one is telling the other party. We accepted the claimant's evidence that she was careful to be forthright with Mrs Foster about her condition precisely because of the difficulties she had experienced previously at PG and her desire to avoid any unpleasant misunderstandings in the future.

16. We find from Mrs Foster's notes of the conversation (page 146) that the claimant mentioned her health issues early on. Mrs Foster accepted that the claimant told her it was IBS, although she recorded it in her notes as "tummy issues". Although Mrs Foster's notes only cover two sides of her note pad, we accepted the claimant's evidence that this conversation was a lengthy one. It therefore appears that Mrs Foster did not record all that she discussed with the claimant in the course of the conversation.

17. Mrs Foster's brother suffers from IBS and she accepted that she was aware that it is a physical impairment which can be life-long. She told us in cross examination that she knew there could be a spectrum of severity of symptoms. Significantly, in her notes (page 146) she recorded "*Tummy issues/adjustments can be sorted flexi work. - from home. – reliable? Need previous employer to confirm how she works as stressful, can she work in a team?*". We agreed with Mr Proffitt that the reference to adjustments suggested that Mrs Foster had an understanding of the severity of the claimant's symptoms and of the fact that her condition had an impact on her day-to-day activities and work that might require adjustments. Although not yet a qualified solicitor, Mrs Foster had a legal background and displayed an understanding in cross examination of the components of the definition of disability in the EQA. Mrs Foster's notes of their conversation support the claimant's account that the claimant told Mrs Foster about the nature of her condition and, while she may not have shared the kind of detail set out in her impact statement, we accepted that she told Mrs Foster enough for Mrs Foster to realise that adjustments would be required. There was no evidence, however, to suggest that either Mrs Foster or the claimant used the word 'disabled' or 'disability' during the conversation and we accepted Mrs Foster's evidence that she did not 'join the dots' to conclude that the claimant's condition was a disability at this stage.

18. The claimant says she told Mrs Foster during the telephone conversation on 22 June 2020 that she had raised a formal grievance against Miss Garnett while working at PG. Mrs Foster's notes do not make reference to that and her later notes display shock ("*Grievance(!) not disclosed*") when she learned of the grievance from Miss Garnett. That response recorded in Mrs Foster's notes suggested that it was news to Mrs Foster that the claimant had raised a grievance. We accepted the claimant's evidence that she made it clear to Mrs Foster that she experienced problems at PG with their accommodations for her condition, and that she recalled telling Mrs Foster that she had raised a grievance. But we consider that a newly qualified solicitor in search of a position would be unlikely to expressly spell out that they had brought a grievance against a partner at a previous employer in

conversation with a prospective future employer. We find that, given the length of time which has passed, Mrs Foster's contemporaneous notes are, in this instance, likely to be more reflective of the conversation and claimant did not make expressly clear to Mrs Foster that she had raised a grievance.

19. The claimant says Mrs Foster made her an offer of employment, subject to references. The respondents deny that discussions had got to that stage. We do not consider it is material whether there was a conditional contract in existence or not. We accepted, from the evidence of all parties, that the recruitment process was proceeding and that Mrs Foster had made it clear to the claimant that proceeding further would be subject to references. Mrs Foster conceded in cross examination that, other than making a decision about whether to employ the claimant, there were no further hurdles for her to surmount, once good references had been obtained.

20. The claimant gave Mrs Foster the names of four potential referees from PG, (p276) avoiding Miss Garnett. Mrs Foster explained that these individuals were not suitable as referees as they were 'peers' of the claimant. However, we accepted that they were all in positions of seniority to the claimant at PG and three out of the four were in a supervisory position in her various 'seats' during the claimant's training contract. However, the referees she identified declined to provide references, because they were not the Training Partner. Instead Miss Garnett provided a reference to Mrs Foster on 1 July 2020 (page 279) which stated that the claimant left over a grievance, that she would not be re-hired due to sickness levels, had lots of absence from work due to illness ('many weeks in total'), that she had some issues with staff members and concluded that her "work was very good but unfortunately not present long enough to be of assistance due to sickness absences". The claimant obtained a reference from Williamsons on 3 July 2020, but that was a factual reference identifying only the position held, employment dates and salary, in keeping with that firm's usual practice.

21. Mrs Foster telephoned Miss Garnett a 'couple of days' after receiving Miss Garnett's reference for the claimant. We concluded that this must have occurred on around 3 or 4 July 2020. We find from Mrs Foster's evidence that she accepted Miss Garnett's account of the claimant's shortcomings. Miss Garnett told her the claimant's absences were for a 'myriad of reasons' and that there was a pattern to the claimant's absences that they usually occurred on a Monday after the weekend. It was following this conversation and a subsequent chat with Mrs Truefitt, that Mrs Foster added the addendum to her notes at page 146 regarding the undisclosed grievance: "*Bad attitude? Grievance not disclosed. Why? Seek other references 1 or 2 attutude to other staff. HST – risk to the business as NQ no endorsement. Not honest*!". However, Mrs Foster did not end the recruitment process with the claimant at this stage.

22. The claimant obtained a further reference from KW on 7 July 2020, which was not glowing and identified weaknesses in time-keeping and accuracy, and stated that the claimant got along with co-workers and management "*once initial boundaries in respect of her roles and responsibilities to others had been established*". It also identified that the claimant had, "*various days off due to illness. I have no record of the dates but there were more than expected*."

23. We find that, by the time Mrs Foster had received all three references, she knew that the claimant had had significant absences from two of her previous three roles through sickness. Although she did not know the cause of the sickness absences, she knew that the claimant had IBS and would require flexibility and adjustments. She also knew that the claimant had had problems at PG with their accommodation of her condition and its symptoms.

24. Mrs Foster subsequently sent an email (page 288) to Mr Clay and Mrs Truefitt at 17.30 on 7 July 2020:

"*I forward this to you as we have discussed the matter of Kandice's employment. The reference below is the third one received. The first from Hayley Garnett states that Kandice was a good worker but took weeks off at a time, the second only confirmed her times and role. This is the third. Again it mentions timekeeping and time off. In light of the fact that she is NQ and will require supervision for some time, I personally do not feel comfortable with the comments made around her absence and even if she does work from home we cannot supervise properly"*

25. There is an apparent conflict between the reason for failing to go ahead with the claimant's recruitment given in Mrs Foster's notes on page 146 and the reasons stated in her email on page 288. Mr Sellwood submitted and Mrs Foster gave evidence that it was the wider set of considerations identified in Mrs Foster's notes on page 146 (i.e. the claimant's honesty, accuracy, attitude etc) which was the reason for the decision. Mr Proffitt submitted that it was clear from the fact that the sole focus of the email at page 288 was on the claimant's time keeping and absences, that her sickness was the real reason. We consider it significant that, at 18.39 on 7 July 2020 (just over one hour after the email at page 288) Mrs Foster sent the email to the claimant (page 290) informing her that she would not be offered a position. Mrs Foster's evidence regarding what happened in that intervening hour was vague, but she did not recall having a conversation with Mr Clay or anyone else, nor any further facts or information becoming available or being discussed. During that hour Mrs Foster moved from being 'not comfortable' employing the claimant (page 288) to rejecting her (page 290).

26. We find that, while there may have been a number of reasons contributing to Mrs Foster's decision to end the recruitment process with the claimant (including questions over her attitude, honesty, accuracy, etc), the primary reason was concerns about her sickness absence and timekeeping. The email at page 288 is clear that this reason was uppermost in Mrs Foster's mind only an hour before she rejected the claimant, and that was the only reason cited to Mr Clay and Mrs Truefitt in the email. The timing of the emails and the absence of any intervening act suggest that the sickness absence and timekeeping were the defining factor. Had any of the other reasons played a significant part in her decision making, we consider that Mrs Foster would have cited them in her email to Mrs Truefitt and Mr Clay at page 288.

27. On receipt of Mrs Foster's email the claimant emailed back at 18.55, explicitly making the connection between her previous sickness absences

and her IBS and identifying this as the likely cause of her rejection: "*oh no I am so upset to hear this … I am certain the only issues would have been my attendance due to sick leave and having treatment at hospital. ….Is there anything I can discuss with you further to provide more clarifty regarding my medical condition…".*

28. Mrs Foster replied at 19.00, saying, "*No medical condition has any bearing on the firms decision to recruit*". Mr Proffitt submitted, and the claimant's complaint of harassment (section 15 in the alternative) is based on, the assertion that Mrs Foster withheld the real reason for the claimant's rejection. We agreed that Mrs Foster's response looked disingenuous (in light of the claimant's concern that her sickness absence might be the reason and her invitation to Mrs Foster to address that concern), but we found that it was not dishonest. As the respondent submitted, Mrs Foster's email was simply an explanation that the claimant was not directly discriminated against due to the fact that she had IBS. Mrs Foster did not state that 'absences have no bearing on the firm's decision to recruit' which would be more relevant to the claimant's allegations and would have been dishonest. Mrs Foster's email refrained from giving the claimant any reason for her rejection. Mrs Foster gave evidence, which we accepted, because her actions bore it out, that she initially thought the references she had received about the claimant were confidential. She did not therefore want to reveal their contents to the claimant. The fact that she sent the references to ACAS as soon as they were requested demonstrated to us that she did not previously realise the claimant was entitled to see them.

29. The claimant submitted that Mrs Foster's motive was to keep the claimant in the dark and avoid legal proceedings. We accepted Mrs Foster's evidence that her response to the claimant was prompted by her belief that references were confidential and her desire to end the conversation and move on to recruiting someone else. That evidence was supported by her reference to other candidates in her email to Mr Clay and Mrs Truefitt. In our judgment therefore, while Mrs Foster did withhold the reason for rejection, it was not because of the claimant's sickness absence or her need for flexibility, nor because of her condition nor anything arising from her condition. Instead, it was because Mrs Foster believed the references were confidential and wanted to draw her dealings with the claimant to a close.

30. We accepted the claimant's evidence set out at paragraph 39 of her witness statement regarding the effect of Mrs Foster's email at page 290 on her. Her exclamation "oh no I am so upset to hear this!" in her email at page 291 supported what she said about the impact on her. However, there was insufficient evidence that the impact on her was a result of or specifically linked to Mrs Foster's actions in withholding the reasons for ending the recruitment process. It seemed more probable that her expression of dismay and the impact she described was a result of the recruitment process being terminated suddenly.

31. Subsequently on 17 July 2020, Mrs Victoria (Tori) Moss, one of the claimant's preferred referees from PG, provided a reference to the claimant (page 390). That reference was complimentary and Mrs Foster stated in cross examination that had she seen that reference at the time, "we wouldn't be here". Although Mrs Foster refused to be further drawn as to what she

meant by that statement in cross examination, in our judgment the obvious implication of her words was that she would have taken the positive reference from Mrs Moss into account, it would have been sufficient to satisfy her concerns about the claimant and the claimant would in all likelihood have been employed by the respondents. We concluded that, had Mrs Foster been in receipt of the reference at page 390, the recruitment process would not have been terminated.

The Law

Discrimination arising from disability

32. Section 39 of the Equality Act 2010 ('EQA') provides that:

(1) An employer (A) must not discriminate against a person (B) –
(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

33. Section 15 EQA provides that:

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

(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.

34. Section 15 therefore requires the Tribunal to investigate two distinct causative issues:

34.1. Did A treat B unfavourably because of an (identified) something?
and
34.2. Did that something arise in consequence of B's disability?

35. In the course of submissions we were referred to a number of authorities, including:

36. **City of York Council v Grosset** [2018] EWCA Civ 1105, [2018] IRLR 746, in which it was established that, *'it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability'.* A respondent has a defence only if they did not know, and could not reasonably have been expected to know, that the claimant had the disability, or if they are able to justify the unfavourable treatment. If they know of the disability, they would *'be wise to look into the matter more carefully before taking the unfavourable treatment'*.

37. **Pnaiser v NHS England** [2016] IRLR 170 EAT, in which Simler P reviewed the previous authorities and gave guidance on the correct approach to a section 15 claim, which we have applied in this case:

    37.1. A Tribunal must first identify whether there was unfavourable treatment and by whom. i.e. Did A treat B unfavourably? No comparison is necessary.
    37.2. The Tribunal must determine what caused that treatment or what was the reason for it. The focus is on the reason in the mind of A, whether conscious or unconscious. 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. A's motive for acting as they did is irrelevant.
    37.3. The Tribunal must determine as a fact whether the reason/cause is 'something arising in consequence of B's disability'. There could be a range of causal links, but the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test is an objective question and does not depend on the thought processes of A.
    37.4. Knowledge is required only of the disability. It does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.
    37.5. It does not matter in which order these questions are addressed. A Tribunal might ask why A treated B in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of B's disability'. Alternatively, it might ask whether the disability has a particular consequence for B that leads to 'something' that caused the unfavourable treatment by A.

38. **A Ltd v Z** [2019] IRLR 952, [2020] ICR 199, EAT, in which HHJ Eady QC drew together the previous authorities' guidance on knowledge of disability [23]:

    (1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see **City of York Council v Grosset** [2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492 CA *at para 39.*
    (2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see **Donelien v Liberata UK Ltd** (2014) UKEAT/0297/14, [2014] All ER (D) 253 (Dec) *at para 5, per Langstaff P, and also see* **Pnaiser v NHS England** (2016) UKEAT/0137/15/*LA*, [2016] IRLR 170 EAT *at para 69 per Simler J.*
    *(3) The question of reasonableness is one of fact and evaluation, see [***Donelien v Liberata UK Ltd***]* [2018] EWCA Civ 129, [2018] IRLR 535 CA *at para [27]; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.*

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see **Herry v Dudley Metropolitan Council** (2016) UKEAT/0100/16, [2017] ICR 610*, per His Honour Judge Richardson, citing* **J v DLA Piper UK LLP** (2010) UKEAT/0263/09, [2010] IRLR 936, [2010] ICR 1052)*, and (ii) because, without knowing the likely cause of a given impairment, "*it becomes much more difficult to know whether it may well last for more than 12 months, if it is not *[*already done so*]" [sic], per Langstaff P in* **Donelien** *EAT at para 31.*

(5) The approach adopted to answering the question thus posed by s 15(2) is to be informed by the Code, which (relevantly) provides as follows:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

*(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (***Ridout v T C Group** (1998) EAT/137/97, [1998] IRLR 628*;* **Alam v Secretary of State for the Department for Work and Pensions** (2009) UKEAT/0242/09, [2010] IRLR 283, [2010] ICR 665)*.*

(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code.

39. **Hensman v Ministry of Defence** [2014] (UKEAT/0067/14) [44], in which Singh J set out the approach to assessing proportionality: *"the Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer".*

40. **Ali v Torrosian (t/a Bedford Hill Family Practice)** [2018] 5 WLUK 25 in which it was established that the issue of proportionality includes consideration of whether there was a less discriminatory means of achieving the legitimate aim, balancing the objective needs of the business against the discriminatory effect of the unfavourable treatment.

41. We referred to the EHRC's Employment Code ("the EHRC Code") which states, with reference to the objective justification in indirect discrimination:

41.1. At paragraph 4.28, for an aim to be legitimate, it must be:

…legal, should not be discriminatory in itself and must represent a real, objective consideration.

41.2. At paragraph 4.30:

Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all of the relevant facts.

Harassment

42. Section 40 EQA provides that:

(1) An employer (A) must not, in relation to employment by A, harass a person (B) –
(a) who is an employee of A's;
(b) who has applied to A for employment.

43. Section 26 EQA provides that:

(1) A person (A) harasses another (B) if –
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of –
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

44. The respondent referred us to several authorities:

44.1. **Grant v Land Registry** [2011] EWCA 769 [49] in which the Court of Appeal reminded Tribunals that they must be careful to satisfy themselves than an effect really does amount to a 'violation of dignity' or create an 'intimidating, hostile, degrading, humiliating or offensive environment': "*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".*

44.2. **Richmond Pharmacology v Dhaliwal** [2009] (UKEAT/0456/08) [22] in which Underhill P observed: "*dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that*

employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase".

44.3. **Weeks v Newham College of Further Education** [2012] (UKEAT/0630/11) in which Langstaff P noted that, when considering a proscribed environment had been created, "*it must be remembered that the word is 'environment'. An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff room concerned. We cannot say that the frequency of use of such words is irrelevant".*

Burden of proof

45. The burden of proof applicable under the EQA is set out at Section 136 EQA:

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

46. The application of section 136 to section 15 means that it is for the claimant to show that 'something' arose as a consequence of her disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment. In respect of the employer's knowledge of disability, section 15(2) provides that it is for the employer to show that it did not know about the disability, but it is unlikely that section 136 could operate to shift the burden of proof without there being some facts to indicate that the employer knew that the claimant was disabled.

47. Where the claimant has shown facts from which the Tribunal could conclude that the employer discriminated against her because of something arising from her disability, the employer has three ways to prove that it did not commit the act of discrimination. It can show that:

47.1. It did not know the claimant was disabled, i.e. that it lacked actual or constructive knowledge of the disability itself (section 15(2));
47.2. The reason for the unfavourable treatment was not the 'something' alleged by the claimant; or
47.3. The treatment was a proportionate means of achieving a legitimate aim.

48. The application of section 136 to section 26 means that it is for the claimant to show facts from which the Tribunal could conclude that the unwanted conduct in question was related to the relevant protected characteristic (section 26(1)(a)). If the burden of proof is shifted, it is for the employer to

prove that the unwanted conduct was not related to the protected characteristic.

Determinations

Discrimination arising from disability (Equality Act 2010 section 15)

Unfavourable treatment

49. The respondents accepted that they treated the claimant unfavourably by ceasing to proceed with the recruitment process/consider her for a role.

50. It was denied by Mrs Foster that she withheld the real reason for that decision or, if she did so, that it was unfavourable treatment. Mrs Foster submitted that sickness absence was not the 'real reason' or the sole or main reason, given that Mrs Foster's notes identified other matters of concern (page 146). However, we found as a fact that the uppermost reason in Mrs Foster's mind was the claimant's sickness absence and this was therefore the 'real reason' for the cessation of the recruitment process. We found that Mrs Foster refused to give the claimant any reason for the cessation of the recruitment process until she realized the claimant was entitled to see the references and forwarded them when requested to do so by ACAS. The respondent submitted that the brief delay was not unfavourable treatment and the claimant merely had an unjustified sense of grievance. We disagreed. The claimant was entitled to know the reason for the sudden cessation of the recruitment process and Mrs Foster's actions in avoiding answering the claimant's concern until ACAS were involved was clearly unwanted treatment, which caused the claimant distress.

'Something' arising in consequence of disability

51. The respondents accepted that the claimant's requirement for flexibility regarding her place of work and hours arose in consequence of her disability. We found that the lack of flexibility at PG resulted in timekeeping issues which therefore arose in consequence of her disability. The respondents also accepted that the majority of her sickness absence record at her previous employer, PG, arose in consequence of her disability, although there were a number of absences not connected to her disability.

52. The respondents accepted that the cessation of the recruitment process arose in part due to the claimant's sickness absences and requirement for flexibility. However they did not accept that this was the 'real reason' for the cessation or the sole or main reason. They nevertheless recognized that the hurdle for causation in section 15 claims is not high and only requires that the matter be a reason. The respondents therefore conceded that the claimant's sickness absences and requirement for flexibility were a reason for the cessation of the recruitment process. The unfavourable treatment was therefore because of the 'something arising' from disability. We found as a fact that the claimant's sickness absence/timekeeping were uppermost in Mrs Foster's mind when she made the decision to terminate the recruitment process.

53. Mrs Foster argued that withholding the real reason for the cessation of the recruitment process was not because of the claimant's sickness absence or requirement for work flexibility. It was submitted that it was "not entirely understood on what basis the claimant could make such an argument, as it simply does not follow from the facts. Even on the claimant's own case, the alleged withholding came about due to the respondents' alleged desire to keep her in the dark and/or to avoid legal proceedings, not because she had suffered sickness absence".

54. Although the connection between the disability and something arising can be a loose one, the claimant must establish that one has a significant influence on the other, not a 'mere influence'. However, as Mr Sellwood pointed out in his submissions, on the claimant's own case the reason for withholding that information was to keep her in the dark/avoid legal proceedings, not because of her sickness absence or the need for flexibility. Even if we were to infer from the disingenuousness of Mrs Foster's email that she was trying to avoid legal proceedings connected with disability, there would be multiple 'links in the chain' to connect the two. Following **Pnaiser** the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. There is not sufficient nexus, in our judgment, between the withholding of the real reason and the claimant's sickness absence/need for flexibility to satisfy the first stage of the burden of proof. We concluded that the claimant did not show facts from which we could conclude that her sickness absence/need for flexibility had a sufficiently significant influence on Mrs Foster's actions to satisfy the section 15(2) test.

55. Even if we are wrong, and the burden of proof shifted to the respondent to show that the claimant's sickness absence or need for flexibility had insufficient influence on Mrs Foster withholding of the real reason, we would find that the first respondent satisfied that burden. We find that Mrs Foster showed on the balance of probabilities, that the reason for not telling the claimant the reason for the cessation of the recruitment process was that Mrs Foster believed the references were confidential and wished to end her dealings with the claimant in order to move on to recruiting someone else. We therefore concluded that the complaint of discrimination arising from disability against Mrs Foster in relation to the withholding of the real reason for the cessation of the recruitment process.

Objective justification

56. Was the cessation of the recruitment process a proportionate means of achieving a legitimate aim? The respondent's pleaded legitimate aim was "ensuring that, as a newly established law firm with limited operational and/or managerial resources, they recruited an individual who they felt confident would be able to produce accurate work who would be able to operate effectively as part of a team, who was sufficiently capable and experienced and who would require a minimum level of day-to-day supervision" (paragraph 17e Grounds of Response, page 47 – 48).

57. The claimant submitted that what the respondents 'felt' about the claimant was irrelevant to justification because the test is an objective one. However,

we accepted that the respondent's aim was to recruit someone who was capable of doing the job required, and that they would require references to be able to take an objective view of the candidate. We accepted that the references took on particular significance in the context of their inability to interview candidates face-to-face due to the Covid pandemic. In our judgment the respondent's aim was a legitimate one.

58. Was the termination of the recruitment process with the claimant a proportionate means of achieving that aim? **Hensman** reminds us that we must take particular account of the business needs of the employer and we accepted that this was a start-up business with limited resources and needed to recruit someone capable of doing the job with a minimum of supervision. However, we find that Mrs Foster was actively trying to recruit the claimant, who she knew to be newly qualified, and therefore must have been prepared to recruit someone with the claimant's level of inexperience. The business needs of the respondent were not such that the claimant was unsuitable. Further, as the claimant submitted (paragraph 14 of the claimant's written submissions) the respondents' pleading on justification made no reference to the fact that it was concerned about the claimant's sickness absence levels which caused the unfavourable treatment. The unfavourable treatment (terminating the recruitment process because of concern primarily about the claimant's sickness record) was not a means of achieving the pleaded legitimate aim. Had the pleaded legitimate aim been reliability or regularity of attendance, the treatment might have been a means of achieving that aim. But, as pleaded, there appeared to be no link between the means and the aim.

59. Separately, **Ali** tells us that we must consider whether there was a less discriminatory means of achieving the legitimate aim, balancing the objective needs of the business against the discriminatory effect of the unfavourable treatment.

60. Mr Proffitt made various suggestions (paragraph 16 and in the course of oral submissions and cross examination) regarding less discriminatory options open to the respondents, including offering the claimant employment on a trial basis or employing her in the knowledge she would not have the right to bring an unfair dismissal claim if dismissed in under two years. We accepted the respondents' submissions that the level of enquiry Mr Proffitt appeared to suggest in cross examination and some of his suggestions would be more suited to an established firm and were disproportionate for a small start-up business at this stage in its inception.

61. However, we agreed that Mrs Foster could reasonably have discounted the reference from Miss Garnett and/or made further enquiries with the claimant and other referees about the claimant's absences to obtain a more objective picture. This would have been a less discriminatory act than simply terminating the recruitment exercise.

62. We considered it significant that, before rejecting the claimant, Mrs Foster went to the lengths of obtaining three references and that, on receipt of the reference from Miss Garnett, Mrs Foster followed up with Miss Garnett by telephone to obtain more information. The respondent's commercial realities obviously therefore allowed for Mrs Foster to pick up the phone to

Miss Garnett, and to seek further references when the ones she received did not provide the assurances she was seeking. This is significant, because had she spoken to the claimant again about Miss Garnett's reference or waited to obtain the reference from Tori Moss dated 17 July 2020, the further information they would have provided would, in all likelihood, have changed her view. She told us "if we'd had that [Tori Moss' reference] we wouldn't be here". In our judgment, it would have been less discriminatory and would not have been disproportionate in the circumstances for Mrs Foster to seek further clarification or references. There was insufficient evidence for us to find that there was any particular reason why Mrs Foster stopped her enquiries at that specific moment/point in the process. The respondent did not show that terminating the recruitment process at that point was a reasonably necessary way to achieve the respondent's legitimate aim.

63. Another less discriminatory approach open to the respondent was to disregard anything in the reference materials obtained which potentially related to disability or sickness absence. Given what the claimant had told Mrs Foster about her condition, and in any case, following the email at page 291, Mrs Foster could have taken the decision based on the information available to her, after having struck out anything which might relate to the claimant's disability. That would still leave issues raised in the existing references around boundaries, relationships, attitude and accuracy.

64. As it was, the discriminatory effect of the unfavourable treatment on the claimant was significant. She was a newly qualified solicitor with a disability, who needed significant flexibility, meaning her job search was unlikely to be straightforward. She had been approached by the respondents and offered what appeared to be an attractive position and the flexibility she needed, she had been open and honest with them about her needs and her condition and had hopes that they would make the adjustments she needed. Instead the recruitment process was terminated abruptly precisely because of her disability-related requirements and history, jeopardizing her job-search and damaging her self-confidence.

65. Balancing the needs of the claimant and the respondent, on the balance of probabilities, we find that terminating the recruitment process at this stage was not proportionate in the circumstances.

Knowledge of disability

66. The respondents submitted that they did not know, nor could they reasonably have been expected to know that the claimant had the disability. The respondents accepted that they were aware of the claimant's IBS, that it was a physical impairment and that it's effects were likely to last longer than 12 months. It was disputed that the respondents knew that the claimant's IBS had a substantial adverse effect on her day-to-day activities.

67. The respondents disputed actual knowledge on the grounds that the claimant did not explain the extent of her symptoms and the difficulties they caused to Mrs Foster during the telephone call on 22 June 2020.

68. We found as a fact that the claimant was forthright with Mrs Foster about her condition and told Mrs Foster enough for Mrs Foster to realise that adjustments would be required. We inferred from the fact that Mrs Foster mentioned adjustments in her notes that she understood that the claimant's condition had a substantial adverse effect on her day-to-day activities.

69. The respondents submitted that the claimant's case was self-contradictory in respect of knowledge, in that, if the claimant had told Mrs Foster about the extend of her IBS symptoms in the conversation on 22 June, and Mrs Foster had had concerns, she would not have continued with the recruitment process for the next 2 weeks. We agreed that our finding that Mrs Foster's decision to terminate the recruitment process was primarily because of the claimant's disability-related sickness record does not sit neatly alongside our finding that the claimant was explicit with Mrs Foster about her condition and its symptoms. However, the facts are not always neat, and we concluded that Mrs Foster's thinking was not that clear cut. In part because of assumptions based on her brother's experience of IBS, she did not associate that condition with disability and sickness absence. The word 'disability' was not used in the claimant's conversations with Mrs Foster and we find that Mrs Foster did not 'join the dots'. She did not have actual knowledge of disability. She did not appreciate the extent of the claimant's previous sickness absence nor how a failure to make adjustments may have impacted her attendance.

70. We find that the respondents had constructive knowledge of the claimant's disability from 22 June 2020 or, even if not then, by the time Mrs Foster received the three references. In making this finding, we took account of the respondents' circumstances: They were not the claimant's employer and they were engaged in a recruitment process for a job role in a start up firm with limited resources and operational capacity, during lockdown when they were unable to interview candidates in person. Nevertheless we find that Mrs Foster knew about the claimant's diagnosis of IBS from their first telephone conversation. We find that the claimant was clear with Mrs Foster about the impact of her condition on her. Mrs Foster referred in her notes of the conversation to 'adjustments' being made for the claimant. Mrs Foster knew that IBS symptoms were on a 'spectrum of seriousness'. Moreover, once she had received the references, she knew that the claimant had had substantial sickness absences at her previous firms, albeit that she had been told this was for a 'myriad of different reasons'. Mrs Foster demonstrated that she knew the components of the definition of disability in the Equality Act 2010 and has a legal background. She was in the process of recruiting a solicitor to a new law firm and could reasonably therefore be expected to appreciate the basic requirements of employment law or to check what they were. In these circumstances, weighing up the evidence on the balance of probabilities, we find that Mrs Foster could reasonably have been expected to know that the claimant had a disability at the time she decided to terminate the recruitment process with the claimant and at the time of the email on page 291. Separately, she could have made further reasonable enquiries with the claimant to establish whether the sickness absences were disability related and/or that her condition had a substantial adverse effect on her day-to-day activities. We find that the respondents had constructive knowledge of the claimant's disability at the relevant time.

71. In conclusion, we find that the respondents discriminated against the claimant in respect of the decision to terminate the recruitment process. Mrs Foster did not discriminate against the claimant in withholding the real reason for that decision.

Harassment

72. We found that Mrs Foster withheld the real reason for the withdrawal of the offer of employment/refusal to progress employment. We also found that that was unwanted conduct.

73. The respondent accepted that the withholding the real reason for the cessation of the recruitment process was related to disability. We agreed. The 'related to' test under section 26 EQA is wider, in our view, than the 'because of something arising from' test in section 15 EQA. There is no causative link required by section 26 EQA. Although we found that Mrs Foster's withholding of the real reason for the cessation of the recruitment process was not because of something arising from the claimant's disability (her sickness absence or requirement to work flexibly), we consider that it is related to her disability. The multiple links in the chain, while too numerous to establish influence for the purposes of section 15 would comprise sufficient relation, in our view, to satisfy section 26. Separately, our finding that Mrs Foster's reason for not telling the claimant the real reason was her belief the references were confidential and wished to end her dealings with the claimant did not, in our view, preclude a finding that the decision was related to the claimant's disability. The decision to cease the recruitment process was because of the claimant's disability-related absence and the withholding of that reason from the claimant was therefore related to her disability, though not causally.

74. The claimant accepted that Mrs Foster's action in withholding the reason for terminating the recruitment process did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for her. The key question was whether it had that effect ("the proscribed effect").

75. The respondent submitted (paragraphs 23 – 28 of its written submissions) that Mrs Foster's actions did not have the proscribed effect. We agreed that this was a one-off action by a future prospective employer with whom she did not have to work or come into contact and was not, therefore, capable of amounting to an 'environment', as required by the second limb of the test for the proscribed effect. Further, we agreed with the respondent that, while the claimant was understandably upset that the recruitment process did not continue, that was not the conduct which was alleged to have been harassing. The alleged harassing conduct was purely the withholding of the reason, which related to the email of 7 July 2020. The claimant did not appear to have been in doubt at any stage as to the reason for the recruitment process ceasing, so the withholding of the reason cannot have made any significant difference to her. There was insufficient evidence for us to find that the effect on her was as a result of or specifically linked to Mrs Foster's actions in withholding the reason for ending the recruitment process, rather than the termination of the process itself. We find that the

claimant has not shown facts from which we could conclude that Mrs Foster withholding the reason for the cessation of the recruitment process had the proscribed effect on the claimant.

76. We conclude that the claimant's complaint of harassment related to disability was not well-founded. That complaint was dismissed.

77. A remedy hearing was listed and judgment and reasons on remedy have been promulgated separately.

Employment Judge Bright
8 August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

8 October 2022

CM Haines
FOR EMPLOYMENT TRIBUNALS