EMPLOYMENT TRIBUNALS

Claimant: **A**

Respondent: **B**

Heard at: **Bristol (By VHS)**

On: **16, 17, 18 March 2022 (Evidence)**
3 May 2022 (Tribunal chambers meeting)
6 and 16 June 2022 (Writing)

Before: Employment Judge Midgley
Mrs C Date
Mrs J Le Vaillant

Representation
Claimant: In person.
Respondent: Mr A Leonhardt, Counsel.

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the claimant's claims are not well founded, and they are dismissed.

REASONS

Claims and Parties

1. By a claim form presented on 18 January 2021, the claimant brought claims of unfair dismissal on the grounds of having made a protected disclosure and disability discrimination. The respondent is an organisation with a national presence providing essential pro-bono advice to those in need.

2. The claims were clarified at a telephone preliminary case management hearing by Employment Judge Livesey and, at a preliminary hearing on 17 December 2021, it was found that the claimant's condition of anxiety and depression amounted to a disability for the purposes of section 6 and the Schedule 1 of the Equalities Act 2010. The respondent maintained that it did not know and could not reasonably have been expected to know that any of

the conditions amounted to a disability prior to 20 October 2020.

3. The essence of the dispute between the parties is whether the claimant performed poorly in her role and failed to follow reasonable managerial instructions (particular only to work on casework in her paid role on the one day a week for which she was contracted), such that the respondent was entitled to dismiss her during her probationary period, or whether the true reason of the claimant's dismissal was that she had made a protected disclosure in relation to the needs to submit a completed PIP MR report outside of her contractual hours.

4. Separately, the claimant alleged that her manager, "C", directly discriminated against her or treated her less favourably by:

   4.1. including reference in the disciplinary investigation report to the fact that the claimant had stated that she was living with a very demanding and difficult partner and had emailed and posted that report to her home address, in circumstances where C, being the respondent's lead for domestic violence, knew that it was likely to be seen by the claimant's partner, and could therefore place the claimant and her children at risk; and

   4.2. accusing the claimant of failing to follow a management instruction in relation to her attendance at work in September 2020, when she knew the claimant had attended early because of her anxiety.

5. Lastly, the claimant argued that the respondent had failed to make reasonable adjustments for her disabilities in relation to the training she was required to undertake and the equipment that she had to use whilst working from home.

6. The respondent's primary argument in relation to the discrimination claims was that it did not know and could not reasonably have been expected to know that the claimant was suffering from anxiety and that the condition amounted to a disability.

Procedure, Hearing and Evidence

7. The hearing was conducted virtually using the Video Hearing Service. The parties had agreed a bundle of documents of 451 pages. The claimant had prepared a statement, which took the form of an outline written argument, rather than a narrative describing events, and gave evidence.

8. The respondent had prepared statements for the following individuals each of whom gave evidence:

   8.1. "C", the respondents Projects Manager;

   8.2. "D", the respondent's Operations Manager; and

   8.3. "B", the respondent's Chief Executive Officer.

9. At the outset of the hearing on 16 March 2022, the respondent conceded for the purposes of the hearing that the claimant's condition of Asperger's Syndrome ("Asperger's") and ADHD/OCD-like tendencies were also

disabilities for the purposes of section 6 and Schedule 1 of the Equality Act 2010. The claimant clarified as the outset of the second day of the hearing that the documents she relied upon as protected disclosures were the record of webchat with D on 22 September and an email sent to C on 5 October 2020.

10. Evidence was heard over the three days between the 16th and 18th March 2022, but it was not possible to hear the parties' submissions within the listing and the Tribunal did not deem it appropriate to do so because it would not allow the claimant sufficient time to consider the effect of the evidence and to respond to the respondent's submissions, more so because of the effects of her anxiety. Furthermore, there would have been insufficient time for the Tribunal to deliberate and promulgate Judgment. Accordingly, the case was adjourned part heard until the Tribunal was able to meet again on 3 May 2022, and in the interim we made orders for the parties to file and exchange written submissions.

11. The respondent's counsel provided written submissions on 28 March; the claimant on 1 April 2022. Each of the written arguments had been carefully prepared, was focused on the issues, and was of great assistance to the Tribunal. We are very grateful to the parties for the manner in which they conducted themselves during the course of the hearing, particularly for the sensitive matter in which Mr Leonhardt cross examined the claimant, and for the helpful written submissions. The claimant's were a credit to her and would not have caused any embarrassment to a qualified representative.

12. The Tribunal reached its decision on 3 May 2022, and thereafter the Judge produced the written reasons. The delay in the promulgation of the Judgment is a consequence of the pressure and demands on judicial resource, but I apologise to the parties for any anxiety caused by the delay.

13. In order to protect the claimant and her children, a Rule 50 anonymisation Order was made by consent, to avoid reverse data harvesting by which the claimant or her children could be identified.

The Issues

14. The issues were set out in the case management order of EJ Livesey which was sent to the parties on 25 August 2021. They were as follows:

1. Protected disclosure ('whistle blowing')

1.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Claimant says she made a disclosure as follows:

1.1.1 To C in writing (an email) on or about May or June 2020; an email in which she highlighted the fact that a client was about to lose her PIP benefit and that an urgent application was required to ensure that it was retained during the mandatory reconsideration period. The Claimant requested an extra day of work to enable her to process the application.

1.2 Were the discloses of 'information'?

1.3 Did she believe the disclosure of information was made in the public interest?

1.4 Was that belief reasonable?

1.5 Did she believe it tended to show that:

1.5.1 A person had failed, was failing or was likely to fail to comply with any legal obligation. The Claimant believed that a failure to have retained the client's PIP may have exposed the Respondent to liability;

1.5.2 The health or safety of any individual had been, was being or was likely to be endangered. The client was disabled and would not have been able to function without the benefit in terms of care provision and/or chilDare.

1.6 Was that belief reasonable?

2. Dismissal (Employment Rights Act s. 103A)

2.1 Was the making of any proven protected disclosure the principal reason for the Claimant's dismissal?

4. Direct disability discrimination (Equality Act 2010 section 13)

4.1 Did the Respondent do the following things:

4.1.1 C breached the Claimant's confidentiality in relation to a conversation which she held regarding a domestic violence situation. The Claimant complains that a report of her conversation was printed and posted to her house where it was then seen by the alleged perpetrator;

4.1.2 C accused the Claimant of not adhering to management instructions regarding compliance with Covid 19 regulations when she attended work in September 2020.

4.2 Was that less favourable treatment? The Claimant says she was treated worse than a hypothetical comparator.

4.3 If so, was it because of disability?

4.4 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to disability?

5. Discrimination arising from disability (Equality Act 2010 section 15)

5.1 Did the Respondent treat the Claimant unfavourably as set out in paragraph 4.1 above?

5.2 Did the following things arise in consequence of the Claimant's disability?

The Claimant's case is that, in relation to the first matter, her disability and heightened anxiety caused her to offload her problems on C. She considered that C did not want to deal with somebody like her who required additional support and attention. In relation to the second matter, she claims that her conduct rose from her heightened anxiety as well.

5.3 Was the unfavourable treatment because of any of those things?

5.4 Was the treatment a proportionate means of achieving a legitimate aim?

5.5 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

6. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

6.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

6.2.1 The requirement for employees to complete in-house training;

6.2.2 The manner in which in-house training and/or training materials were delivered and presented

6.2.3 The Claimant's work environment and/equipment. The Claimant complains about the equipment which she was required to use whilst working from home after the imposition of the national lockdown. In particular, she complains about the inadequaC of the laptop, printer and internet connection (physical features).

6.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? The Claimant alleges that all of the PCPs/features caused the additional stress and made her less effective as a learner and/or worker.

6.4 Did the Respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

6.5.1 Provide her with more support during the training process and/or clarify her training targets;

6.5.2 Provide training in a manner which could have been more readily absorbed by her, given the nature of her disabilities (more diagrams, for example);

6.5.3 Provide her with a new laptop, printer and internet dongle 6.6 Was it reasonable for the Respondent to have to take those steps and

when?

6.7 Did the Respondent fail to take those steps?

Factual Background

15. In approximately October 2019 the claimant began to work for the respondent as a volunteer, working one Thursday a week.

The claimant's roles with the respondent

16. In January 2020, the claimant applied in response to an advert for a Dementia Outreach Worker for the respondent. The role was for a fixed term of one year, working one day a week, a Monday. She was interviewed by C, the Project Manager, and D, the Operations Manager. She was appointed to the role on 21 January 2020 and reported to C although the respondent's structure included supervisors who provided support to employees on a day-to-day basis. The claimant's supervisor was P.

17. As the claimant was relatively inexperienced, it was a condition of her appointment that she would complete the necessary training for the role during the first 40 weeks of her appointment. The respondent offered substantial online training; as employees completed units their progress was recorded on the respondent's Learning Assessment Record, and their progress was monitored.

18. The claimant's post was funded by a private donor, and operated in partnership with Dementia Support, another charity. In consequence, the respondent was required to log and account for the hours and work done by the claimant so that it could report those matters to the donor. The claimant continued in her voluntary position, and therefore, there needed to be a clear separation between the work the claimant undertook in her paid and voluntary roles.

19. D, in her role as Operations Manager, conducted a monthly Quality Assurance review of the case reports prepared by the outreach workers to identify errors, points of learning, and to appraise the extent to which the case worker had assisted the client. Three grades were possible: a '0' indicated that it was either not possible to tell if the client's needs have been met due to poor case reporting or the client may have been subject to a detriment, a '1' that the client had been helped marginally but not fully, and a '2' that the case evidenced meeting the required standards and the client's needs had been met.

The impact of the Covid-19 pandemic

20. In March 2020 as a consequence of the pandemic, it was necessary for the claimant to work from home. The claimant initially stopped her voluntary work, but within a period of weeks was able to return to it. She continued in the employed role throughout.

21. Working from home was a very challenging and difficult situation for the claimant. Her children were at home throughout the day, one of whom was autistic, and her partner was also within the house effectively for 24-hour today. He was a controlling and manipulative individual, given to periods of excessive drinking, anger and rages.

22. On 6 March 2020, D raised concerns with C that the claimant had potentially breached the GDPR in one case which she had reviewed. She notified C who in turn raised the issue with the claimant.

23. In April 2020, because of the decrease in referrals, the claimant was instructed by C to undertake telephone advice. On 22 April 2020, C sent a Teams message to the claimant suggesting that they should discuss how the claimant was progressing and finding the challenges of the work. The claimant replied that the workload was all right, but she had fallen behind with her training because of the difficulties of trying to work from home when her children were present all day. She said that she was not feeling confident and had been having problems with her work laptop and so proposed to use her own laptop. In an email, C replied permitting the claimant to use her personal laptop and asked the claimant to update her as to her progress with training. She agreed that the claimant could use half of her voluntary day's work to undertake training for the paid role to assist the claimant catch up. She expressed come concerns about the claimant's overall progress with training.

24. On 25 April 2020, the claimant replied to C. Given the claimant argues that respondent knew or ought reasonably to have known from that email that she had anxiety, we address the content of the email in our conclusions below.

25. Another six weeks or so passed without event, and the claimant subsequently emailed C on approximately 8 June stating that she felt that she was doing much better and was enjoying her work and the casework.

26. On 19 June 2020, the respondent emailed all staff in relation to the need to ensure compliance with the GDPR, given a number of recent issues (of which the claimant's conduct formed one).

27. On 29 June 2020, the claimant emailed C to advise her that she had fallen and broken her ankle. As the claimant relies upon the email to demonstrate that the respondent had knowledge of her anxiety, we address the relevant content in our conclusions below. On the same day the respondent asked all staff to review their cases and to provide a list and status for each, for the purpose of a review by the respondent.

28. On 6 July 2020, C emailed the claimant chasing the receipt of her cases progress report.

The claimant's appraisal

29. On 13 July 2020 C conducted the claimant's appraisal by telephone. C stressed the need for compliance with the GDPR (the respondent was

considering at or about this time the need for insurance to cover liability in the event of GDPR breaches) and re-iterated that the claimant should only do the work for her paid role on a Monday, as the claimant was confused as to whether she needed to include cases she had undertaken in her voluntary role as well as those in her paid role. C stressed that it was only the latter which needed to be addressed in the report. Again, as the claimant asserts that she disclosed her anxiety to C during this meeting, we address the detail of the discussion and its effects in our conclusions below.

30. On 27 July 2020, the claimant emailed D explaining that she was using her own laptop as she had had problems with her work laptop (which had repeatedly crashed and was very slow) and to a lesser extent with her broadband. D forwarded that to C who repeated her permission for the arrangement but asked the claimant to ensure that the work laptop was returned so that it could be repaired, if necessary.

The performance improvement plan

31. On 3 August 2020, the respondent held a management meeting. By the time of the meeting C had concluded that the claimant was 'not up to the job' as she described it. She had formed the view that the claimant was progressing too slowly to complete her training within a reasonable period, was making consistent errors in relation to GDPR and was slow to comply with what C regarded as clear instructions; for example, the claimant had still not completed the cases report which had been asked for in June. She shared that view with the management team and stated that she would begin a formal Performance Improvement Plan ("PIP") with the claimant.

32. On 6 August 2022, the claimant had still not sent the cases report to C.

33. On 10 August 2002, the claimant and C exchanged emails in relation to a case the claimant was handling, where C was concerned that the claimant had still not grasped the fundamentals of the need to ensure consent for the release of information for GDPR purposes.

34. On 17 August 2020, C conducted a performance review meeting with the claimant by Teams during which she formally notified the claimant that she would be subjected to a PIP. There is a significant dispute between the parties as to what the claimant said and how she reacted at this meeting. The claimant argues that she broke down in tears and informed C that she was suffering from anxiety and was the victim of domestic abuse by her partner. The respondent argues that the claimant only informed C that her partner was demanding, and that the claimant seem to be emotionless throughout the meeting. Consequently, we address our findings as to the content of the meeting in our conclusions below.

15. On 19 August C chased the claimant for the status report for her cases.

The return to the office in September 2020

16. In August and early September 2020, the respondent was making

preparations for its staff to return to its offices. On 2 September each staff member was notified of a time for attendance, which would permit the managers to take their temperatures as they arrived before they were admitted. The letters sent to the staff indicated that they should not attend before their allotted time, and failure to comply with that instruction could be treated as a disciplinary matter.

17. On 4 September 2020 D informed C that she had assessed another of the claimant's cases and had graded it as 0 during the preceding monthly quality assurance review.

18. On 7 September 2020, the claimant was due to attend the office in accordance with her allotted time of 9:10 a.m. In the event, she attended before 9 AM, because she was carrying her laptop and papers that she had been working on at home and was using crutches. She was anxious to allow sufficient time for her to walk from the car park to the office to ensure that she arrived on time. In the event she was early, C saw her outside the building, and instructed her to come in because she felt she could not ask her to walk all the way back to her car on her crutches for the sake of a few minutes.

19. On 11 September 2020, the claimant emailed C advising her that she was feeling more confident and was really enjoying her role, and that she had focused upon debt processing and PIP MR processes in her training.

20. On 14 September 2020, C sent the PIP to the claimant. The claimant was deeply upset by the criticisms of her performance within the plan, and replied by email, indicating that she believed that their professional relationship had been damaged over the preceding few months, and suggested a face-to-face meeting to talk things through. C agreed to a meeting if it would assist the claimant.

21. On 21 September 2020, the claimant met with C for an interim review meeting for the claimant's PIP. At that stage, the claimant had still not completed her training but had had approximately four months longer than the respondent would normally permit for her to do so. There were ongoing concerns with the claimant's understanding of the necessity for consent for the purposes of the GDPR.

<u>The PIP MR client application</u>

22. On 22 September 2020 at 9:59, the claimant messaged C asking whether it was permissible for her to do paid work during her voluntary day for a client who had visit the respondent's office to check on her PIP MR report progress. In the ensuring discussion, the claimant suggested that another employee could call the client back to discuss it and that a supervisor could review it before it was sent. At 11:13 C suggested that she should send it to a supervisor. The claimant raised a series of further questions, and at 12:09 ended by saying "I just felt that it could delay the client if I had to wait until next week?".

23. C was attending an external meeting, and was not able to respond, and so asked D to assist the claimant. Approximately an hour later, at 13:00, D contacted the claimant. The claimant advised her that she had just completed a PIP MR report for a client but could do no further work on the report until her

next day in her employed role, and she was concerned as the report needed to be reviewed and submitted. She asked for permission to ask a supervisor to check the report before it was sent, expressing her concern as she had not written a PIP MR report previously. She stated that she was concerned that if the respondent were unable to progress the report until the following Monday, it would not be acting in the client's best interests.

24. The claimant asserts that that message was a protected disclosure. We consider that assertion in our conclusions below

25. D replied indicating that she was familiar with the case, and had reviewed it, and gave some advice about the best course to adopt where PIP MR reports were time critical (in the sense of an impending deadline with the DWP or the relevant tribunal). She advised the claimant to submit the report that day and asked her to indicate if that was not possible so that she could make arrangements to ensure that it was submitted. She offered to support the claimant if she required it.

26. The claimant agreed to send the report to a supervisor to review it, so that it could be submitted. Within 25 minutes of being authorised to send the report to a supervisor, the claimant had done so.

27. On 5 October 2020, the respondent had a further management meeting. The claimant's performance was discussed. The meeting was told that the claimant could not be suspended because the issues in relation to her performance were not gross misconduct (in reality they were matters of performance or capability). It is clear that the respondent foresaw the possibility of the claimant bringing legal action, given the extent to which the respondent's insurance would cover them in that scenario was discussed. It is therefore apparent that the respondent was considering the possibility that the claimant would be dismissed at this stage.

28. Consequently, at the end of the working day on 5 October, C emailed the claimant providing her observations following the claimant's PIP Review. She observed that:

    28.1. the claimant had continued to undertake activities related to her paid rolled on non-working days without prior agreement. (That was a reference to the PIP MR report that had been raised on 22 September.)

    28.2. Two of the claimant's cases had been reviewed and each had been scored a 0 due to a possible detriment to the client; and

    28.3. other cases demonstrated that the claimant was not making clear progression and seem to require unnecessary appointments.

29. C indicated that the purpose of the subsequent meeting was to review the cases in light of those observations and was not a disciplinary hearing.

30. The claimant was deeply upset and replied indicating that in at least one instance she had been permitted to work on a client's case outside of her contractual hours. In the ensuing email exchange, the claimant sent a long and detailed email (18:10) which she asserts is a further protected disclosure. In addition, she argues that the content of the email had the effect that the

respondent ought reasonably to have known that she was suffering from anxiety and depression. Consequently, we consider the content and effect of that email within our conclusions below.

31. On 6 October 2020, C informed the claimant that as the discussion was then running into the claimant's non-working days and was not productive, she would discuss the claimant's concerns with the management team and would revert to her in due course.

The disciplinary investigation report

32. On 12 October 2020, C prepared a disciplinary investigation report in relation to the claimant's performance. The report focused on two disciplinary allegations: a refusal to obey reasonable instructions and poor performance and development.

33. In the 'Background' section of the report, C referred to the performance review meeting which was held on teams on 17 August and reported as follows,

> *Rachel disclosed some issues with her partner since sustaining an injury two weeks prior and found he had been very demanding. As such, C agreed that the training time could be used more flexibly, e.g. in the evenings, if this was more helpful and that she could contact C if that were necessary.*

34. Further reference was made to her partner when C addressed the question of mitigation in the report; the report's recorded that the claimant had said that she was frequently distracted by the issues around her partner.

35. The report identified that the failure to comply with reasonable orders of the manager consisted of the claimant "repeatedly ignoring instructions from her line manager to not complete paid work outside working hours without prior agreement." It set out a litany of concerns about the claimant's performance and concluded with a recommendation that the claimant should be dismissed from her role on the grounds of capability because it was unlikely that a longer period performance management would permit the claimant to reach the required standards, particularly because of the claimant's simultaneous disregard for the instructions from our manager and supervisors.

36. On 14 October 2020, C emailed the report to the claimant. A further copy of the report was posted to the claimant's home address.

37. 16 October 2020, the claimant email D raising questions as to the process that would be followed in relation to the disciplinary and stating that she had suffered a family bereavement and that her stress and anxiety levels were high. Once more, the claimant relies upon the content of the email for the purposes of establishing that the respondent knew or ought reasonably to have known that she had a disability. We therefore address the content of the email in our conclusions below.

38. Later that same day, the claimant sent her supervisor, P, an email in relation to the struggles that she had had with learning as a consequence of the conditions of anxiety, Asperger's and ADHD/OCD. Once again, the claimant

relies upon that email for the purpose of establishing that the respondent had knowledge of her conditions. Again, we address the content and effect of that email in our conclusions below.

39. On 19 October 2020, P informed D of the matters raised in the claimant's email to her on 16 October.

40. On 20 October 2020, the claimant emailed D directly explaining the nature of her domestic situation, disclosing her condition of anxiety, and explaining their combined impact upon her performance. The respondent accepts that it had knowledge of the claimant's condition of anxiety from that date.

41. The disciplinary hearing took place on 22 October 2020. There was a full and comprehensive discussion of the matters addressed in the investigation report. When discussing the claimant's domestic situation, D asked whether the claimant had asked for any adjustments to her role as a consequence, the claimant confirmed that she had not, but that more time for training would assist her.

42. A further disciplinary meeting to discuss the claimant's domestic situation and anxiety was arranged for 26 October. During that meeting the claimant explained that her partner had read the disciplinary investigation report on her laptop, that she had been taking medication for anxiety, and that the dosage had been increased significantly in April as a consequence of her partner's behaviour when he became more controlling, aggressive, and demanding. She explained that she became anxious at work, as a consequence of her ADHD/OCD tendencies, when she could not obtain what she regarded as an unambiguous explanations of expectations or instructions. The claimant again asked for more time to complete her training.

43. From 29 October 2020, D met with the claimant to inform her of her decision. Whilst she concluded that the claimant's performance and development had been poor, she determined that no formal action would be taken as a consequence of the discovery of the impact of the claimant's anxiety and the effects of the domestic abuse situation upon her. However, she concluded that the allegation that the claimant had failed to comply with reasonable instructions was proved, because the claimant had disregarded GDPR requirements, had contacted clients despite being told not to do so, and worked outside of her paid hours despite being told not to on a number of occasions. She concluded that the claimant had received clear instructions in relation to each of those matters and did not regard the claimant's anxiety as sufficient mitigation or explanation as to why the claimant had not followed them. She therefore dismissed the claimant on one months' notice.

44. A letter detailing the reasons for the claimant's dismissal was sent on 30 October 2020. She appealed on 2 November 2020, but the appeal was not upheld.

The Relevant Law

<u>Protected disclosure claims under the Employment Rights Act 1996</u>

45. The concept of "protected disclosure" is defined by section 43A of the 1996 Act:

"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H ."

46. A qualifying disclosure is in turn defined by section 43B:

"In this Part a qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

47. The disclosure must be a disclosure of information. In practice, many whistle-blowing disclosures raise concerns, or complaints, or make allegations. This does not, however, prevent them from falling within the terms of the section. As Sales LJ observed in Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; [2019] ICR 1850 at para. 35, the question is whether the statement or disclosure in question has "a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in the subsection". He added that whether this is so "will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case" (para. 36). A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly not suffice; by contrast, one which also explains the basis for this assertion is likely to do so.

48. Whether such words are to be regarded as “disclosure of information” within the meanings of ERA section 43B(1) depends on the context and the circumstances in which they are spoken. The decision as to whether such words which include some allegations cross the statutory threshold of disclosure of information is essentially a question of fact for the Employment Tribunal which has heard evidence (see Eiger Securities LLP v Miss E Korshunova [2017] ICR 561 EAT at para 35.)

49. Where a Claimant argues that the information tended to show a breach of legal obligation “Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of

verification by reference for example to statute or regulation. …" (see Blackbay Ventures Ltd v Gahir [2014] IRLR 416 per HHJ Serota QC at paragraph 98).

50. However, neither the EAT was not referred to Babula v Waltham Forest College [2007] ICR 1045, CA in either Blackbay or in Eiger Securities, and although it was referred to the case in NASUWT v Harris (2019) UKEAT0061/19, Soole J did not address the potential inconsistenC and tension between those Blackbay and Babula (see para 62 for his analysis). Blackbay was relied upon by the EAT in Harris and applied by Soole J to allegations of the commission of criminal offences.

51. The identification of the legal obligation "does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation." The decision of the Tribunal as to the nature of the legal obligation the claimant believed to have been breached is a necessary precursor to the decision as to the reasonableness of the Claimant's belief that a legal obligation has not been complied with" (see Eiger at paras 46 to 47 respectively).

52. In Twist DX v Armes UKEAT/0030/20/JOJ (V) Linden J returned to the issue of disclosures of information. He concluded that it is not necessary that a disclosure of information specifies the precise legal basis of the wrongdoing asserted.

53. The worker does not have to show that the information did in fact disclose wrongdoing of the kind enumerated in the section; it is enough that he reasonably believes that the information tends to show this to be the case. As Underhill LJ pointed out in Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979; [2017] IRLR 837 at para.8, if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable.

54. Having reviewed the law we conclude that the following propositions apply when considering whether a claimant has made a protected disclosure;

54.1. First there must be a disclosure of information. That may include allegations, complaints, and allegations, provided the combined effect has a "sufficient factual content and specificity" (Cavendish Munro Professional Risk Management Ltd v Geduld [2010] ICR per Sales LJ at para 35;

54.2. Secondly, that information must objectively tend to show, in the claimant's reasonable belief that one of the qualifying grounds exists. The Tribunal's task is to assess the information in context and against the prevailing circumstances. Those circumstances:

54.2.1. Permit a higher objective test where the individual is a professional (see Korashi v Abertawe Morgannwg University Local Health Board [2012] IRLR 4 per HHJ McMullen at para 62);

54.2.2. Permit the Tribunal to read across documents and consider statements to create an objective picture of what would reasonably

have been believed to have been understood from a written or verbal statement.

54.3. Thirdly, where the qualifying ground relied upon is a breach of legal obligation:-

54.3.1. *Either* the information must identify the legal obligation, although the "identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong" (Eiger at paras 46-47; Twist DX).

54.3.2. *Or*, if the obligation is not identified it must be objectively "obvious" from the information disclosed (Blackbay per HHJ Serota QC at para 98);

54.4. Fourthly, it does not matter whether the claimant's belief is wrong, if objectively his/her belief that he/she has identified a breach as detailed above is reasonable (Babula per Wall LJ at para 79 and Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73 per Elias LJ at para 21.)

54.5. Finally, the articulation of the general breach of legal obligation in that sense is a "necessary precursor" for a claimant to establish a *reasonable* belief that the information tends to show that there had been such breach.

55. In Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731, CA, the following factors were identified by the Court of Appeal as being relevant to the degree of public interest:

55.1. the numbers in the group whose interests the disclosure served;

55.2. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;

55.3. the nature of the wrongdoing disclosed, and

55.4. the identity of the alleged wrongdoer.

S.103A

56. Section 103A provides:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

57. "This creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it seems to me that it is simply the result of placing dismissal for this particular reason into the general run of

unfair dismissal law" see Kuzel v Roche Products Ltd [2008] ICR 799 per Elias J at para 44.

58. The principle reason for the dismissal is "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (see Abernethy v Mott, Hay and Anderson [1974] ICR 323).

59. The focus must be on the knowledge, or state of mind, of the person who actually took the decision to dismiss, as, "by S.103A, Parliament clearly intended to provide that, where the real reason for dismissal was whistleblowing, the automatic consequence should be a finding of unfair dismissal. In searching for the reason for a dismissal, courts need generally look no further than at the reasons given by the appointed decision-maker. …[however] If a person in the hierarchy of responsibility above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination." Royal Mail Group Ltd v Jhuti 2019 UKSC 55, SC.

Claims under the Equality Act 2010

60. The claimant brings four claims under the Equality Act 2010. The first for direct discrimination (s.13 Equality Act 2010 ("EQA")), the second that the respondent treated her unfavourably because of something arising from her disability (s.15 EQA), the third that the respondent failed to make reasonable adjustments (contrary to s.20 EQA 2010).

61. The relevant law is contained in sections 39 and 13, 15, 20, and 23 EQA 2010 which provide respectively (in so far as is relevant) as follows:

39 – Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;
(d) by subjecting B to any other detriment.

13. Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

s.15 Discrimination arising from disability

(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.

s. 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(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.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

23. Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

Section 13

62. The basic question in every direct discrimination case is why the complainant was subjected to less favourable treatment (Amnesty International v Ahmed [2009] IRLR 884, per Underhill P, para. 32).

63. Once it is established that the treatment is because of a protected characteristic, unlawful discrimination is established and the respondent's motive or intention is irrelevant (Nagarajan v London Regional Transport [1999] IRLR 572 HL).

64. The protected characteristic does not need to be the only reason for the less favourable treatment, or even the main reason, so long as it was an 'effective cause' of the treatment: O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372, EAT.

The reverse burden of proof

65. The statutory tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

(2) If there are facts on 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.

66. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the Tribunal has to determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

67. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e., that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of (or related to if the claim is under s.26) the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

68. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

69. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

70. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

71. Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e. that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination (see Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA

Civ 18.)

72. The Tribunal does not have slavishly to follow the two-stage process in every case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr Justice Elias identified that 'it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

73. It is for the claimant to show that the hypothetical comparator in the same situation as the claimant would have been treated more favourably. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

Detriment and unfavourable treatment (s.15)

74. The test of a detriment within the meaning of section 39 EQA 2010 is whether the treatment is "of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" (per Lord Hope in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] ICR 337, para 35).

75. The Equality and Human Rights Commission's Code of Practice (2011) observes at 5.7

> "For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage "

And at 4.9

> "'Disadvantage' is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection, or exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable, and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently."

76. The same approach must be adopted in relation to unfavourable treatment within the meaning of section 15 (see Williams v Trustees of Swansea University Pension & Assurance Scheme and anor per Langstaff J in CA (paras 28-29) of the word "unfavourably", which formulation was approved in the Supreme Court (at para 27):

> "… it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person … The determination of that which is unfavourable involves an assessment in which a broad view is to

be taken and which is to be judged by broad experience of life."

77. In City of York Council v Grosset [2018] EWCA Civ 1105, the Court of Appeal (per Sales LJ) held (at paragraphs 36 and 37) that s.15(1)(a) of the Equality Act 2010 should be interpreted as setting the following two-part test for courts and tribunals to apply:

    77.1. did the alleged discriminator treat the claimant unfavourably because of an identified "something"?

    77.2. if so, did that "something" arise in consequence of the claimant's disability? This is an objective test, and it is therefore irrelevant whether the alleged discriminator did not know that the "something" arose in consequence of the claimant's disability. Also, there does not have to be an immediate causative link between the "something" and the claimant's disability; a relatively wide approach should be taken to the issue of causation.

78. In Pnaiser v NHS England and anor [2016] IRLR 170, EAT, Simler P summarised the proper approach to establishing causation under s.15, as follows:

    78.1. first, the tribunal has to identify whether the claimant was treated unfavourably and by whom;

    78.2. it then has to determine what caused that treatment, focussing on the reason in the mind of the alleged discriminator. An examination of the conscious or subconscious thought processes of the alleged discriminator is likely to be required. The 'something arising in consequence of disability' need not be the main or sole reason for the unfavourable treatment, 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 (see also Charlesworth v Dransfields Engineering Services Ltd EAT 0197/16, EAT per Simler P);

    78.3. the tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator. It will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability, and "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" (para. 31(e)).

Failure to make reasonable adjustments

79. A tribunal must consider: (1) the Provision, Criterion or Practice ("PCP") applied by or on behalf of the employer, or the relevant physical feature of the premises occupied by the employer, (2) the identity of non-disabled comparators (where appropriate), and (3) the nature and extent of the substantial disadvantage suffered by the claimant (Environment AgenC v

Rowan [2008] ICR 218, EAT.)

80. The burden of proving the PCP, the substantial disadvantage and the steps necessary to remove them rests on the claimant (see HM Prison Service v Johnson [2007] IRLR 951, confirmed in Project Management Institute v Latiff [2007] 579). What a claimant must do is raise the issue as to whether a specific adjustment should have been made, not prove a prima facie case of breach (see Jennings v Barts and the London NHS Trust EAT 0056/12) and the adjustment can be identified, in exceptional circumstances, during the hearing (PMI v Latiff). The Tribunal must, therefore, identify with some particularity the step which an employment should take to remove the disadvantage (HM Prison Service v Johnson)

Provisions, Criterions and Practices

81. The purpose of the PCP is to identify what it is about the employer's operation that causes disadvantage to the employee: General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, EAT.

82. A poliC, criterion or practice must have an air of repetition about it, and cannot be a one off (see Nottingham City Transport Ltd v Harvey EAT 0032/12, confirmed in Fox v British Airways plc EAT 0315/14), unless there is an indication that it will be repeated (Ishola v Transport for London [2020] EWCA Civ 112, CA.).

83. If the substantial disadvantage complained of is not because of the disability, then the duty to make reasonable adjustments will not arise: Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley UKEAT/0417/11, [2012] EqLR 634.

84. Tribunals should "set out what it was about the disability of the [claimant] which gave rise to the problems or effects which put him at the substantial disadvantage identified": Chief Constable of West Midlands Police v Gardner EAT 0174/11, para. 53.

The steps to remove the disadvantage

85. The word 'steps' must not be construed unduly restrictively, as the Court of Appeal made clear in Griffiths v Secretary of State for Work and Pensions [2017] ICR 160, CA. 'In my judgment, there is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of S.20(3). Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken.'

86. A statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission. Courts are obliged to take it into consideration whenever it is relevant: section 15(4). Chapter 6 is concerned with the duty to make reasonable adjustments. Paragraph 6.2 states:

> "The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply

> avoiding treating disabled workers … unfavourably and means taking additional steps to which non-disabled workers … are not entitled."

87. Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps" and paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantive disadvantage. So far as efficaC is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness: see the observations of Lewison LJ in Paulley v First Group plc [2014] EWCA Civ 1573; [2015] 1 WLR 3384, paras 44-45.

88. Tribunals are not under a duty to address every factor set out in the Code, but would be wise to address directly those factors that they find to be relevant: Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341, EAT.

89. An employer cannot make an objective assessment of the reasonableness of proposed adjustments/steps unless it appreciates the nature and extent of the substantial disadvantage imposed on the employee by the PCP, physical feature or lack of access to an auxiliary aid, and an adjustment to a work practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage — Lamb v Business Academy Bexley EAT 0226/15.

90. There is no duty to consult in relation to the adjustment that should be made, but it will potentially jeopardise an employer's position if it does not consult (see Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT):

> 'any employer would be wise to consult with a disabled employee in order to be better informed and fully acquainted of all the factors which may be relevant to a determination of what adjustment should reasonably be made in the circumstances. If the employer fails to do that, then he is placing himself seriously at risk of not taking appropriate steps because of his own ignorance. He cannot then pray that ignorance in aid if it is alleged that he ought to have taken certain steps and he has failed to do so.'

91. A proposed adjustment will not amount to a 'reasonable' adjustment if it has "no prospect" of removing the substantial disadvantage: Romec v Rudham [2007] All ER (D) 04 (Sep), EAT per HHJ McMullen; however, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be "a prospect" (as opposed to "a good prospect" or "a real prospect") of the adjustment removing the disadvantage (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

92. A step which, on its own, may be ineffective might nevertheless be one of several adjustments which, when taken together, could remove or reduce the disadvantage experienced by the disabled person: e.g. Shaw and Co

Solicitors v Atkins EAT 0224/08.

Discussion and Conclusions

Protected disclosure

Was the claimant's message to C in which she highlighted the fact that a client was about to lose her PIP benefit and that an urgent application was required to ensure that it was retained during the mandatory reconsideration period a protected disclosure?

93. As detailed in the Procedure, Hearing, and Evidence section above, the claimant clarified as the outset of the second day of the hearing that the documents she relied upon as protected disclosures were the record of webchat with D on 22 September and an email sent to C on 5 October 2020. The qualifying grounds relied upon were identified as breach of legal obligation and health and safety (s.43B(1)(b) and (d) respectively). We address each alleged disclosure in turn below.

94. However, it is important for the claimant to understand that the nature of our enquiry is limited to the information that was disclosed in the messages and their context, as opposed to the arguments she articulated in her closing argument (in so far as they had not previously been articulated and so were not part of the context). For example, the claimant's allegation that a client's health and safety was likely to be put a risk because the respondent had allocated the case to her, and she was untrained and already under investigation for failing to meet learning and developments needs was not one that was articulated in the messages. We address the content of the communications and their context below.

Webchat of 22 September 2020

95. The webchat must be seen within its context, the claimant was asking for assistance with the review of a PIP MR report ("MR report") she had completed, which was an unfamiliar task to her, in response to a message from D in which she stated she had reviewed the report and was willing to help. The claimant was concerned that she was unable to do further work on the report and make any changes identified by the review and/or would be unable to send it to the DWP, because it was her non-working day, in circumstances where there as a time limit for the client to submit an application to the DWP and, if that failed, to the Health and Social Welfare Tribunal. The particular concerns she expressed were two-fold:

    95.1. Obtaining permission to work on the report to reflect changes on a day which were not funded for her to work in her paid role; and

    95.2. The strict application of the restriction of her work in her paid role could have the effect that the respondent was failing to act in the best interests of the client.

96. The claimant's argument was that the information she disclosed about which she was blowing the whistle was the 'poor management handling of a case

which would present a clear danger to the health and safety of [the affected] public member should [the application] fail.' The poor management about which she complained was that the respondent had allocated the case to the claimant, who was not trained to complete PIP MR reports in circumstances where the respondent regarded her as underperforming, and that that made it likely that the client would suffer harm because it was more likely that the DWP or the Tribunal would refuse her permission to appeal.

97. Whilst the main focus of the message was the immediate request for authorisation to send the report to a supervisor, it is clear that the claimant disclosed information which in her view tended to show that there was a likelihood that the respondent might fail to comply with a legal obligation and that the consequence would be that the client's health and safety could be placed at risk if she lost her disability allowance.

98. That view may have been wrong, but the claimant need only establish that it was one she reasonably believed. The facts relevant to her reasonable belief are detailed in the message itself; it was the first time the claimant had written such a report, and if she made an error, it might deny the client the opportunity to challenge the DWP's decision by appeal. Furthermore, the nature of the legal obligation is sufficiently obvious as not to require detailed explanation and in any event is identified within the message: acting in the client's best interests.

99. However, the facts relevant to whether that belief was reasonable arise from the context of the message. The claimant's understanding when sending the message was that the harm would only materialise in circumstances where the report were not reviewed and sent to the DWP. At the time that the claimant was writing the message, she did not and could not reasonably have believed that the respondent would not organise for the report to be reviewed and sent to the DWP. That is because the message was a response to D's, in which she had asked, "I have already reviewed the case, so can I help.' It was therefore clear to the claimant that D, having reviewed the report, would send it to the client rather than jeopardise the client's prospects of appeal. Furthermore, another supervisor had been identified by C to whom the claimant should send the report for review and filing with the DWP.

100. We are not satisfied therefore that claimant made a protected disclosure on 22 September 2020 because the claimant's belief that the respondent would breach its obligation to act in the client's best interest was not reasonable, and in consequence the claimant's belief that the client's health and safety would be likely to be put at risk was not reasonable.

Email of 5 October 2020

101. We turn next to the email sent by the claimant to C on 5 October 2020. The context of that message was an email for C to the claimant advising her that she was making limited progress in her performance, specifically identifying the incident above as having been scored '0' due to a possible detriment to the client and identifying that she had worked on days when she was funded. The claimant had replied, expressing concern and dismay at that score, given that the report had been reviewed by her supervisor without criticism and that on one occasion she had been specifically authorised to

work, following her request.

102. The claimant listed in her email the steps she had taken to understand what the MR report required, the delay in receiving a reply for D, and also stated,

> *The important point for me to make here is that I WAS requesting support and permission because of my concern for the client's welfare and case benefit. I was clearly aware that had I obeyed the rules literally, and not looked at that case again until my following Monday it could have been detrimental to the client.*

103. The remainder of the email is, in essence, the claimant's defence of and explanation for the matters which C had indicated were to be considered at a disciplinary hearing. At the time of writing, the claimant knew that the respondent had reviewed the report and that it had been sent to the client. There was therefore no basis on which the claimant could reasonably have been that the alleged breach of level obligation would have occurred.

104. We are not satisfied therefore that the email of 5 October 2020 was a protected disclosure.

105. As we have concluded that the claimant did not make a protected disclosure it necessarily follows that the claimant's claim that the reason or principal reason for her dismissal was a protected disclosure must also fail.

106. The claim under s.103A ERA 1996 is not therefore well founded and is dismissed.

Claims under the Equality Act 2010

Knowledge of disability

107. As a consequence of the respondent's concession at the hearing that the claimant's conditions of Asperger's and Attention Deficit Hyperactivity Disorder ("ADHD") were disabilities, we must determine whether the respondent knew or ought reasonable to have known that the claimant was disabled as a consequence of three conditions: (a) anxiety and depression; (b) Aspergers and (c) ADHD, and (for the purposes of the reasonable adjustments claim only) (d) that she was placed at a disadvantage by them.

108. The claimant accepts that she did not disclose her disability in her application form. Her case is that the respondent specialises in assisting and supporting vulnerable members of society, many of whom have mental health conditions, and she argues that in that context the respondent ought reasonably to have known from her messages and her circumstances as someone who was living alone with an abusive partner in lockdown that she was also suffering from a mental health condition, specifically anxiety and depression. Further, she argues that that if the respondent did not know the information was sufficient to put the respondent under a duty to make reasonable enquiries to identify whether that was the case, and it cannot use its failure to make such enquiries as a defence.

109. The respondent's case is that it did not know and could not reasonably

have been expected to have known of the conditions until 20 October 2020 when it accepts that the claimant disclosed them in in an email to D. It argues that references to anxiety are not, without more, sufficient to put the respondent on notice of an underlying condition of anxiety and depression.

110. We consider the relevant documents and meetings in chronological order:

111. On 25 April 2020 in her email to C, the claimant referred to anxiety in the context of C receiving a few concerns about the claimant's performance in feedback. The claimant wrote,

> *"if there is anything I'm not doing correctly, please do tell me. I have had issues, and anxiety, but its more because I am quite sensitive to conflicting advice or responses. The anxiety is purely the fear of not progressing correctly, and not meeting your expectations….*
>
> *The latest, yesterday… was a query about the process for emails. I was following the spreadsheet diagram in team documents…. that all resources and reference you use should be listed in information sources…. I didn't feel comfortable with Cathy's request that I didn't include links in my write up on case book…. And I felt concerned that at a later date the case may be review and score a very low mark… because the procedure hadn't been followed.*
>
> *… Just an example of what causes me anxiety/confusion – or am I being too over sensitive? I have a very black and white mind – it's why I like the law."* [sic]

112. The references to anxiety are reasonably to be understood, when viewed in context, to be reactive anxiety caused by trigger events, as opposed an underlying condition of anxiety. In our view, there was insufficient information within that email to put the respondent on notice that the claimant suffered from anxiety and depression. The email does however contain information which might have put the respondent on notice that the claimant demonstrated qualities which were potentially consistent with Asperger's (namely sensitivity to conflicting instructions or advice; having a black and white mind), but the respondent's staff are not medical professionals, Asperger's is a complex condition, and the symptoms described were equally indicative of a character trait which was not associated with or derived from Asperger's. We bear in mind that the email describes many matters (such as IT failures, contracting a flu that was initial suspected to be Covid) which anyone would find stressful and a cause of anxiety. Consequently, we are not persuaded on the balance of probabilities the respondent ought reasonably to have known from those matters that the claimant had Asperger's, ADHD/OCD, anxiety or depression.

113. On 29 June 2020, in her email to C, the claimant updated C that she was absent on a particular day because she had fallen in the garden and broken a bone in her ankle. She ended by saying "sometimes the painkillers make it harder to concentrate – but I wanted to battle forwards – I always fear that if I take time off I will drop too far behind…" Again, on balance, we conclude that there is nothing within the email which identifies or ought reasonably to have led the respondent to identify that the claimant had any of the conditions

above – many people can struggle to concentrate when using analgesics and falling behind is a cause of anxiety for all, rather than being an indication of an underlying condition.

114. On 13 July 2020, the claimant's case is that she broke down in tears during her appraisal with C, stated that she needed instructions in bullets points and stressed that if not provided in that format she struggled to understand instructions. However, that is not an account that is contained in the claimant's ET1 or in her statement; it was one that she gave for the first time in cross-examination. The respondent's case is that nothing of that sort happened whatsoever; it relies upon the evidence of C and the minute of the meeting.

115. It is clear that the claimant raised concerns about her difficulties in working from home when her children were present during to the lockdown. Many, many parents would empathise with that position, being part of parents' common experience nationally, if not globally. The claimant further raised concerns about IT difficulties. Again, many people share and would empathise with those frustrations. There is nothing within the minute itself which is consistent with the claimant advising C that she had anxiety or depression. We recognise, however, that such minutes are very much the product of the perspective of the person who writes them, and here it is apparent from their content and style that the minutes are largely (if not entirely) a reflection of C's perspective, rather than a more balanced composition reflecting the claimant's remarks. Nevertheless, in the documents provided covering the period after appraisal meeting until the end of July, there is nothing which is consistent with the claimant having broken down or referenced the need for information to be provided in bullet points.

116. We note that in her evidence when she described what had occurred the claimant said words to the effect of,

> *"I explained that I needed things in bullet points, C always felt I was being defensive when I actually I was just asking for help, for a change to be made to help me, when we discussed the PIP on the telephone, I was in tears and saying that I didn't understand."*

117. The reference to the PIP can only have been a reference to the PIP which was instigated on 17 August 2020. We conclude therefore that the claimant must be mistaken as to the nature of the discussion on 13 July 2020 and had conflated it with what occurred in the subsequent supervision meeting on 17 August 2020. The claimant has not therefore persuaded us that the events occurred as she describes on 13 July 2020.

118. On 17 August 2020, the claimant had a follow up supervision meeting with C. The claimant's case is that she broke down in tears at this meeting and suggested that she could not cope unless she had instructions in bullet points. Again, the document produced by C does not reference any remarks made by the claimant, but again we do not regard that document as a minute of the meeting but as a crib sheet that C prepared in advance to explain why the claimant was being placed on a PIP, the areas she needed to improve upon and the action that she needed to take to do so. It does not detail the discussion which C accepts occurred in which the claimant raised concerns

about her partner being at home following an injury and that he had been 'very demanding' which made 'concentrating and finding time for training difficult;' there is no mention of either matter on the PIP document used for the discussion.

119. We conclude that, on balance, the claimant did burst into tears at this meeting and said that she needed instructions in bullet points. We reach that conclusion because we are persuaded that C, having concluded on 3 August that the claimant did not have insight into her failings and did not appear to think that she needed to improve and was not "up to the job" (to use C's words), was very short, direct, and to a degree dismissive with the claimant when discussing the failings which had been the cause of the PIP. That approach may well have been contributed to by the condition which C has which causes her constant pain. In that context, we are persuaded that the claimant said that she struggled with instructions and needed directions in bullet points or flow diagrams, and that C regarded the claimant as being defensive and failing to accept responsibility for her performance. In that context, we are persuaded that the claimant broke down in tears.

120. There is support for the claimant's case that she informed C of her anxiety and its cause during their discussion on 17 August within her email to D on 20 October 2020. In that email she stated,

> *"During the summer months, I had a chat with [C] about matters which I expressly said were told to her in confidence. I was very upset to see them referred to in the report she prepared. During our conversation, I explained to her, that I was struggling to make use of home time and extra evening time to complete research and training. That I was under extreme stress at home, suffering from anxiety and that this had a significant impact on my wellbeing and my ability to work.*
> *This was due to difficulties I was having at home of a domestic nature. As you are aware, domestic issues have been harder to cope with since lockdown, as victims have no-where to go. I was in lockdown, and my partner was home following reduced work hours and then later injury. The situation got worse. The level of aggression and alcohol fuelled arguments around myself and my children increased considerably and my ability to function and cope decreased.*
> *My anxiety and stress levels got worse and my medication was increased as a result of this…*
> *But it took a tremendous amount of strength to confide in [C]. At the time I was speaking to her, he came into the room to check who I was talking to, and I had to go outside making excuses - she heard this. I didn't mention it earlier because I was embarrassed. Deeply embarrassed. And being watched."*

121. We therefore accept the claimant's account that she told C that she was suffering from anxiety. We reject the evidence of C she did not do so, and that the claimant was strikingly calm and emotionless during the meeting. Our reasoning is as follows: first, both parties accept that the claimant disclosed she was in a very difficult domestic situation during the conversation; we consider that the claimant would have used considerable mental and emotional strength to remain calm when describing the fact of the situation

and its impact on her and/or on her children, particularly given that her partner was within earshot and walked in during the discussion. On balance, we conclude it was that aspect of the conversation that C remarked to D that the claimant had been almost emotionless in describing.

122. Secondly, within the same conversation (if not the precursor to it) C set out in a direct, unsympathetic, and critical manner what she perceived to be the claimant's extensive failings in her role and performance. We do not doubt that she did little to disguise her then firm view that the claimant was not 'cut out for the job.' For the claimant to have been on the receiving end of such a critical review of her performance and to have been trying to explain how her personality (the need for bullet points to learn) and her domestic situation impacted upon that performance, only for those explanations to be rebuffed by C on the grounds that she was making excuses and C's instructions had been perfectly clear, would, we find, inevitably have led the claimant to have been greatly distressed as she described. It was that aspect which we conclude was the 'horrendous' part of the meeting, as the claimant described it in evidence.

123. On balance, however, whilst we accept that the claimant was very distressed and told C of her anxiety and stress, we are not satisfied that the claimant told her that she was taking medication for anxiety. The claimant did not address this specifically in her statement, and when giving evidence in relation to it she spoke in general terms, save where she alleged that she had said she was a victim of domestic abuse and that her home situation during lock down was the cause of significant stress and anxiety. In contrast, the claimant had been specific in describing to C that she was taking medication for a broken ankle and that the analgesics she had been prescribed made her feel drowsy.

124. In those circumstances, we cannot say that the respondent knew that the claimant was disabled by reason of anxiety and depression. The claimant's description of anxiety was equally consistent with reactive stress and anxiety as with an underlying condition of anxiety, and the circumstances the claimant described would inevitably have caused anyone to feel the same stress and anxiety as she did. There was no evidence before us that the claimant told C how long the domestic abuse had continued, such that it would have been reasonable for C to conclude that the claimant's anxiety which was caused by it had or would be likely to last for 12 months or to recur.

125. The critical question is whether the respondent could reasonably have been expected to know that the claimant's condition of anxiety and depression was a disability for the purposes of s.15(2) EQA 2010. The Equality Act 2010 does not impose a duty upon a respondent to make enquiries, but EHRC Code of Practice at paragraph 5.15 states that "*an employer must do all it can reasonably be expected to do to find out whether a person has a disability."* It provides as an example, a worker whose performance and time-keeping worsen, stating "it is likely to be reasonable to expect the employer to explore with the worker the reason for these changes

and whether the difficulties are because of something arising in consequence of a disability."

126. In our judgment, there was sufficient information before C to put her on notice that the effects of claimant's anxiety on her ability to perform day to day activities might be sufficient to constitute a disability if it had lasted for a year or was likely to recur. Given the respondent's particular status in helping those with disabilities and C's status as the co-chair of the Citizens Advice Disability Network Group, in our view the cogency of the evidence required to explain why those enquiries were not made is higher. We are not persuaded that the respondent has discharged that burden here. The obvious questions were "how long have you had those symptoms? What treatment have you received, if any?" and "how has it affected you?" Given the anxiety was disclosed in the context of domestic abuse by the claimant's partner, made worse by lockdown, the likelihood of that period of anxiety being more than short term was very high indeed.

127. In those circumstances, we are very surprised that C did not make a detailed note of the claimant's explanation for what C perceived as her poor performance or, critically, the claimant's domestic circumstances (which C accepts were disclosed to her, whether or not the term 'abuse' was used), notwithstanding that the claimant told her in confidence. The failure to note the claimant's explanation is consistent with and indicative of C's view that the explanation was merely an excuse (and a poor one at that), rather than something that she needed to engage with and so make further enquiry about.

128. The respondent has therefore not persuaded us on the balance of probabilities that it could not reasonably have been expected to have known of the claimant's disability of anxiety and depression from 17 August 2020. Had the respondent made reasonable enquiries in a supportive way, we conclude that the claimant would have disclosed the details of her anxiety and depression, and her belief that she had Asperger's and ADHD, in the same detail that she later disclosed those matters to P.

129. We go on to consider the chronology to assess whether the respondent had actual knowledge at any stage because the question is relevant to the claimant's claims of direct discrimination.

130. On 22 September 2020, the claimant was more explicit in her email to C. The context of the email was the ongoing dispute between the claimant and C as to whether the claimant was at fault in relation to the PIP MR report and the circumstances in which she had sought support to send it to the client. She wrote,

> *"3 months ago, you wrote an email in which you said you wanted me to feel free and happy to contact you whenever I had an issue or needed support - 3 months ago I felt like I could. Now it feels like it will be held against me and causes me days of anxiety in-between shifts. I appreciate that rules and routines need to be in place for purposes of the funder, but*

management of those rules has created a situation detrimental to my career, my job, and by extension the clients.

I know that I pick up on procedural differences and questions, I know that I find conflicting things I have to address with my supervisors….

And I sincerely hope you can understand why this has made me un-well. I just wanted to get on with my training, my job, to put things right between us - to smooth things over a little."

131. The claimant's reference to the response to her requests for support causing her 'days of anxiety in-between shifts' and making her 'unwell' are consistent with an underlying condition of anxiety, but they are also consistent with reactive anxiety. When seen in the context of the PIP and the dispute concerning the PIP MR report, we are not persuaded on balance that the respondent knew that the claimant had anxiety and depression at this stage. Indeed, the incident involving the PIP MR had occurred on the day of the email; in consequence, C would not have known from the exchange that condition did or might amount to a disability. However, given the events which we have found occurred on 17 August 2020, C should have made enquiries about the extent of the claimant's anxiety between shifts, and why and how she was unwell. Had she done so, she would have been informed of the claimant's underlying conditions of anxiety and Asperger's type tendencies which the claimant had alluded to.

132. On 16 October 2022 at 11:39, in an email to D, the claimant stated that she had recently suffered a bereavement and that had had caused her stress and anxiety levels to be high. There is nothing within that email which could or should have alerted D to the conditions she relies upon in these proceedings as a disability. Shortly thereafter, at 13:35 the claimant emailed P and specifically requested reasonable adjustment to assist her with her learning, identified that she had Aspergers and ADHD and had struggled with them throughout her life, and that she need longer to complete training modules, and that bullet points assisted her to learn and from which to create flow charts. Lastly, she expressly identified that could suffer from brain fog which affected her ability to learn, and that that condition was exacerbated by stress and anxiety, time pressure, and felling misunderstood. She explained that she took medication for anxiety.

133. The respondent therefore knew that the claimant had Aspergers, ADHD like tendencies and anxiety, and of the effects of those conditions, as at 16 October 2020.

134. D's evidence is that P did not inform her of the content of the email until the 19 October after the weekend. Although the Tribunal was surprised that the message was not communicated sooner, we accept that account.

135. The respondent accepts that it had knowledge of the claimant's disability and its effect as of 20 October 2020, as a consequence of the claimant's email to D, in which she detailed that she was suffering from anxiety and had been taking medication for it. However, we have found that the respondent, as a corporate entity, as opposed to individuals, had knowledge 16 October

2020 and could reasonably have been expected to have known from 17 August 2020.

Claims under the Equality Act 2010

C breached the Claimant's confidentiality in relation to a conversation which she held regarding a domestic violence situation. The Claimant complains that a report of her conversation was printed and posted to her house where it was then seen by the alleged perpetrator.

136. The report was sent to the claimant on 14 October 2020. The claimant's complaint, as we understood it was twofold: first that C referenced the domestic violence in the report, and secondly that she sent that report to the claimant's home address, where the perpetrator of that abuse was residing. The relevant section of the report stated,

> *"Rachel disclosed some issues with her partner since sustaining an injury 2 weeks prior and found he had been very demanding. As such, C agreed that the training time could be used more flexibly, e.g. in the evenings, if this was more helpful and that she should contact C if that were necessary."*

137. The simple points the claimant made were that the report referenced (a) the claimant disclosing issues with her partner, (b) it suggested that he had been very demanding and that (c) the report had been emailed to her and sent by post to her address. In those circumstances, she argued, C knew (a) of the risk that the claimant's partner would open the claimant's email or the post as part of the controlling behaviour that the claimant had described to C, and (b) in that scenario each of the references to him was a red flag in cases of domestic violence which placed her and her children at risk of further abuse and/or violence.

138. Consequently, the claimant alleged that that conduct amounted to direct discrimination (Issue 4.1.1), alternatively discrimination arising from her disability contrary to section 14 (Issue 5.1).

Direct discrimination

139. The respondent argues that C did not know that the claimant was disabled so her disabilities cannot have been the reason for her decision to include the reference in her report or for her to have sent it to the claimant by post and email. Given our finding above that the respondent and C specifically did not know of the conditions amounting to disabilities on 14 October 2020 when C sent the report, that argument must succeed. The claim of direct discrimination in respect of the content and means of communication of the disciplinary report is therefore not well founded and is dismissed.

Discrimination arising from a disability.

140. We have found that the respondent and C could reasonably have been expected to know that the claimant was disabled from 17 August 2020. The

respondent therefore cannot rely upon the defence in s.15(2) EQA if the claim is established.

141. The first issue for us is whether C's action in referencing the domestic abuse within the disciplinary report and/or in sending it to the claimant's home was unfavourable treatment. We remind ourselves of the test of detriment in Shamoon, and in para 4.9 of the EHRC Code of Practice "it is enough that the worker can say that they would have preferred to be treated differently", and of the words of Langstaff J in Williams that it is enough that the conduct created "a particular difficulty for, or disadvantaging a person." The respondent argues that the conduct cannot be regarded as unfavourable because it was necessary to refer to the fact of the domestic circumstances in the report. We reject that argument, which is properly to be regarded as one relevant to the issue of justification not unfavourable treatment, as any reasonable employee suffering domestic abuse would regard C's conduct as unfavourable because of the inherent risk it would pose the safety of the employee and their dependants.

142. Separately the respondent argues that it cannot have been unfavourable treatment because C did not know of the full extent of the abuse at the time that she sent the report. That argument is misconceived, it is not part of the test of unfavourable treatment that the perpetrator has to know of the circumstances that render the conduct unfavourable, knowledge is relevant to whether the perpetrator acted as they did because of something arising from the disability, which we address below.

143. Applying Pnaiser, we next consider what caused that treatment, having regard to C's conscious and unconscious thought processes. The claimant's case, properly understood, is that since C knew the appropriate process to follow so as to protect a victim of abuse, her departure from that process must be viewed as deliberate. She argues that we should infer that the reason that C consciously departed from the process was because of her frustration with the claimant because of the effects of her disabilities, in particular her need for far greater support and clarity of instruction.

144. In our view, given our findings as to what the claimant disclosed, when viewed in the context of C's status as the domestic abuse lead for the respondent, the failure to adopt a cautious safeguarding process, so as to reduce the risk to a victim of domestic violence to the lowest possible level, calls for an explanation in the absence of which an inference could reasonably be drawn. C suggested that she had offered the claimant the opportunity to object to a copy being sent by post in the email to which she had attached the report, but the email did not expressly identify that option and C did not explain why she thought there was no risk of the claimant's partner accessing her emails, given she knew the claimant was using her home computer for work. It seems to us that that explanation is neither coherent nor cogent and would not prevent us from drawing an inference.

145. The second explanation C provided was that the claimant did not disclose the full extent of the abuse as she had in evidence, but had just said that she a demanding partner, the stress of which had been exacerbated by lockdown and his injury. There is support for that account in the claimant's email of 20 October in which she wrote,

> *During our conversation, I explained to her, that I was struggling to make use of home time and extra evening time to complete research and training. That I was under extreme stress at home, suffering from anxiety and that this had a significant impact on my wellbeing and my ability to work.*
> *This was due to difficulties I was having at home of a domestic nature. As you are aware, domestic issues have been harder to cope with since lockdown, as victims have no-where to go. I was in lockdown, and my partner was home following reduced work hours and then later injury. The situation got worse. The level of aggression and alcohol fuelled arguments around myself and my children increased considerably and my ability to function and cope decreased.*

146. The first paragraph and the first line of the second paragraph, it seems to us, contains the account of what the claimant reports she told C. What follows (particularly the last sentence) is a more reflective, retrospective account of what was actually occurring, rather than what the claimant told C. That is consistent with the claimant's communications with the respondent relating to her health and her domestic situation generally: she was not specific or explicit, but rather addressed matters generally and assumed that the respondent would be able to put the pieces together.

147. We are satisfied that that was the cause of the C's decision to send the report to the claimant's home by email and post: she did not regard the claimant as being a victim of domestic abuse. Whilst the Tribunal do not share that conclusion, and many others faced with the same facts might have reached the opposite conclusion, we are persuaded on balance that that was the cause. We suspect that C's judgment was clouded by her view that the claimant was not up to the job and regarded her explanations of pressures at home as a further unsatisfactory excuse. She therefore recorded the explanation and her rejection of it in the report. We are not persuaded therefore that we should draw an inference on the grounds that C knowingly and deliberately failed to adhere to the respondent's guidance in relation to domestic abuse.

148. Was the decision to send the report to the claimant's home address influenced more than trivially by the things which arose from the claimant's disability? The things that arise from the claimant's disabilities are fatigue, brain fog, exhaustion, inability to retain information, confusion, fearfulness, breathlessness, palpitations and anxiety attacks. A consequence of those matters is that the claimant struggled to process instructions, to manage her time efficiently to meet deadlines, and would regularly request clarification of the instructions that she had been given. The claimant articulated such matters in her emails to C and others.

149. The claimant argues that C became frustrated with her suggestions that instructions were unclear, her requests for clarification and for examples and bullet points, and the management time that such requests necessitated, and that led her to conclude that the claimant was not fit for the role and so wanted to be rid of her, and she therefore compiled the report in the form that she did, which was highly critical of the claimant.

150. There is support for that argument in the contemporaneous documents: in the tone and content of C's correspondence with the claimant, within her own evidence that "from the beginning [the claimant] needed a lot of the supervisors' time and so I need to provide extra support to allow them to be available for others," "she was given a lot of time and support," and repeated reference to the claimant's requests for clarification. Furthermore, the general tenet of C's evidence was that the claimant was inefficient, and lacked appropriate time management skills, and generally was "not up to the job." Her statement records on several occasions that the claimant failed to do something, despite C having "clearly explained" what was required and in relation to the PIP MR that she had "consciously decided to disregard the instructions given to her."

151. On balance, we are satisfied that the things that arose from the claimant's disabilities did have a more than trivial influence on C's decision as to the content, diction, and recommendations in the investigation report. The critical issue is whether they had any influence upon C's decision to send the report by email and by post to the claimant's home address, which is a separate and distinct issue. There was no direct evidence to support that allegation and given that we have not drawn an inference to support it, the claim is not well founded and is dismissed.

C accused the Claimant of not adhering to management instructions regarding compliance with Covid 19 regulations when she attended work in September 2020.

152. The claimant pursues the allegation both as allegation of direct discrimination (allegation 4.1.2) and as discrimination arising from disability (allegations 5.1).

Direct discrimination

153. As we have found that C did not know that the claimant was disabled, it follows that her criticism of the claimant when she attended for work on 7 September 2020 before her allotted time cannot have been because of the claimant's disability. Moreover, we are satisfied that C would have been equally critical of an employee without a disability who had attended in advance of their allocated time; she would have reprimanded them for failing to adhere to a reasonable managerial instruction; after all, the respondent's guidance on returning to work in the office stated, "a breach of these guidance [sic] will have serious consequences."

154. The allegation is not well founded and is dismissed.

Discrimination arising from a disability

155. An accusation of failing to comply with a reasonable managerial instruction, particularly when placed in the context of subsequent disciplinary allegation, is a matter which the reasonable employee would objectively regard as amounting to a detriment.

156. The cause of the reprimand was the claimant's attendance at work before her allocated time on 7 September 2020 in circumstances where the respondent had sent specific instructions only to attend at the allocated time. The claimant argues that she attended work early because of her anxiety and her desire to allow time to walk from the car park to the office with her laptop and a large bag of papers and training records whilst on crutches. We are not persuaded that the claimant's early attendance was because of anything which arose from the claimant's depression or anxiety, or Asperger's or ADHD, but rather the cause was, as she described, wanting to allow plenty of time to walk on crutches whilst carrying her laptop. Whilst the claimant may have been anxious to avoid being late, the primary cause of the need to allow extra time was claimant's broken ankle, it was certainly not depression, Asperger's or ADHD tendencies.

157. The claim is not well founded and is therefore dismissed.

Reasonable adjustments

158. We address each of the PCPs relied upon by the claimant below:

6.2.1 The requirement for employees to complete in-house training;

6.2.2 The manner in which in-house training and/or training materials were delivered and presented

159. The respondent accepts that it required employees to complete in-house training, and that newly appointed employees were required to complete a set number of training units in order to complete their probationary periods.

160. The claimant provided limited clarification as to the 'manner' or 'materials' about which she complained; in her statement she stated that the documents should be more diagrammatic or in bullet points, which is to identify the potential adjustment, rather than the PCP which necessitated them. She did not address the matter in her closing submissions at all.

161. We understood that her complaint related in part to online training and that, in that format, it took her longer to understand and complete the units, because it was harder for her to learn, as a consequence of her Asperger's and the consequent stress exacerbated her anxiety. The respondent's case, as put to the claimant in cross-examination, was that the respondent did not know, and could not reasonably be expected to have known that the PCPs put the claimant at that disadvantage because she did not expressly inform the respondent or ask for any adjustment to them and there was insufficient to put the respondent on notice until the claimant's email to P on 16 October 2020.

162. We are satisfied that the respondent' argument is correct. The claimant accepted that she could and did discuss the training material with her supervisors but did not specifically raise any issues or request adjustments during those discussions. That was the logical time to do so. She did not raise any concern about the training material by email until 16 October 2020. In those circumstances, the respondent did not know and could not reasonably be expected to know that the training materials or the requirement to complete training was placing the claimant at any disadvantage because of her disability.

163. It is not therefore necessary for us to make specific findings as to whether the requirement to undertake training, or the materials or manner of the training placed the claimant at any disadvantage because of anxiety, Asperger's, or ADHD tendencies, or whether the proposed adjustments would have removed those disadvantages.

164. The two allegations are not well founded and are dismissed.

6.2.3 The Claimant's work environment and/equipment. The Claimant complains about the equipment which she was required to use whilst working from home after the imposition of the national lockdown. In particular, she complains about the inadequacyof the laptop, printer and internet connection (physical features).

165. The claimant argues that the work laptop which was provided to her was inadequate, and that when she worked from home she had no printer and a poor internet connection which compounded the difficulties of completing work and training timeously.

166. EJ Livesey had identified the allegation as potentially being one of the need to make reasonable adjustments due to physical features (s.20(4)). Paragraph 6.12 of the EHCR Code of Practice on Employment includes "equipment or other chattels … in or on the premises" amongst the physical features which could require adjustments. The difficulty with the claim if approached under that section is that neither the printer nor the internet connection which were available in the work place caused the claimant any disadvantage because of her disabilities: the claimant's complaint was that there was no printer at home and her home internet connection was poor.

167. If the claim were treated as a claim under s.20(3) and the PCP were defined as being the requirement to work from home, with the consequence that the claimant did not have access to the respondent's internet and printer, the claim makes slightly more sense. In that context, the requirement to work from home and the consequent frustrations and delays due to technical issues caused by the lack of a printer and a poor internet might bite harder on the claimant than on someone who did not have her disabilities, because the claimant experienced greater and more acute anxiety as a consequence of the delay and the associated stress.

168. However, the claimant accepted in cross-examination that she did not inform the respondent that the technical issues were exacerbating an underlying condition of anxiety, but merely raised the concerns as technical problems that she was experiencing. Indeed, in so far as she raised concerns

at all about her internet or the work laptop the respondent acted promptly in trying to resolve them and permitted her to use her home computer. The claimant raised concerns about her laptop in March/April 2020 but by 23 April had been permitted by D and C to use her home computer. She did not expressly raise any further concern about it until 27 July 2020, but even then it was in the context of describing historically why the she had chosen to use her own laptop, rather than it being an ongoing issue. She made no express complaint about the internet speed at her home or the lack of a printer and she informed the respondent that any of those matters placed her at a disadvantage because of her disability.

169. At the material time (April until July 2020), therefore, the respondent did not know and could not (for the reasons detailed above) have been reasonably expected to know that the claimant had a disability, or critically, that she was disadvantaged as a consequence of a disability by the requirement to use the work laptop or to work from home where there was no printer and poorer internet.

170. The claim is not well founded and is therefore dismissed.

Conclusion

171. For the reasons we have given above, the claims under the Equality Act 2010 of direct discrimination, discrimination from disability and failure to make reasonable adjustments are dismissed. As the claim under the Employment Rights Act 1996 that the claimant's dismissal was automatically unfair because it was done on the grounds of a protected disclosure was dismissed, it follows that the claims all fail.

Employment Judge Midgley
Date 16 June 2022

Amended Judgment sent to the parties: 17 October 2022

FOR THE TRIBUNAL OFFICE