EMPLOYMENT TRIBUNALS

Claimant: **Miss L Mahoney**

Respondent: **The Vogue Clinic Limited**

Heard at: **East London Hearing Centre (in public)**

On: **29, 30 November and 1 December 2022**

Before: **Employment Judge Moor**
Members: **Ms J Clark**
Mrs B Saund

Representation

Claimant: in person

Respondent: Mr S Hoyle, consultant

RESERVED JUDGMENT

It is the Tribunal's unanimous decision that all claims fail and are dismissed:

1. **The unfair dismissal claim is dismissed because the Claimant did not have the necessary qualifying service under section 108 of the Employment Rights Act 1996.**

2. **The deduction of wages claim is dismissed because it was presented out of time when it was reasonably practicable to present it in time i.e. on or before 3 September 2019.**

3. **The claim of discrimination arising from disability, contrary sections 15 and 39 of the Equality Act 2010, does not succeed because the Claimant was not dismissed.**

4. **The claim of a failure to make reasonable adjustments does not succeed.**

5. **The claims of harassment relating to disability do not succeed.**

REASONS

1. These claims have been much delayed including by a postponement caused by the pandemic and a lack of cooperation in case management between the parties.

2. We ended the hearing at about 3.15pm on 1 December and indicated to the parties we expected to meet again on 31 January 2023 to deliberate. However, the Tribunal was able to sit late on the same day to complete its deliberations and, hence, this reserved decision is promulgated earlier than anticipated.

Hearing Days and Adjustments

3. It is accepted by the Respondent that the Claimant is a disabled person because she experiences cluster headaches. They occur sporadically and result in excruciating pain. When experiencing an attack then, as quickly as possible, the Claimant uses a painkilling injection into her thigh and/or takes oxygen. The Claimant carries the injection pen and oxygen cannisters with her at all times. We set aside a private room for the Claimant to use.

4. At the Preliminary Hearing on 29 September 2022 EJ Reid decided that there should be a hybrid hearing with the Claimant and Respondent's representative attending in person and other witnesses by video. EJ Reid decided that the Claimant might be disadvantaged as an unrepresented party by a video hearing, even taking into account her medical condition. Unfortunately, on the first day of the hearing, the Claimant attempted to attend remotely by video, because the lift she had arranged with her friend had been cancelled (through her friend's daughter's illness). It was not possible, despite help by the Tribunal's digital support officer, to enable the Claimant to connect. We therefore encouraged her to attend in person, which she did by arranging a taxi. We began the hearing at 1.00pm.

5. Having explained the hearing day, we encouraged the Claimant to inform us if she needed further breaks or other adjustments. In the afternoon, she did need further breaks and these were given. By 4.15 pm it appeared to the Tribunal that the Claimant was not well enough to continue that day: she had become upset and unfocussed and said she had experienced a cluster headache. She said she was well enough to continue, but we decided to adjourn until the morning. We raised the option of continuing the Claimant's evidence by telephone but the Respondent objected to this. Having heard their submissions we agreed that it would be better for the Claimant as well as achieving fairness between the parties if she continued to attend in person for essentially the reasons EJ Reid had given. If the Claimant became upset or unwell, we would have less understanding of this happening if she was on the telephone.

6. On the second and third hearing days, the Claimant arrived on time and was composed. Her son attended to support her. The Respondent's

representative and Miss C Pace were in person, other witnesses gave their evidence remotely by video. We conducted the Tribunal hearing as normal, with breaks in the morning and afternoon. For the benefit of both parties, I assisted the Claimant with the formulation of some of her questions in order to keep them short.

7. We are satisfied that these adjustments meant the Claimant could take full part in the proceedings.

Issues

8. At a previous Preliminary Hearing on 3 March 2021, EJ Tobin clarified the issues with the parties. They are set out in non-legal language at paragraph 8 and in legal terms at paragraph 11 of his summary (set out below). We amended the issues at the start of the hearing, as follows: the harassment claim that the Respondent did not inform its students about the Claimant's disability was more properly to be understood as a failure to make reasonable adjustments claim: the claimant says the practice of not informing students about staff's medical conditions should have been adjusted in her case because the student's ignorance of her disability meant she was subject of their misunderstanding and harassment. We again explained that the Claimant could not bring a claim about the students' alleged harassment because of the amendment made to section 40 of the Equality Act 2010. At another Preliminary Hearing on 22 September 2022, EJ Reid had ordered the Claimant to provide further information about her harassment claim and, in relation to the Respondent, she had done so relying, essentially, on remarks by Miss C Pace relating to her cluster headache attacks as 'outbursts' and 'meltdowns'.

Paragraph 8 of EJ Tobin's summary is as follows:

> *1. <u>Wages shortfall under s13 Employment Rights Act 1996 ("ERA").</u>*
>
> *The claimant said that she started work (as an employee) on 22 March 2019. The respondent contends that the claimant started work on 15 May 2019. The claimant quotes different employment start dates and end dates in her Claim Form, but she said that this was in error and should be disregarded.*
>
> *The claimant worked 2 days per week and claims that she was not paid her wages from 22 March 2019 until 14 May 2019. The claimant contended that she was an employee throughout this time. The respondent contend that she was a self-employed contractor. Mr Walters advised me that the respondent accepts that the claimant was a "worker" for the purpose of these proceedings so the Tribunal will not need to determine the claimant's employment status as a worker can claim for an unlawful deduction of wages.*
>
> *The fundamental issue in respect of this claim is whether wages were due between 22 March 2019 and 14 May 2019. There may also be*

an issue in respect of whether this claim has been brought within the statutory time-limit (see below).

2. *Failure to make reasonable adjustments in breach of s21 EqA.*

The claimant needed to medicate in private. The claimant said that Ms Pace offered appropriate storage for her medication; however, the respondent's premises were small (2 or 3 rooms for teaching and administration, a small kitchen, corridor and toilet). So, after discussing this claim, it does not appear that there is a dispute about the lack of a private room for the claimant to take her injections. The claimant said that the toilet was obviously inappropriate to take her medication. She said that she could have taken her injections in her classroom and it would have been a reasonable adjustment for the respondent to preclude entry or remove students from the classroom whenever the claimant needed to medicate. Her complaint is more about not having privacy or a private space to administer her medication rather than (as set out in Appendix A) not having a dedicate room to take her injection. [We amended this to include a complaint also of not informing students about her condition.]

3. *Harassment under s26 EqA.*

The claimant would experience a cluster attack infrequently. These attacks lasted 10 to 15 minutes. I could not ascertain how many attacks the claimant had during the time that she worked for the respondent (3 months according to the claimant or 1½ months according to the respondent). The claimant said that she would be disorientated during her attack and on occasion she made her way to her car. Such was the consequence of the attack that the claimant would go limp and go into a faint or trace-like state. The claimant contended that during her episodes she was abused, called names and made fun of by some of the students. This occurred both in the clinic and when in her car as some students followed her outside, opened her door of her car and continued the abuse.

The provisions in respect of third-party harassment was removed from the EqA in 2013; however, the claimant may have a viable claim against her employer for the behaviour of some students as she alleges her employer knew of this harassment and failed to address it as they were motivated by a discriminatory outlook in respect of her condition so failed to effectively tackle the behaviour of some of the students.

4. *The claimant's dismissal, which was discrimination arising from the claimant's disability in breach of s15 EqA.*

The claimant contends that she was dismissed by Ms Pace on 22 June 2019 by text/WhatsApp message.

I asked the claimant whether this might have been a constructive dismissal (and explained this in detail to her) as the respondent denies that the claimant was dismissed and say that the claimant

resigned her position. The claimant was adamant that she was dismissed by Ms Pace, and that that she did not resign at all or in response to any breach of contract/discriminatory behaviour from the responded.

In the circumstances, I advised the claimant, and she accepted, that as her claim is one of express dismissal and not enforced resignation, I will not allow the fundamental basis of this claim to change. The claim will proceed as an allegation that Ms Pace dismissed the claimant. There has to be some degree of certainty or clarity for the parties to prepare their respective cases.

Paragraph 11 of EJ Tobin's Summary. List of Issues

Time limit /limitation issues

i. *Were all of the claimant's complaints presented within the time-limits set out in s123(1)(a) & s123(1)(b) EqA and s23(2) Employment Rights Act 1996?*

Dealing with this issue may involve consideration of subsidiary issues including:

- *when the treatment complained about occurred; etc.*
- *whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures;*
- *whether it was reasonably practicable for the wages complaint to be presented within 3 months plus early conciliation extension from when the claimant says these wages fell due;*
- *whether time should be extended on a just and equitable basis for the discrimination claims;*

ii. *Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before [ ] [we have inserted date] is potentially out of time, so that the Tribunal may not have jurisdiction to deal with it.*

Unauthorised deductions of wages

iii. *Was the claimant an employee or worker for the respondent from 22 March 2019 until 14 May 2019?*

iv. *Was the claimant entitled to be paid during this period?*

v. *If the answer to (iv) above is "yes" then the claimant is entitled to this sum as a shortfall (i.e. unauthorised deduction) of wages.*

Reasonable adjustments

vi. *Did the respondent know, or could it reasonably have been expected to know, the claimant was a disabled person?*

vii. *A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):*

a. *There was no first aid room/medical room or private area (in which the claimant could administer her medication)*

and/or

b. *There was no dedicated responsible member of staff who could arrange for the claimant to use a classroom free from interruption from students or others.*
c. *[The Respondent did not inform its students about the medical conditions of its staff.] [Our amendment on day 1.]*

viii. *Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time.*

ix. *If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?*

x. *If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however, it will be helpful to know what steps the claimant alleges should have been taken.*

xi. *If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?*

Harassment related to the claimant's disability

xii. *Did the respondent's student(s) engage in conduct that was mocking and/or abusive towards the claimant? [And did the Respondent know about this.] [Plus did Miss Pace use the remarks 'meltdown' 'outbursts'?]*

xiii. *If so, was that conduct unwanted?*

xiv. *If so, did it relate to the protected characteristic of the claimant's disability?*

xv. *Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

Discrimination arising from disability

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

- *The claimant would experience cluster attacks*
- *The cluster attacks occurred sporadically*
- *The claimant was disorientated or insensible during her attack*
- *The cluster attacks were alarming for those witnessing them*

xvii. *Did the respondent treat the claimant unfavourably in dismissing her?*

xviii. *Did the respondent dismiss the claimant because of [something arising in consequence of] her cluster attacks?*

xix. *If so, has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim? The respondent may rely on the following as its legitimate aim(s): The health, safety and welfare of the claimant, students and staff members.*

xx. *Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?*

Deduction of Wages – Out of Time

9. The Respondent invited us to deal with all time limit points first. We decided to hear evidence first on why the deduction of wages claim had been brought out of time. The claim was presented on 13 October 2019 when the latest time for presentation was 3 September 2019, taking into account the primary time limit in section 23 of the Employment Rights Act 1996 and the 10 days of ACAS Early Conciliation. Having heard the evidence of the Claimant and submissions, we decided that it was reasonably practicable for her to have presented her claim in time and therefore, following the provisions of section 23 of the Employment Rights Act 1996, we had no jurisdiction (power) to hear that claim and we dismissed it. We gave our reasons orally and do not repeat them here.

Findings of Fact

10. Having heard the evidence of the Claimant, Mrs J Brennan, Mrs S Stubbs (nee Stewart), Miss Stephanie Pace, Miss Charlie Pace, Ms Joanne Williams, Ms Ruby Moore, and having read the documents referred to us, we make the following findings of fact. We have applied the 'balance of probabilities test to the facts by asking what we think was more likely than not to have happened.

11. The Respondent runs beauty clinics and trains beauticians. In 2019 it opened new premises in Hornchurch both offering treatments and 12 week courses for NVQ beauty levels 2 and 3. The Claimant was engaged by Miss C Pace, the owner of the Respondent, to teach these courses on Wednesdays and Saturdays from 10am-4pm. The first course began on 15 May 2019. Miss C Pace's sister also worked at the premises providing beauty treatments.

12. The premises comprised a reception area, a treatment room, a training room, a toilet and a small back kitchen.

Cluster Headaches

13. The Respondent concedes that the Claimant is a disabled person within the meaning of the Equality Act 2010.

14. The Claimant experiences chronic cluster headaches. She experiences these headaches in the form of an 'attack' when she has a very severe, painful headache on one side of the head. They come on quickly. While experiencing an attack she cannot do anything but very quickly self-medicate with a pain killing injection into her thigh; then take oxygen; and sometimes an anti-vomit tablet with water. During an attack she is confused and disorientated. It is better not to speak to her until it is over.

15. The attacks are sporadic. There is no pattern. The Claimant does not experience attacks every day, indeed sometimes many months can go by without one, sometimes a few can happen in a day. When they do happen, they last between 10 to 20 minutes by which time she has recovered.

16. The Claimant now carries an OUCH card. This is printed by a charity for those who have cluster headaches. The card says this:

> *Firstly, thank you for your concern. I suffer from a rare neurological condition known as 'cluster headache' which causes me excruciating pain in one side of my head. There is no need to call an ambulance. The attack I am suffering can last anything from 45 minutes to 3 hours. Please don't be alarmed as these can occur up to 6 times a day. Please don't try to ask me any questions. I don't mean to be rude, but I cannot think clearly whilst coping with an attack. I may be extremely agitated and move about, but there is nothing you can do for me and I am best left alone until my medication takes effect and the pain is under control.*
>
> While the card says 45 minutes, the Claimant was clear in her evidence and we accept that her attacks were usually between 10 and 20 minutes.

17. The Claimant also carries some 'to whom it may concern' letters from her GP that explain her symptoms. They say the following:

    17.1. 6 March 2018 letter: *I wish to highlight the effects that cluster headaches are having on the aforementioned patient. The type of headaches she suffers from require a number of treatments, including oxygen, due to their severity. As such, during severe headaches, patients typically experience a change in mood. This may of course be reflected in their mode of communication. Therefore I would be most grateful if you are to take the above information into account when offering our patient support*

    17.2. 31 July 2018 letter: *I would be most grateful if you took the following into account: The [Claimant's] cluster headaches can be as frequent as daily events or as rare as weekly. During a cluster attack, it is*

impossible for any patient to perform activities of daily living such as self-care, or care for others. She will either then cease communicating altogether, or respond in a challenging way typical of a patient in pain. The use of oxygen has been effective in managing headaches, however the transportation of oxygen cylinders is challenging for a patient of [the Claimant's] build. Having had to support her through such episodes, and having experienced migraines personally, which are somewhat related to cluster headaches, I can understanding the anxiety of having further attacks, the fear of not having access to O2, and the intense pain of the headaches. …

Again, while this letter says 'as rare as weekly', we accept the Claimant's evidence that sometimes months could go by without an attack.

17.3. Letter of 21 January 2019: this describes four ambulatory cylinders (2 litres) and 2 static cylinders (10 litres) are supplied. The Respondent suggests that, because part of this letter is in bold font, that it has been falsified. We find this to be an outlandish suggestion: it is not uncommon for documents to carry different fonts and, on its own, the emboldening of some text does not give rise to a suggestion of falsification.

17.4. A four-page description of cluster headaches (134) from OUCH. This explains that they can be regular or not. They are accompanied by at least one of the following: … watering of the eye; blocked or runny nose; extreme agitation [sufferers will rock backwards and forwards, pace up and down] droopy eyelid; constriction of the pupil. It describes the level of pain akin to amputation and worse than childbirth. The information suggests reasonable adjustments including: an area or room set aside for them to deal with attacks; an area to store oxygen. It explains there is very little warning – only a few minutes--that an attack is coming, so the sufferer will have to leave the room quite suddenly to go and deal with it. Their work colleagues will need to know this so that the … behaviour is not seen as rude …. Stress is not a principal trigger though stressful situations can exacerbate attacks.

18. Mrs Brennan, the Claimant's friend, described credibly an example of a cluster attack she had seen the Claimant having on a shopping trip triggered by close helicopter noise. She described the Claimant holding her head and rocking.

19. Miss C Page said that students had reported to the Claimant her holding her head on 1 June and having to leave the room.

20. In 2020 EJ Crosfill ordered the Claimant to produce medical records, the Claimant did not provide any GP records save her GP letters. EJ Reid later varied the order so that disclosure of medical records was not required. We

do not draw any inference from the failure to provide the records, given that she has supplied GP letters that cannot have been written if she did not have a diagnosis of cluster headaches.

21. We do not find however that the Claimant's ability to engage socially with people is adversely affected by her disability except when she is experiencing an attack. She has made it clear to us that she can engage with her current clients in her carer role. She also made it clear, in her engagement with the Respondent, that she could work alone with her students. That she has a finding in her PIP decision that she needs support to engage socially, may suggest that she has another condition that affects her ability to do so, but it is not the result of her cluster headache condition. And the Claimant has made clear in this claim that she does not rely on any other condition as a disability.

22. In the light of these findings, we find that from at least 2018 the Claimant was diagnosed as having chronic cluster attacks and does experience them. To the extent that Mr Hoyle submitted otherwise, we reject that submission. Nor does this appear to have been Miss C Pace's approach: she accepted the Claimant had the condition and that she was disabled by it.

23. When the Claimant is at home she chooses to go to the toilet to administer the painkilling injection because she needs to take her trousers down and the toilet is private. She also used the toilet at work on one occasion to do so as she told Miss Pace in a text p185. She made no complaint about having to do so. There was no other private room that she could use.

Knowledge

24. We find both parties have been mistaken about who said what to whom and when in relation to the disability. We have relied on the contemporaneous texts between the Claimant and Miss C Pace to reach a conclusion on what is likely to have been said and when.

25. Miss C Pace approved the Response form attachment, which states she was never told of a disability. This Response was plainly incorrect. She readily accepted this in her evidence and that on 3 June 2019 the Claimant did tell her about her cluster headaches and disability in a series of texts.

26. On balance we find that the Claimant did not tell Miss C Pace before 3 June 2019 about her cluster headaches or her need to self-medicate. We have taken into account the following evidence:

    26.1. At the initial meeting between them the Claimant had a dressing on her face from a recent skin cancer procedure. Both remember talking about this. Miss Pace is clear that she did not ask about anything else: we accept this is likely because she was not an experienced employer and the meeting was very informal.

26.2. The two communicated in large part by what's app text. There are several pages of transcript during the period when the Claimant was preparing to start teaching in April and May 20120 between her and Miss C Pace. In those texts she made no mention of her disability or about her medication or any needs she had.

26.3. We accept that Miss C Pace had not seen medication or the Claimant's blue parking badge and these matters therefore did not alert her to the Claimant's condition.

26.4. While the Claimant remembers handing her OUCH card and GP letters to Miss Pace at a second meeting, we accept Miss Pace's denial. This is because natural reading of later texts show Claimant was intending to give her these documents, not that she had already done so: 'I get a card for you', p185 'I will bring my GP letter' p186 'GP letter tomorrow' p189. And she said 'no one knows me or my attacks' and gave an explanation in this text about how her condition affected her. She would not have had to say this if she had already told Miss Pace: more likely she would have referred her back to the earlier conversation.

26.5. While it may be that the Claimant had prepared a file with her medical information and qualifications in it. We find it likely that she did not show it to Miss C Pace or tell her where it was. We rely again on the wording of the texts that suggest the Claimant knew Miss C Pace had not seen this material.

26.6. Nor do we accept that she told Miss S Pace, Charlie's sister, about her condition. We accept her clear denial.

26.7. It may well now be the Claimant's practice to provide the OUCH card and GP letters, as Mrs Brennan testified, but we find that practice is likely to have started after the Claimant's experience at the Respondent.

27. We find that the Claimant had not told her students about her condition before the attack on 1 June 2019:

27.1. She told Miss C Pace that no one knew about her attacks (see above) and that she was 'trying to hide it from public' p 185.

27.2. We accept Mrs Stubbs clear and uncomprehending denial of this.

27.3. There was discussion in the texts in June about who would tell the students. And on 5 June the Claimant said with the next lot of students she would tell them straight away: a clear acknowledgement that she had not done so with these students.

28. We do not accept the Claimant used a safe word 'I quit' or that she told anyone at the Respondent or the students about it. It was a highly improbably

phrase to use in the context of employment, given the ease with which it could be misunderstood as a resignation.

29. By 3 and 4 June 2019, the Respondent knew that the Claimant experienced cluster headache attacks and how they affected her. There was no reason to ask more. The full text transcript shows the Claimant gave information at this stage.

Coping with Students

30. From early on in the Claimant's work it became apparent that she had difficulty with classroom control. She would become flustered and unhappy if students were speaking while training and if they asked too many questions. She would sometimes shout at students if this occurred. Miss C Pace observed this on the first day. Mrs Stubbs and Ms Moore also observed this as the training progressed. We find there is an element of exaggeration in what they told us because there is no indication in the student what's app group that there was dissatisfaction, but we find it likely that their basic observations that the Claimant could not cope with too many questions and became flustered and angry and told students to 'go away' is true. Miss Moore recalls the Claimant leaving the classroom fairly frequently. Miss C Pace thought this would improve over time.

Attack on 1 June

31. On Saturday 1 June 2019 the Claimant experienced a cluster headache. She immediately left the training room, injected herself in the toilet at work and went to her car for oxygen. The attack was over quickly and she was able to continue teaching. We do not find she used oxygen in the classroom.

32. In a text on 3 June 2019, Miss C Pace asked the Claimant what had happened and the students were worried. This was when the Claimant told Miss Pace about her attacks (see above).

33. Miss Pace in these texts also referred to the need for the Claimant to stop her outbursts' and 'meltdown'. We find this referred not to the headache attack but the occasions when the Claimant had shouted at students. Another student had complained to Miss Pace that the Claimant had criticised Miss C Pace and was threatening to leave (p189).

34. In the long text conversation that followed Miss Pace suggested that they have a meeting rather than deal with it by text. She asked a number of questions to see how the student's concerns could be resolved asking, for example, if the Claimant needed another teacher or person to help her. The Claimant refused this. The Claimant did not ask for a private space.

35. During the conversation the Claimant became more and more angry and upset and suggested that Miss Pace was criticising her because of her disability. Miss Pace sought to reassure her that her concerns were not about that (p186). The Claimant resigned on 4 June 2019 at 18.30 'I'm done go find

some other mug to run your shop' (189). At 18.51 Miss Pace wrote 'Look meet tomo and we sort it out'. The Claimant replied 'OK we will meet no need to cancel students I just do my job ok… and carry on until we speak ok' (p190).

36. They had some discussion about who should tell the students about her condition. This ended with Claimant stating that she wanted do so (p190).

37. By 5 June 2019 the Claimant wrote '*Had great day. I did make students be ok with my clusters. I have them a paper to read and said I do smack my head in attack it's very painful but not to worry I know how to get them gone. I just need 5 mins to 10 mins to recover and if it happens again for them to just practise or revise while I go off to my meds'*. The Claimant texted that with the next lot of students she would tell them 'straight away'. Miss Pace was reassured. She told the Claimant she was glad she had dealt with it and just wanted everyone to be happy. There was therefore no reason for her to talk to the students.

38. There is a dispute between the Claimant and the student witnesses as to whether the Claimant in fact told them anything about her cluster headaches as she had informed Miss Pace in this text. Both Mrs Stubbs and Ms Moore cannot recall that she had done so. Mrs Stubbs is clear that the first time she heard about disability was on the final day. On balance, we find it unlikely that the Claimant informed the student body about her headaches. The Claimant had wanted to keep them private. She was chaotic in her communication as the texts show. We find that she told Miss Pace she had told students in order to allay her concerns.

Verbal warning

39. The Claimant accepted that Miss Pace had given her a verbal warning when they met. The Claimant said it was about her 'conduct'. We find it was about her shouting at students and her poor class control.

Final Incident

40. On 22 June 2019 the Claimant was teaching a class and again became very frustrated when the students asked several questions at once. Mrs Stubbs tried to calm the Claimant down. In the corner, the Claimant shouted at Mrs Stubbs and accused her of discriminating against her in relation to disability. This was the first time that Mrs Stubbs understood the Claimant had a disability.

41. The Claimant then suddenly left the training room and burst into the treatment room where Miss Stephanie Pace was treating a client. Miss S Pace recalls her waving a bit of paper that she said was from her doctor.

42. Miss S Pace stopped the treatment and brought the Claimant into the reception area. The Claimant said to her that she quit and that she did not want to work there anymore. We accept Miss S Pace's evidence that the

Claimant used more than the words 'I quit'. It was clear to her that the Claimant was resigning. She informed Miss C Pace about what she had said.

43. The Claimant then left and went to her car.

44. After a while, Ms Moore went out to car to find out what was happening to the class. We find that she tried to open the door to speak to the Claimant but we do not agree that she slammed the door or opened it several times While she was annoyed at the Claimant leaving, by the time she arrived at the car she could see the Claimant using oxygen and was concerned about her. At some stage the Claimant was on the phone to Mrs Brennan: by then obviously not using an oxygen mask. We do not consider that Mrs Brennan could be clear about what she had heard: she could not recall how many times the door opened or closed.

45. We do not find that Ms Moore insulted or mocked the Claimant over having a 'snotty nose'. The Claimant recalled different words in her evidence than in her questions of Ms Moore. Ms Moore was clear in her denial. We find the Claimant's recollection mistaken.

46. We have had to decide whether the Claimant experienced a cluster headache attack on 22 June 2019. Based on the information about attacks and our findings as to what occurred, we find that the Claimant did not have an attack in the training room or Respondent's premises. This is because she took several steps that she would be highly unlikely to have taken if she had been experiencing an attack: the discussion with Mrs Stubbs; getting her GP letter; going to see Miss S Pace in the treatment room and waving the letter at her; then announcing her resignation in clear words. During an attack the Claimant is disorientated and in extreme pain. Her focus is on leaving immediately in order to self-medicate. We find it highly unlikely that she would have stopped to discuss matters with Mrs Stubbs or Miss S Pace. We find she was flustered, annoyed and stressed by too many student questions. We find she decided to leave her employment and told Miss S Pace that is what she was doing. By the time she got to her car the Claimant took oxygen. It may be that she experienced an attack at that time, but not before.

24 June 2019

47. On 23 June 2019, the Claimant texted Miss C Pace to say that she would see her on 'Wednesday' p142. But on this second occasion, Miss C Pace chose not to allow the Claimant to retract her resignation and told her not to come in, p142. She referred to the Claimant's resignation in the text discussion that followed, p144.

Legal Summary

48. Under section 120 of the Equality Act 2010 ('EqA') the Tribunal has jurisdiction to determine a complaint relating to employment under Part 5.

Section 15 'arising from' discrimination

49. Section 15(1) of the EqA provides that:

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

50. Here the unfavourable treatment relied upon is dismissal. We must first ask whether there was a dismissal. If not, the claim fails.

51. If there was a dismissal, we go on to consider the employer's reason for the dismissal. We must look at who made the decision and their reason. If the reason is the '*something arising as a consequence of disability'* then the first part of the section is made out. Para 5.9 of the Code states that the consequences of a disability include anything that is the result, effect or outcome of a disabled person's disability. They will be varied and will depend upon the individual effect.

52. Section 15 does not give the disabled employee in these circumstances complete protection: the employer can avoid liability if it can 'objectively justify' the treatment.

53. First, it must identify that the treatment was in order to pursue a legitimate aim: a real, objective consideration or real need on the part of the business.

54. Second, it must satisfy us that treatment was a proportionate means of achieving this aim: *both* an 'appropriate means' of achieving it and 'reasonably necessary' (not the only possible way but we should ask whether lesser measures could have achieved the same aim). This requires an objective balancing exercise between the discriminatory effect of the treatment and the importance of the aim. This is an objective test and does not matter if employer did not have these reasons in its mind at the time.

55. We have had regard to the Equality and Human Rights Commission Code of Practice on Employment 2011 para 5.21: 'if an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.'

Failure to make adjustments

56. A duty to make reasonable adjustments arises:

> *'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. …'* (section 20, EqA)

57. The Tribunal must first identify the criterion, policy or practice ('PCP') complained of.

58. It must then ask whether the PCP put the Claimant to a comparative substantial disadvantage. Substantial means more than minor or trivial.

59. It must then ask whether the employer knew about this disadvantage or reasonably ought to have done.

60. It must then consider how the proposed adjustment would have addressed the substantial disadvantage in question. It is well established that this is an objective question the focus being on the practical result and it does not require a definitive answer. What must be shown is a real prospect of avoiding the disadvantage.

61. The Tribunal considers a wide variety of factors in deciding reasonableness: the size and resources of the employer; what proposed adjustments might cost; the availability of finance or other help in making the adjustment; the logistics of making the adjustment; the nature of the role; the effect of the adjustment on the workload of other staff; the other impacts of the adjustment; the extent it is practical to make (see 7.29 of the Code).

Harassment relating to Disability

62. Section 26 EqA provides so far as is relevant to this case:

> *'(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to [disability], and*
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. …*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.'*

63. We must ask the questions posed by the statute in turn.

64. To establish that the unwanted conduct is 'related to' the protected characteristic the Claimant does not have to show that the unwanted conduct was directed to her 'because' she was disabled, but that there was a connection between the conduct and those matters, see paragraph 7.9 of the Code, and Hartley v Foreign and Commonwealth Office Services 2016 (paragraph 23-24). In that case the EAT held that whether the conduct is 'related' to the protected characteristic is a broad test, requiring an evaluation

by the Tribunal of the evidence in the round. The alleged perpetrator's and victim's perceptions of whether it is related are not conclusive. The precise words and the context are important. It is also open to us to draw inferences if necessary.

65. In Weeks v Newham College of Further Education EAT 0630/11 Langstaff P considered that '*environment'* means a state of affairs, which may be created by one incident where the effects are of longer duration (paragraph 21). But at paragraph 17 he observed:

> '*Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.'*
> The context of words used is very important.

66. Whether the conduct violates a person's dignity is also a question of fact and degree. We note the observations of Underhill P (as he then was) referred to us by Mr Caiden in Richmond Pharmacology v Dhaliwal [2009] ICR 724 (EAT) at paragraph 22 (in a harassment related to race claim):

> *… We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…*

67. Section 40 of the EqA only makes unlawful harassment by an employer. The Tribunal does not have power to hear cases about third party harassment.

Application of Facts and Law to Issues

68. We use the same numbering as EJ Tobin uses in his summary.

(i)(ii) Time Limits

69. On time limits we decided issues (i) against the Claimant in relation to her Wages Act claim. We have decided to make findings on the merits of the discrimination claims first and only if any succeed to consider the time points.

70. We therefore do not need to make a decision on issues iii, iv and v.

Reasonable Adjustments

vi Respondent's knowledge

71. We have decided that the Respondent knew that the Claimant was a disabled person only from 3 June 2019 when the Claimant informed Miss C Pace by text.

72. As to 'constructive knowledge'. In our judgment, there was no information until 1 June 2019, when the student raised concerns about the Claimant hitting her head, that ought reasonably to have alerted Miss C Pace to asking questions about the Claimant's health. The Claimant had had conduct difficulties in managing the class but this on its own did not raise a health concern. Miss Pace raised appropriate questions in the 3 June texts and was then informed about the cluster headaches and medication needs. We find therefore 3 June 2019 is the first time that the Respondent had either actual or constructive knowledge.

73. We shall deal with each PCP in turn.

vii(a) policy, criterion or practice: private room

74. There was no medical room for the Claimant to use to self-medicate.

75. But we find there was a private area where the Claimant could self-medicate, namely the toilet, and as a matter of fact she did use this to self-medicate on 1 June. Indeed she used the toilet at home to do so. She made no complaint about this.

viii disadvantage

76. Thus, we reject that the PCP vii (a) placed the Claimant at a comparative substantial disadvantage: there was an adequate private area to self-medicate, namely the toilet. We disagree with the Claimant's assertion, recorded by EJ Tobin, that the toilet was obviously inappropriate. On the facts of this case it was entirely appropriate.

ix knowledge of disadvantage

77. Even if we are wrong about this, the Respondent did not know about any such disadvantage: the Claimant had not told Miss Pace there was no adequate private space. Indeed to the contrary, she had told Miss Pace she had used the toilet.

vii(b) PCP: member of staff to clear classroom

78. There was no dedicated member of staff to arrange for the Claimant to use the classroom free from student interruption.

viii disadvantage

79. This second PCP was directed at the need to self-medicate. We can see in theory that it would place the Claimant at a comparative disadvantage to be in a room with others when she experienced a cluster headache because of the pressing need to self-medicate.

ix knowledge

80. We do not consider that the Respondent knew of the disadvantage that students in the room created for the Claimant. This is because the Claimant had both told the Respondent she self-medicated in the toilet; and because the Claimant told the Respondent that she just needed 5 minutes to recover and that she had told the students they had to practise or revise while she went off to recover. She made it clear it was she who would leave and had no expectation that the students should do so.

x reasonable steps

81. We are clear in our judgment that having a staff member to clear the training room was not a reasonable adjustment in the circumstances in any event. This is because when an attack occurred it happened suddenly and the Claimant wanted to remove herself from the situation. The time and upheaval in having to find another member of staff, then have the students file from the room was not a reasonable way of giving the Claimant the privacy she needed to medicate. She needed to do this quickly given the searing pain. She had not suggested it as a solution: the far more obvious and effective approach was for her to leave the classroom to self-medicate. She described this clearly in her 5 June email. Furthermore it was not reasonable because the Respondent had raised whether the Claimant wanted another staff member present in the text discussion in early June, but the Claimant had refused.

vii(c) PCP: not informing students

82. We agree that there was a practice of the Respondent not informing its students about the medical conditions of its staff. This is unsurprising: medical conditions are confidential.

viii disadvantage

83. Arguably such a practice put the Claimant at a comparative disadvantage in that the students did not know when the Claimant was experiencing an attack and were less able to support her.

ix Knowledge

84. Certainly until 3 June the Respondent did not know that the student lack of knowledge might be a problem for the Claimant. But, in their text discussion on 3 and 4 June the Claimant raised it as an issue. From then on the Respondent knew it was a disadvantage.

x, xi Reasonable Step?

85. We are clear, however, the Respondent did not fail to take a reasonable step by not informing students of the Claimant's medical condition because, on 5 June 2019, the Claimant informed Miss Pace clearly that she had done so

herself. There was therefore nothing further for Miss C Pace reasonably to do.

86. Thus we find there was no failure to make reasonable adjustments in the circumstances of this case.

xii Harassment

87. On the facts that we have found, the students did not harass the Claimant. Mrs Stubbs tried to get the Claimant to calm down when she was frustrated with student questions. Miss Moore tried to open her car door and speak to her out of concern. Neither of them insulted or abused or mocked the Claimant. Nor did Miss Moore open and shut her car door numerous times.

88. In any event, even if we are wrong about this, such conduct is not justiciable under section 40 EqA because it is alleged to have been done by students not employees of the Respondent.

89. Nor did the Respondent know about this alleged harassment, which took place outside its premises. There was no occasion after it that the Claimant worked.

90. We have found that Miss C Pace did refer to 'outbursts' and 'meltdowns' in her text discussion with the Claimant. While this was after the first cluster attack, we have found it was not referring to it. Miss Pace was referring to the Claimant's behaviour of not controlling the class and becoming frustrated with students for which she was given the verbal warning. She made it clear to the Claimant that her concerns were not about her disability.

91. Plainly the words 'outbursts' and 'meltdown' were unwanted phrases from the Claimant's point of view. But did they relate to disability? Neither the Claimant's assertion that they were nor Miss Pace's assertion that they were not is conclusive. We have looked at the question broadly in the round: in our judgment the phrases were not related at all to disability but to the Claimant's conduct in managing her students. It was this for which Miss Pace gave a verbal warning. The evidence of Mrs Stubbs and Miss Moore that the Claimant's conduct towards them in being frustrated and shouting at times support this. We have asked whether it is appropriate to draw the inference that the phrases related to disability because they were used shortly after the cluster attack on 1 June, but we have decided it is inappropriate to do so because the evidence supporting that they refer to the other conduct is stronger. Miss Pace had in mind the Claimant's shouting and frustration. Not the one occasion when she had held her head and left the room.

92. The harassment claim therefore fails.

xvii section 15 claim: dismissal

93. Under the section 15 EqA issues, we have first addressed the question whether the Claimant was dismissed. If not, her claim fails.

94. We are clear that the Claimant resigned on 22 June 2019 using clear and unambiguous words that were relayed to Miss C Pace by her sister. She did so at a time when she was not experiencing a cluster attack. It was these words that terminated her engagement with the Respondent, not the text sent by Miss C Pace on 24 June.

    94.1. The Claimant used more than the words 'I quit' when she spoke to Miss Pace. The words she used were unambiguous words of resignation.

    94.2. We find she did use these words. We are reinforced in our view because she had attempted to resign in early June and expressed unhappiness in her job before.

95. The section 15 claim therefore fails because there was no dismissal.

96. We have not considered constructive dismissal because, at EJ Tobin's hearing, the Claimant was adamant she had been expressly dismissed by Ms C Pace. EJ Tobin explained constructive dismissal to the Claimant but she was clear she did not wish to pursue that argument. She confirmed this again at the final hearing.

97. In summary all the claims fail and are dismissed.

Employment Judge Moor
Dated: 14 December 2022