



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107534/2019 and 4105005/2020

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Held in Glasgow on 25, 26, 27, 28 and 29 July and 2 September 2022

Employment Judge L Wiseman

Members R McPherson and N Bakshi

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Mrs Natalie Barnett

**Claimant
Represented by:
Ms S Shlels -
Solicitor**

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Windmills Lanarkshire Ltd

**Respondent
Represented by:
Mr D Hay -
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

REASONS

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1. The claimant presented a claim to the Employment Tribunal in or about July 2019 claiming she had been discriminated against because of the protected characteristic of disability.

2. The claimant subsequently sought to amend the claim to introduce a complaint of pregnancy discrimination and harassment.

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3. The claimant also presented a further claim to the Employment Tribunal (case number 410505/2020) alleging post-employment victimisation.

4. The respondent entered a response accepting the claimant had been employed from January to April 2019 and accepting the claimant had resigned. The respondent denied all allegations of discrimination, but

accepted the claimant was a disabled person at the time of the alleged discrimination because she has Multiple Sclerosis.

5. The claims were consolidated and the claimant's representative subsequently provided a document entitled Statutory Basis for Claims (see below).
- 5 6. The tribunal heard evidence from the claimant; Mr Christopher Blair (the claimant's husband); Ms Angelina Donnachie (the claimant's sister in law); Ms Alison Marcella (the manager of the respondent); Mr John Sloss (a member of the Board of the respondent); Ms Jordan McIlroy (an employee of the respondent) and Mr Christopher Gould (an employee of the respondent).
- 10 7. The tribunal were referred to a jointly produced folder of documents. The tribunal, on the basis of the evidence before it, made the material findings of fact set out below.

Preliminary Issue

- 15 8. The issue of whether this hearing should be in-person or remote was discussed during the case management preliminary hearings in this case. The Employment Judge considered that as this was a case involving discrimination and because of the critical issues of credibility arising from the polarised positions of the parties, the case should be heard in person. The Employment Judge sought the views of the parties. The claimant's
20 representative made a request for the hearing to be dealt with remotely by way of CVP. It was explained the claimant was clinically extremely vulnerable because of her Multiple Sclerosis (MS) and in particular the treatment regime for her condition, which reduced her immune defences and exposed her to infection. It was also said the claimant's witnesses were part of her family and
25 therefore also wished to have a remote hearing in order to protect the claimant.
9. Ms Shiels also had concerns regarding a family member and wished to have a remote hearing.
10. The respondent was neutral on the matter but voiced preference for an in-
30 person hearing.

11. The Employment Judge, having considered the parties' submissions, decided the hearing should be an in - person hearing but agreed the claimant's representative and the claimant and her witnesses could give evidence remotely.
- 5 12. The claimant's representative alerted the Tribunal, in the week prior to the hearing, that she had been informed the claimant had travelled to Spain and intended to give her evidence from there. Ms Shiels was advised there was a procedure to follow to ensure the country (in this case Spain) had consented to evidence being given. There was no time to follow the correct procedure.
- 10 13. Ms Shiels subsequently advised the tribunal that the claimant had arranged a flight home, and would be available for the hearing commencing on Monday 25 July.
14. The respondent's representative, upon learning the claimant had travelled to Spain, made an application to have the case management order allowing the
15 claimant and her witnesses to give their evidence remotely, varied, and for them to attend in person to give their evidence.
15. The respondent's application was dealt with as a preliminary matter at the commencement of the hearing. The tribunal heard submissions from Mr Hay and Ms Shiels.
- 20 16. Mr Hay noted the case was light on documents but heavy on oral evidence, and that this was a case where there were striking differences in the versions of events. Mr Hay submitted the tribunal could depart from the case management order if there was good reason to do so. The email of the 13 December 2021 had given reasons for the claimant wanting to give evidence
25 remotely, and that this was because she was clinically extremely vulnerable. The email made reference to travelling being a particular issue for the claimant.
17. Mr Hay noted no medical vouching had been provided and what was said was taken at face value. There were no mental health issues regarding
30 vulnerability and so the claimant was representing that because of her

condition, the exposure to risk loomed large. There had, at that time, been no suggestion of the claimant going on holiday or travelling abroad: if there had been, the respondent would have requested more information.

18. Mr Hay submitted that if the above was the basis for requesting a remote hearing, it had been flatly contradicted by the information that the claimant had travelled to Spain on holiday. The claimant travelling to Spain, being in the airport, being on the aircraft, congregating with others for a considerable period of time and travelling back at short notice, did not sit comfortably with the need to give evidence remotely. Mr Hay submitted that in the absence of any other explanation, or medical evidence, it posed a concern regarding the genuineness of the reasons the claimant advanced for a remote hearing.
19. Mr Hay submitted that in the absence of a proper basis for a hybrid hearing, the respondent ran the real risk of prejudice in the hearing proceeding in that way. It was always preferable for witnesses to give their evidence in person so the tribunal could assess all of the non-verbal indicators. The respondent's witnesses would be subject to the full scrutiny of the tribunal in the usual way and whilst an inequality of footing was tolerable when the arrangement was for good reason, that basis had now gone.
20. Mr Hay noted Ms Marcella need not be present during the claimant's evidence and there would be no risk of the claimant encountering anyone she did not wish to see.
21. Ms Shiels referred to the Roadmap issued by the Senior President which referred to remote hearings sometimes being what parties wanted, and for there to be a degree of pragmatism. The December email had been sent when the Omicron variant had been at a very high level. The current position was that 1 in 16 people were infected with Covid, so the risk to everyone had increased.
22. Ms Shiels noted a clinically vulnerable person was not confined to the house: they could still go out. The claimant had travelled to her own home in Spain: she travelled by taxi to the airport; wore a mask throughout; used the assistance lounge at the airport; it was not a holiday as the claimant had gone

with her two young children so she could concentrate on giving her evidence and she had not been aware of the rules for giving evidence abroad.

- 5 23. The claimant had relapsing and remitting MS which changed daily and attending the tribunal would increase her risk. The claimant's personal preference was to give evidence remotely.
24. Ms Shiels referred to the claimant's treatment which "wiped out" her immune system. The claimant caught Covid earlier in the year and had spent a month in hospital. She had then caught it a second time.
- 10 25. Ms Shiels submitted that to postpone the hearing for a day and to bring the claimant into the tribunal to hear her evidence would be unfair and damaging to her.
26. Ms Shiels submitted that if the respondent wanted to be on an equal footing, the hearing should be held entirely by CVP. Ms Shiels believed that on CVP everyone could be seen clearly and it was possible to read demeanour.
- 15 27. Mr Hay responded to Ms Shiels' submission by clarifying there was no suggestion all hybrid/CVP hearings were unfair, but there were implicit limitations particularly in cases which turned on credibility. He submitted the claimant had put nothing before the tribunal to allay the concerns which had led to the respondent's application.
- 20 28. The Employment Judge noted the Glasgow Tribunal Centre had social distancing measures in place in the hearing rooms, and sought comments from the claimant regarding adjustments which could be made to allow her to attend the hearing. Ms Shiels confirmed the claimant could not afford the expense of a taxi from home to the tribunal; that the claimant's mother was going on holiday and would not be able to accompany the claimant and to ask the claimant at short notice to attend would present problems.
- 25 29. The tribunal retired to consider the parties' submissions. The tribunal decided to refuse the respondent's application to vary the case management order notwithstanding the fact we considered there was merit in the application particularly on the issue of travelling to Spain being an acceptable risk but
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travelling to the tribunal not being so. The claimant did not offer any explanation to the tribunal to explain her position that one was an acceptable risk and the other not, beyond it appearing to be a matter of personal preference. We acknowledged arrangements would need to be made to allow the claimant to attend a hearing (if ordered to do so) but we did not know when such arrangements could be made. We balanced this with the fact everyone was present, ready and willing to proceed (both representatives had confirmed they were happy to proceed on the basis of a hybrid hearing). We therefore took a pragmatic decision to make progress with this case.

10 **Statutory basis of claims**

(A) *Pregnancy discrimination/unfavourable treatment - section 18(2) Equality Act (points Hi, iv, ix, x, xi, xii and xiii below were also argued in the alternative as sex discrimination)*

15 Point 2 - Ms Marsella said to the claimant that her husband would be upset and there were worse things in life than a baby;

Point 3 - Ms Marsella encouraged Angelina Donnachie to tell Mr Blair about the pregnancy and termination before the claimant had the opportunity to disclose this to him;

20 Point 4 - Ms Marsella disclosed the claimant's pregnancy and her intention to have a termination to Ms Donnachie. She expressed the view the claimant was a baby killer;

Point 5 - Ms Marsella made an irate response to the claimant's query about unpaid wages;

25 Point 6 - Ms Marsella required the claimant to work on the 7 March 2019 despite her being unwell and in pain. The claimant had asked for time off or to take holidays;

Point 7 - Ms Marsella advised the claimant's husband to tell the claimant that she would have to start working in the kitchen or have her hours cut from 3.5 days to 2 days per week;

Point 8 - Ms Marsella required the claimant to attend work on Monday 11 March during the protected period;

Point 9 - Ms Marsella told the claimant that she could work in the kitchen 1.5 days per week or have her hours cut;

5 Point 10 - The claimant was accused of a breach of discipline at a staff meeting and this humiliated the claimant;

Point 11 - Discriminatory dismissal (resignation):

Point 15 - this allegation was withdrawn in submissions;

10 Point 17 - Ms Marsella told staff she would publish persona information about the claimant on social media if the claimant made a complaint and

15 Point 18 - Ms Marsella and other staff sent to each other offensive and derogatory electronic messages about the claimant, including that the claimant was not disabled and that she was faking symptoms to get benefits.

(B) Discrimination Arising from Disability - section 15 Equality Act

Point 2 - Ms Marsella said to the claimant that her husband would be upset and there were worse things in life than a baby;

20 Point 3 - Ms Marsella encouraged Angelina Donnachie to tell Mr Blair about the pregnancy and termination before the claimant had the opportunity to disclose this to him;

Point 4 - Ms Marsella disclosed the claimant's pregnancy and her intention to have a termination to Ms Donnachie. She expressed the view the claimant was a baby killer;

25 Point 5 - Ms Marsella made an irate response to the claimant's query about unpaid wages;

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Point 10 - The claimant was accused of a breach of discipline at a staff meeting and this humiliated the claimant;

Point 11 - Discriminatory dismissal (resignation);

Point 12 - withdrawn in submissions;

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Point 17 - Ms Marsella told staff she would publish personal information about the claimant on social media if the claimant made a complaint

Point 18 - Ms Marsella and other staff sent to each other offensive and derogatory electronic messages about the claimant, including that the claimant was not disabled and that she was faking symptoms to get benefits.

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(C) Harassment - section 26 Equality Act (because of disability)

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Point 3 - Ms Marsella encouraged Angelina Donnachie to tell Mr Blair about the pregnancy and termination before the claimant had the opportunity to disclose this to him;

Point 4 - Ms Marsella disclosed the claimant's pregnancy and her intention to have a termination to Ms Donnachie. She expressed the view the claimant was a baby killer;

Point 5 - Ms Marsella made an irate response to the claimant's query about unpaid wages;

Point 9 - Ms Marsella told the claimant that she could work in the kitchen 1.5 days per week or have her hours cut;

5 Point 10 - The claimant was accused of a breach of discipline at a staff meeting and this humiliated the claimant;

Point 12 - withdrawn in submissions;

Point 15 - withdrawn in submissions;

10 Point 18 - Ms Marsella and other staff sent to each other offensive and derogatory electronic messages about the claimant, including that the claimant was not disabled and that she was faking symptoms to get benefits.

Point 19 - Ms Marsella verbally abused the claimant in public at Greggs and

15 Point 20 - The claimant was advised by the Stenographer, on behalf of Mrs Marsella, that she was there to "write the court story" following being informed by Mrs Donnachie, that Ms Marsella was planning to sell a story on the claimant's termination of her pregnancy.

(D) Failure to make reasonable adjustments - section 20 Equality Act

20 Ms Marsella told the claimant that she could work in the kitchen 1.5 days per week or have her hours cut. (The PCP was said to be requiring the claimant to work in the kitchen).

(E) Victimisation - section 27 Equality Act

Point 11 - Discriminatory dismissal (resignation);

25 Point 12 - withdrawn in submissions;

Point 13 - Reported the claimant to the Police because of the protected act of raising a grievance;

Point 14 - Ms Marsella falsely told a member of staff the claimant had stolen £30;

Point 15 - withdrawn in submissions;

Point 16 - withdrawn in submissions;

5 Point 17 - Ms Marsella told staff she would publish personal information about the claimant on social media if the claimant made a complaint

10 Point 18 - Ms Marsella and other staff sent to each other offensive and derogatory electronic messages about the claimant, including that the claimant was not disabled and that she was faking symptoms to get benefits.

Point 19 - Ms Marsella verbally abused the claimant in public at Greggs and

15 Point 20 - The claimant was advised by the Stenographer, on behalf of Mrs Marsella, that she was there to "write the court story" following being informed by Mrs Donnachie, that Ms Marsella was planning to sell a story on the claimant's termination of her pregnancy.

(F) Failure to provide a statutory statement of employment particulars - section 1 Employment Rights Act 1996.

20 **Findings in fact**

30. The respondent is a charity which, at the time of these events in 2018/2019, provided training for disabled and vulnerable young people to assist them into employment. The respondent operated a cafe where trainees could learn a range of skills including kitchen skills, serving in the cafe, taking orders,
25 operating the coffee machine and the till.

31. The respondent had a small number of employees (6/7) who were supplemented and assisted by a number of volunteers.

32. The respondent was funded by The Big Lottery and a range of other grants.

33. Ms Alison Marcella acted as an Advisor to the Board of the respondent in or about 2016. Ms Marcella had spent many years as a teacher, and in broader child welfare roles, and had extensive experience in dealing with and managing behavioural issues. Ms Marcella was asked by the Board if she would be interested in applying for the Development Manager position.
34. Ms Marcella commenced employment with the respondent in September 2018. Ms Marcella reported to the members of the Board. Her role was Development and Education Manager. Ms Marcella developed the project by (i) opening it up to all with additional support needs, (ii) selling education; (iii) developing a higher quality of training and (iv) improving the cafe.
35. Ms Marcella knew Christopher Blair (and his family) because she had taught him at school. Ms Marcella made contact with Mr Blair, who is a chef, to seek his advice regarding improving the food at the cafe. Mr Blair was subsequently interviewed by the Board and appointed Kitchen Manager in or about September/October 2018.
36. Ms Marcella met the claimant (who is Mr Blair's wife) through Mr Blair. The claimant would often attend the cafe when Mr Blair was working. The claimant started as a volunteer with the respondent in October 2018. The claimant worked "front of house" assisting the trainees.
37. Ms Marcella was aware the claimant had MS and had a discussion with her regarding the support she may require. The claimant was very much of the view that she wanted to start and see what it was like before identifying any adjustments she may need beyond additional breaks.
38. Mr Christopher Gould, Project Supervisor, carried out an induction procedure with the claimant in December 2018 (page 186). The claimant was provided with an Induction Pack, which provided some further information about the respondent, fire arrangements, basic information, a copy of the checklist and details of where to find the respondent's policies and procedures.
39. The respondent's policies and procedures were in a folder on the shelf in the office. Mr Gould showed the claimant this as part of the Induction. The policies

and procedures were also available online. The claimant was provided with an email address and password.

40. The claimant informed Mr Gould about her MS but confirmed she did not require any adjustments. Subsequently (perhaps a month later) the claimant told Mr Gould her hands were not strong and she occasionally needed help with the handle on the coffee machine or with mopping the floor and she could not carry as much on a tray. Mr Gould put adjustments in place to ensure the claimant could carry less on a tray. An electric cleaner was purchased to assist with cleaning the floor, but this was not successful for the claimant and so Mr Gould arranged for the cleaning duties to be removed from the claimant and also the lifting of chairs onto the tables at the end of the day. These duties were done instead by Mr Gould and the other members of staff.

41. The claimant commenced employment with the respondent on the 7 January 2019 as a Training Supervisor. Ms Marcella does not have authority to hire and fire staff. Ms Marcella's role is to make a recommendation to the Board and seek Board approval. The Training Supervisor role was for 2 days per week. The claimant advised Ms Marcella that she needed 3.5 days per week, and Ms Marcella agreed to this subject to approval from the Board. The claimant worked 3.5 days per week until subsequently advised by Ms Marcella that the Board would only approve 2 days per week working front of house.

42. The claimant was not provided with a contract of employment.

43. Ms Marcella and Ms Donnachie knew each other and had been friendly since Ms Donnachie returned to live in Scotland. Ms Marcella understood Ms Donnachie was very good with children and considered she would be an asset for the respondent. Ms Marcella and Ms Donnachie discussed Ms Donnachie starting to volunteer at the cafe and exchanged messages about this (page 205).

44. Ms Donnachie started volunteering at the cafe in January 2019. She worked initially at front of house but quickly moved to the kitchen because there was a need for staff in that area.

45. The claimant discovered she was pregnant in late January 2019. The claimant did not initially tell anyone of her pregnancy. Ms Donnachie did ask the claimant twice if she was pregnant because the claimant was vomiting at work, but the claimant denied it.

5 46. The claimant told her husband of the pregnancy some time in February. The claimant and her husband discussed termination of the pregnancy. The claimant's MS had been diagnosed during a previous pregnancy and the claimant had been very unwell at that time.

10 47. Mr Blair informed his sister, Angelina Donnachie, of the pregnancy and that the claimant intended to have a termination. This was shortly after Mr Blair found out about the pregnancy.

15 48. The claimant's GP notes (page 155) recorded that on the 20 February 2019 there had been a consultation at which the claimant confirmed she had had a positive home pregnancy test and that she was wishing a termination of pregnancy. The claimant attended the Women's Health Clinic that afternoon for a consultation regarding termination.

20 49. The claimant had a meeting with the MS Nurse Specialist on the 27 February 2019. The MS Nurse Specialist reported the details of that meeting to the Consultant Neurologist in a letter dictated on the 28 February (page 161). The MS Nurse noted she had attended the meeting because the claimant had advised she was pregnant, but did not want to continue with the pregnancy. The report continued:

25 *7 advised Natalie I would be keen to discuss this further with Dr MacDougall (Consultant Neurologist) and made it quite clear the fact that Natalie has continued on Tecfidera should not be the reason that she does not want to continue with her pregnancy. I advised Natalie that there has been studies carried out with women who have continued with disease modifying therapy and stopped after falling pregnant. Natalie was quite determined that she was going through with the termination which is booked for the 5 March 2019.*

30 *I called Natalie on the 28 February 2019 following our team meeting and advised Natalie that her options were as follows, to continue with Tecfidera*

throughout her pregnancy if she was concerned about further relapse and that Dr MacDougall would be open to this conversation if this was her decision. Another option was to stop Tecfidera and start on another disease modifying therapy namely Avonex or Copaxone. Or the hope that the hormones would take care of Natalie's pregnancy in the meantime therefore Natalie took [stet] come off Tecfidera and be recommenced immediate once she has given birth. Natalie listened to her options and reported that she would proceed with the termination on the 5 March 2019..."

50. The claimant had morning sickness at work. Ms Jordan McIlroy and the claimant were on a smoke break on the 18 February 2019. The claimant was looking very pale and Ms McIlroy asked if she was pregnant. The claimant confirmed she was and that Ms McIlroy was the first person she had told. The claimant said she wanted to terminate the pregnancy but her husband would want to keep it.
51. The claimant spoke to Ms Marcella privately in February to advise her of the pregnancy. The claimant told Ms Marcella she wished to have a termination but did not want to tell her husband. Ms Marcella asked if it was because of the claimant's MS and the claimant responded it was because there were holidays planned to Turkey and Florida and they were buying a new house and she did not want another child. The claimant told Ms Marcella that if she had to tell her husband about the termination, she intended to tell him and Ms Donnachie that the reason for the termination was because of her MS. Ms Marcella responded "*there are worse things in life than a baby*". She told the claimant to speak to her husband, that he would be upset but he loved her. Ms Marcella told the claimant she would support her whatever she decided and that she was to take whatever time off she needed.
52. Ms Marcella did not tell any other members of staff, or volunteers or trainees about the claimant's pregnancy or that she was considering a termination. Ms Marcella considered it was a private matter. Ms Marcella and Ms Donnachie did discuss it once Ms Marcella knew Ms Donnachie was aware of the pregnancy and the termination. Ms Marcella, in a message to Ms Donnachie, (page 208) said *7 also feel sick about this abortion and her selfish attitude to*

it". This message related to the fact Ms Marcella believed the claimant had not told her husband about the termination.

53. Ms Donnachie told Ms Marcella in a message (page 211) that she was *"thinking I'm going to talk to Christopher tomorrow about the pregnancy, but I won't say anything about you as he has told me she is pregnant. I am going to say I'm really worried that she is saying she's not and I think she's going to do something she shouldn't"*. The next message from Ms Donnachie to Ms Marcella said *7 can't not try to stop this."* *"I can't have it in my hands! I am distraught, I am going to offer to adopt if it comes to it"*.

54. Mr Blair was aware of his sister's views about termination. Ms Donnachie had a discussion with Mr Blair about termination, to try to change his mind. Mr Blair was of the opinion the whole matter of the pregnancy and termination was private and he did not wish to discuss it.

55. Ms Marcella did advise Mr Gould that the claimant was going through a tough time and that he was to give her extra breaks or time off if she needed it. Also, if the claimant suddenly needed to leave early or needed time off, this was to be accommodated and he was not to question it.

56. The claimant, although having told Ms Marcella she was going to have a termination, did not tell Ms Marcella details regarding the termination procedure. Ms Marcella understood the termination was scheduled to happen on the 6th March.

57. The termination procedure was, in fact, undertaken in two stages on the 6th and 8th March. On the 8th March, the claimant lost a lot of blood and was kept in overnight. Ms Marcella and the claimant were exchanging messages (page 287). The claimant advised Ms Marcella (on what was believed to be the 9 March) that she was hoping to get out that day but it was not looking hopeful. Ms Marcella responded on the 9 March at 12.14 (page 288) *"Hope so too but if not just rest up. I was saying to Christopher don't either of you worry about work until you're better. We will sort it. Take care x"*.

58. The claimant decided to return to work on the 11 March. The claimant was on the rota for that day and had not requested a holiday or time off. The claimant informed Ms Marcella at some point during the day that the remainder of the termination had passed. She said to Ms Marcella “that’s the wean deid/away now”. Ms Marcella was shocked and responded “oh right” because she had understood the termination occurred on the 6 March.
59. Mr Sloss joined the Board of the respondent in February 2019 as the Treasurer. He carried out a review of the payroll and all other costs and informed Ms Marcella the claimant would have to return to 2 days per week because the respondent could not continue to pay for something it did not need.
60. Ms Marcella understood Mr Blair required assistance in the kitchen. Ms Marcella spoke to Mr Blair about this and advised him the claimant’s hours were going to be reduced, but the claimant could be offered 1.5 days in the kitchen. Mr Blair told Ms Marcella the claimant would not be able to do this because of her MS.
61. Ms Marcella spoke to the claimant regarding hours of work in or about mid-March. She advised the claimant that the Board would not approve 3.5 days front of house and accordingly the claimant’s hours would have to reduce to 2 days, but the claimant could be offered 1.5 days in the kitchen. The claimant refused to work in the kitchen.
62. The respondent has an E-Safety and Social Networking Policy (page 200) and one of the key child protection issues is that volunteers and members of staff are not permitted to have the trainees (that is, the vulnerable youngsters) as friends on Facebook. Ms Marcella became aware the claimant had accepted a trainee as a friend on Facebook.
63. Ms Marcella spoke to Mr John Sloss about this matter and confirmed she intended to have a staff meeting about that and the fact Mr Blair had resigned from employment on the 1 April 2019. Mr Sloss advised Ms Marcella not to name the claimant at the meeting, but to address matters generally and re-confirm the terms of the Policy.

64. Ms Marcella messaged Ms Donnachie at 07.22am on the 2 April (page 219) to tell her there was going to be a staff meeting to address some issues, one being training staff being friends with trainees on Facebook. Ms Marcella continued *"Natalie has been told she is not allowed to do this yet she has*
5 *Could you make sure you don't say that you don't know about this rule, as she will say that too. The board don't allow it. This might be what I can get her on"*.
65. Ms Marcella convened a staff meeting first thing on the 2 April 2019. Ms Marcella was present together with Chris Gould, Jordan McIlroy, Angelina
10 Donnachie, Jason Marcella, John Sloss and the claimant. Ms Marcella informed those present that Mr Blair had left and therefore the team would need to pull together with all staff taking on some extra responsibility. Ms Marcella then moved on to the issue of child protection and confidentiality and stated it had come to her attention that someone had been breaking the child
15 protection policy by adding a trainee as a friend on Facebook. Ms Marcella reiterated volunteers and employees were mentors, not friends and there was a need to be professional. Ms Marcella asked that whoever had done this should ensure they fixed it because it was serious.
66. The claimant, who was sitting at the table with a butter knife in her hand cutting
20 up a banana, challenged Ms Marcella about confidentiality and suggested that people were allowed to have trainees as friends on Facebook and that she had not ever been told otherwise. The claimant stated she felt everything at the meeting had been directed at her because her husband had left, so she was going to leave too. The claimant stood up, with the butter knife in her
25 hand which she was waving across the table, and "flipped". The claimant started shouting, swearing and ranting about Ms Marcella daring to talk about confidentiality, saying she could *"ram your fuckin job up your arse"*, that Ms Marcella thought she was *"so fuckin smart"* but the claimant was going to come after her, destroy her, destroy the cafe and that she was going to take
30 Ms Marcella *"all the fuckin way"* and that she was *"going to the fuckin top"*.
67. Ms McIlroy, who suffers from anxiety, stood up and removed herself from the meeting.

68. Ms Marcella stood up, told the claimant not to threaten her and that if the claimant did not leave the building, she would call the Police.

69. The claimant did leave and contacted her husband to collect her. Mr Blair sent a text message to Ms Donnachie shortly after, which Ms Donnachie read out to those present. The message said *"you're wiped"*. Ms Donnachie knew her brother was very angry with her for being at the meeting and for not leaving to support the claimant. Ms Donnachie had no contact with her brother or the claimant for about a month after this incident.

70. The claimant attended her GP after the meeting on the 2 April 2019.

71. The claimant sent a letter of grievance dated 3 April (page 191). The focus of the grievance letter was an alleged breach of "current disability legislation" arising from a failure to carry out a risk assessment and make reasonable adjustments in respect of kitchen work.

72. The respondent took no action to "hear" the claimant's grievance because they acted on legal advice that no action was necessary as the claimant had terminated her employment on 2 April 2019.

73. Ms Marcella had been unsure what to do after the meeting on the 2 April. She felt conflicted between going to the Police regarding the claimant's behaviour because the claimant had had a knife in her hand and her friendship with Ms Donnachie. Ms Marcella received legal advice the following day, and acted on that advice, to report the 2 April incident to the Police to protect the cafe.

74. Mr Jason Marcella produced a note of the meeting (page 190).

75. The Police attended at Ms Marcella's home and questioned her and Mr Jason Marcella about the incident. The Police also spoke to other members of staff who had been present. The Police then attended at the claimant's house to question her about the incident and that she had been "brandishing" a knife. The claimant was charged with behaving in a threatening and abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that she did shout, swear, utter offensive remarks, brandish a knife at others; utter threats of violence.

76. The charge was ultimately reduced by deleting the reference to “brandishing a knife at others” and substituting “whilst holding a knife”; and deleting “utter threats of violence”. The claimant produced a Psychiatric Report for the Court (page 173). The Court absolutely discharged the claimant.
- 5 77. Mr Marcella, acting on legal advice, hired a shorthand writer to attend Court when the claimant’s case called, to take notes of the trial. The purpose of this was for the respondent’s legal representative. The claimant became aware of the shorthand writer at Court and complained about it.
78. On the 23 June 2020 the claimant and her daughter were present in Greggs
10 when Ms Marcella entered the shop. Ms Marcella called the claimant “a *fat beast*” and said to the claimant’s husband, when he approached the shop, how could the claimant try to bring down a charity.
79. The claimant reported the incident to the Police and Ms Marcella was issued
15 with a Recorded Police Warning on the 2 July 2020. The warning was issued as an alternative to prosecution and was not a finding of guilt or a conviction.
80. The claimant experienced a deterioration/relapse of her MS in April and June
20 2019. A letter dated 1 May 2019 (page 164) reported on a visit by the Perinatal Mental Health Nurse on the 10 April 2019. The letter noted the Nurse had been asked to see the claimant due to concerns the claimant had about high levels of distress in relation to the recent deterioration. The claimant reported loss of functioning over the past week or so, that she had been struggling to mobilise and was anxious about how she would cope at home with the baby and seven year old daughter.
81. A letter from the claimant’s Consultant Neurologist, Dr MacDougall to her GP
25 dated 29 July 2019 was produced at page 167. The letter confirmed the diagnosis of the claimant’s condition had changed to “highly active relapsing remitting MS”. The letter noted the claimant had had two relapses during the past three months despite being on Dimethyl fumarate. The claimant had experienced bilateral leg weakness affecting her with pain and stiffness of the
30 legs, urinary incontinence and tremors in her right leg.

82. The claimant had an MRI scan in June 2019 which confirmed (page 169) 3 new lesions suggesting the medication was not working. The Consultant Neurologist arranged for the claimant to start on a different medication.
83. A letter from the MS Nurse Specialist to Dr MacDougall dated 27 October 5 2020 (page 183) provided an overview following upon a review being carried out.
84. There was also produced a letter from Dr MacDougall to the claimant's GP dated 22 November 2021 (page 185) in which it was stated that from an MS point of view the claimant appeared to be clinically stable. The Consultant 10 made reference to the claimant's tribunal case and commented "*her MS would not have been triggered by stress but certainly her ability to cope with the symptoms of MS is likely to have been fairly significantly impacted by some of the really rather upsetting events she was subjected to at her former employer*".
- 15 85. Ms Marcella accepted the previous Chairman had spoken to her about the claimant, maybe in October 2018, to say he thought he had seen the claimant steal £30, but he could not be sure. Ms Marcella could not, and did not, believe at the time that Mr Blair's wife could do this.
- 20 86. Ms Marcella did tell Ms Donnachie, after the claimant had left employment, that she would publish personal information about the claimant on social media if she made a complaint. This comment was made after many of the complaints made by the claimant (three complaints to The Big Lottery and two complaints to OSCR) started at arrive and after the claimant and her mother had contacted North and South Lanarkshire schools challenging the fitness 25 of Ms Marcella to be involved with children.
- 30 87. Ms Marcella initially viewed the claimant as someone who was loud and coarse, and swore a lot. She gave the claimant an opportunity to work in the cafe because the claimant was Mr Blair's wife. Ms Marcella's opinion of the claimant changed after the arrival of Ms Donnachie, when she learned from Ms Donnachie that the claimant and Mr Blair were trouble and that the claimant had been "bad mouthing" Ms Marcella, the cafe and the trainees. Ms

Marcella thereafter looked for a way to get the claimant out of the cafe. This was not because of the pregnancy or termination, or because of the claimant's disability, but because Ms Marcella was upset the claimant intended not to tell her husband of the termination and because she (Ms Marcella) had formed the opinion the claimant was trouble.

88. Ms Marcella and Ms Donnachie had, during the course of these events, exchanged a large number of phone messages. The first messages produced at page 206 and dated 2nd and 3rd February, concerned Ms Donnachie coming to work two days at the cafe.

89. The messages on page 207 (undated) concerned the termination. Ms Marcella messaged *"Think u should tell Christopher about that research you sent me"* and Ms Donnachie replied *"that's only a small part of the daily research I've been doing"*. Ms Marcella commented *"so abortion is more dangerous for her"*. Ms Donnachie asked *"what's your solution"* and Ms Marcella replied *"My solution is to only give her 2 days as she is job share with Jeanie. Say they won't sanction 3.5 days - which she wangled out of me anyway"*. Ms Marcella went on to say she could pay Ms Donnachie for the days the claimant was not in, and she need not know about it, and that she felt *"sick about this abortion and her selfish attitude towards it"*.

90. Ms Donnachie's undated messages on page 211 concerned the termination and stated *"Alison I'm thinking I'm going to talk to Christopher tomorrow about the pregnancy but I won't say anything about you as he has told me she is pregnant. I am going to say I'm really worried that she is saying she's not and I think she's going to do something she shouldn't. "Then, "I can't not try to stop this. I can't have it in my hands! I am distraught, I am going to offer to adopt if it comes to it"*.

91. Ms Marcella messaged (page 213) *"I think I'm upset because I hear he's upset and she knows that but doesn't give a shit about how he feels and killing his baby on his birthday."* *"And yet she was bawling at me for saying I don't give a shit, when that person is her. She was only worrying about her mortgage."*

92. On page 215 Ms Marcella messaged Ms Donnachie in relation to the claimant being told her days were being reduced to 2, to say *"Btw Natalie is staying for the 2 days"* and *"Confused. I need to go to sleep now as been up for hours last night worrying about all this. Don't think I'll get rid of her now. Feel I'm no further forward."*
93. Ms Donnachie (page 216) messaged Ms Marcella on the 27 February saying *"I feel so sick about all of this! I really do! Could hardly keep awake on the phone and then couldn't sleep. I feel really worried and just can't believe the things said about me and Willie"*. Ms Donnachie (page 218) continued *"I feel totally ill about this abortion I'm gutted!!! Absolutely gutted. I'm just talking to Willie about it all now ...so many things are making sense now and I don't know is why I fall for it all the time when I know what she's like but my brother is totally blinded by her"*.
94. Ms Marcella (page 217) messaged *7 am praying hard about this. I also feel totally sick about how she has conned me. I need a way out. And yes, this is a baby. She is conning Christopher and your mum about this too by saying her illness is so bad"*. Ms Donnachie replied *"I've read all I can. I'm gutted two holidays are making this an inconvenience"*.
95. Ms Marcella messaged Ms Donnachie on the 2 April (page 219) to tell her she was having a staff meeting at 9am to address some issues, one of them being training staff being friends with trainees on Facebook. Ms Marcella continued *"Natalie has been told she is not allowed to do this yet she has. Could you make sure you don't say that you don't know about his rule, as she will say that too. The board don't allow it. This might be what I can get her on."*
96. Ms Donnachie replied that night, after the meeting to say she was in a state and badly affected by it all. Ms Donnachie felt it was *"all too close to home atm with it involving Natalie and Christopher"*. Ms Marcella asked Ms Donnachie to confirm her address so she could get her wages to her, and Ms Donnachie replied *7 would never take any money Alison. I want his [sic] to work out but right now I can't. I'm really upset at how he's treated me today I don't feel it's over and Willie doesn't want me around while it's not. I am gutted*

and would have loved to have stayed but the timing is wrong." Ms Marcella replied "If I were you and I'm not, I'd let them come to you. I think they need cut off to show them." Ms Marcella questioned what they could do to her, and Ms Donnachie replied "Well I have no idea but be prepared". Ms Marcella commented that she thought she would phone the Police tomorrow to pre-empt the claimant, and Ms Donnachie messaged to say "Anything you've ever said to her could be used against you..." Ms Marcella commented that she had said far too much to the claimant, but that she would deny it.

5
10 Q7. Ms Marcella (page 223) messaged Ms Donnachie about charging the claimant with breach of the peace, and that it would go to court and that it would "protect the cafe".

15 98. Ms Marcella (page 224 - 17 April) commented "Just realised - she is ill to get benefits. If you leave a job or get sacked you get nothing. She left work that day and went immediately to doctor. She was fine. But who can question her? Desplicable woman!". Ms Donnachie replied "Never thought of that, also her resignation, she wouldn't have a leg to stand on (pardon the pun) with the sacking offence! My bad side feels like reporting that!!!".

20 99. On page 226, Ms Donnachie messaged "Thing is, because she has diagnosis they would believe her because relapses are possible! Maybe her brain scan won't show more scarring than previous! Who knows?" Ms Marcella replied "She will even have your mum convinced she is ill. She worked 5 days before that and then decides she's ill the minute that happened. She went to doc directly after incident You wait she'll be fine to go to turkey".

25 100. On page 227 there was reference to the claimant stealing tax payers money and Ms Donachie commented "What's new?? She openly admits she steals". Ms Marcella replied "She is trying to bring a charity down. I honestly cannot cope with how repulsive she is - it actually feels overwhelming".

30 101. Ms Marcella messaged Ms Donnachie (page 230) saying "I actually can't handle these evil people any more.... I fell like I've totally hand enough. Think I might need to find a way to retaliate".

102. Ms Donnachie messaged Ms Marcella regarding comments made by Ms Marcella about Ms Donnachie's mother running after the claimant. Ms Donnachie said (page 236) *"I agree wholeheartedly! ... I do truly believe that they fully believe Natalie's lie, therefore they think she is justified in all her actions but I will st [sic] some point give it clearly to my mum. I know she will believe me as she knows what Natalie is like and that I don't. In saying that ... although I know she will believe me she will choose them, but at least she will know, in full!!!!!!"*
103. Ms Marcella posted a message (page 238) saying *"Thomas told Jordan and me that he saw Natalie today and she was walking fine. Told you it was act to get money from benefits"*.
104. An extract from The Dream Team Whatsapp group was produced (in typed format) at page 251 for the period 14 April to 28 April. This Whatsapp group did not appear to have been set up for work purposes. It appeared it was an informal forum. Some of the messages made comment about the claimant: for example:-
- (i) Ms Marcella wrote (page 233) *"Geeze me the boak too cos I'm sure she isn't ill. Far too convenient and coincidental. Bad boss getting her charged when she is so disabled. It all suits her narrative/lie- I didn't support her at work and now she'll get sick pay instead of nothing and everybody feels sorry for her and she can sit on her a**e and your mum and her husband can run after her! Sickening! IT is indeed her soul that is sick so your mum should do spiritual warfare for her rather than pray for her lies."*
- (ii) On page 238 Ms Marcella said *"Thomas seen nat walking with ruby today. No sticks, crutches or zimmers"*.
- (iii) On page 249 there was reference to a video called "seven mind games played by the narcissist" and subsequent messages referred to the claimant being a "narcissist" and Ms Marcella noting that the video described exactly what "they both did to me ;

- (ii) one message questioned whether there was anything genuine about the claimant at all (page 255);
 - (iii) Ms Donnachie commented that she did not trust [the claimant] and never really did;
 - 5 (iv) Ms Marcella commented the claimant and Mr Blair were “pathetic, venting all their bile”;
 - (v) Ms Donnachie referred to the claimant and her mother being poison;
 - (vi) The claimant was described as being calculated and manipulative;
 - (vii) Ms Marcella wrote that [name] told me and Jordan that he saw Natalie
10 today and she was walking fine. Told you it was act to get money from benefits.
 - (viii) Ms Donnachie messaged to say the claimant had defriended her on Facebook (24 April). On the 26 April Ms Donnachie messaged “I
15 actually don’t think they want it to close, think they want to destroy Alison and ruin her job if I’m honest! They never got their way, in their eyes”. Ms Marcella asked why they would want to destroy her, and Ms Donnachie replied “because she is nasty”.
 - (ix) On page 271 there were caricature/cartoon photos of the claimant and Mr Blair.
- 20 105. The claimant has, since the termination of her employment, been in receipt of Employment Support Allowance (contribution based) and full rate PIP for mobility and care.

Claimant’s submissions

- 25 106. Ms Shiels invited the tribunal to accept and prefer the evidence of the claimant and her witnesses, and her submissions were based upon the tribunal doing so. Ms Shiels noted the respondent had conceded the claimant was a disabled person at the relevant time and that they had knowledge of the disability.

107. Ms Shiels referred to the claims brought under section 15 Equality Act and submitted no comparator was required and that it was not necessary for the respondent to have been aware that the relevant “something” arose in consequence of the claimant’s disability (**City of York Council v Grosset**
5 **2018 IRLR 746**).

108. In a claim brought under section 15 Equality Act, there were two questions of fact to be determined and they were, what was the relevant treatment and was it unfavourable to the claimant. There must be an investigation of two distinct causative issues: (a) did A treat B unfavourably because of an
io (identified) something and (b) did that “something” arise in consequence of B’s disability? The claimant relied on two “somethings”, namely termination of the pregnancy and inability to work in the kitchen.

109. The termination of pregnancy was linked to the claimant’s disability. She was on Tecfidera, a drug which is contraindicated during pregnancy. Pregnancy
is itself can also affect MS symptoms both during pregnancy and post-partum. The termination arose in consequence of the claimant’s MS and the drugs prescribed for that. The unfavourable treatment was because of the claimant’s termination. It was submitted that the evidence showed Ms Marsella’s attitude to the claimant changed when the claimant disclosed that she was
20 considering a termination, and continued when the claimant proceeded with the termination, requesting time off to attend the clinic on the 6 March 2019. The text messages make clear Ms Marsella’s views on the termination, and her plans to get rid of the claimant. The first plan was to cut the claimant’s hours in the hope she would leave. The claimant’s termination arising from
25 her MS was therefore a significant influence and/or an effective cause/reason for the unfavourable treatment (points 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 17 and 18 as set out below).

110. The claimant’s inability to work in the kitchen arose from the fact she had impaired function which is a feature of MS, which progresses over time and
30 with new episodes, flare ups and new or enlarging lesions in the brain. The claimant’s strength, co-ordination, ability to stand, grip, carry and lift as well as write are all a consequence of her disability. (The claimant relied on this

“something” in the alternative to termination of pregnancy for points 7 and 9 below.)

111. In point 2 it was alleged Ms Marcella said to the claimant that her husband would be upset and “there were worse things in life than a baby”. Ms Shiels submitted that on or about 20 February 2019, to explain the reason for her severe morning sickness, the claimant advised Ms Marcella that she was pregnant and considering a termination due to her MS. Ms Marcella stated there were worse things in life than a baby. She also told the claimant her husband would be upset and to discuss the termination with him. Ms Marcella was opposed to the termination and trying to change the claimant’s mind. Ms Marcella disregarded the medical reason related to the claimant’s disability. This was unfavourable treatment. The claimant was distressed and emotional: she did not have an easy decision to make. Ms Marcella’s comments placed unnecessary pressure and guilt on the claimant who was having to balance competing factors in her mind. Ms Marcella told the tribunal about her decision to continue with a pregnancy when she was an unmarried mother. This is not the same situation as the claimant and demonstrated the bias, ignorance and insensitivity which formed the basis of the unfavourable treatment of the claimant.
112. In point 3 it was alleged Ms Marcella encouraged Ms Donnachie to tell Mr Blair about the termination. She encouraged Ms Donnachie to share the research information that Ms Donnachie had seen. They both were trying to change the outcome of the decision the claimant had made. Both Ms Marcella and Ms Donnachie were unaware Mr Blair already knew of the claimant’s decision to terminate the pregnancy and that he knew the appointments on the 6th and 8th March 2019 had already been made. It was Mr Blair’s evidence that he gave Ms Marcella a false reason why the claimant was in hospital.
113. In point 4 it was alleged Ms Marcella disclosed to Ms Donnachie that the claimant was pregnant and proceeding with a termination. Ms Marcella sent derogatory text message to Ms Donnachie regarding the claimant, and (at page 213) stated the claimant was killing Mr Blair’s baby on his birthday.

114. In point 5 it was alleged Ms Marcella had made an irate response to the claimant's query about unpaid wages. It was submitted that prior to disclosing her pregnancy and its termination, Ms Marcella would not have treated the claimant unfavourably when raising concerns about bank charges caused by the failure to pay wages on time, by angrily and aggressively shouting and swearing at the claimant in front of Ms Donnachie stating *7 don't give a fuck about your bank charges*". This change in treatment, it was submitted, was because of pregnancy termination.
115. In point 6 it was alleged Ms Marcella required the claimant to work on the 6th, 7th and 11th March 2019 despite her being unwell and/or in pain. The claimant had asked for time off or to take holidays. On or about the end of February 2019, the claimant advised Ms Marcella she was proceeding with the termination and required time off or holidays during the process commencing on 6 March 2019. The claimant required to return to work after attending the clinic on 6 March. The claimant worked on 7 March despite being in pain. The claimant was told to attend work on the 11 March because there was no-one to cover her shift. It was submitted that prior to disclosing the termination, Ms Marcella was flexible and supportive of the claimant taking time off when unwell. The unfavourable treatment was because of the termination.
116. In point 7 it was alleged Ms Marcella advised the claimant's husband to tell the claimant that she would have to start working in the kitchen or have her hours cut from 3.5 days to 2 days. On the 8 March Ms Marcella spoke to Mr Blair about the claimant working in the kitchen or having her hours reduced by 1.5 days. Mr Blair explained the claimant could not work in the kitchen due to her MS and advised Ms Marcella to speak to the claimant directly. Mr Blair did tell the claimant what Ms Marcella had said.
117. In point 8 it was alleged Ms Marcella required the claimant to attend work on Monday 11 March during the protected period. On the 8 March the claimant was admitted to hospital due to complications from the second part of the procedure. The claimant advised Ms Marcella she was unlikely to be discharged that day. The claimant was kept in overnight. On the 9 March Ms Marcella texted that she would see the claimant on the 11 March, if well

enough, for a chat. On Sunday 10 March the claimant phoned MS Marcella. Ms Marcella advised the claimant that she was needed at work on the 11th because they had no-one to cover her shift. The claimant attended for work and advised Ms Marcella that the termination was not complete and she did not know when that would happen. Ms Marcella said "ok". The claimant passed the product of her pregnancy at work and Ms Marcella, who response was "no problem". The claimant was emotionally upset. Ms Marcella did not make any enquiries of the claimant as to whether she was fit to continue working.

10 118. In point 9 it was alleged Ms Marcella told the claimant that she could work in the kitchen 1.5 days per week or have her hours cut. Ms Marcella and the claimant discussed the issue of working in the kitchen on the 11 March. The claimant advised Ms Marcella that both the work and the environment were not suitable for her due to her MS. The claimant requested a risk assessment with a view to making reasonable adjustments before a decision was made about cutting her hours. Ms Marcella stated that if the claimant could not work in the kitchen, she would be replaced by someone who could (that is, Ms Donnachie). It was submitted that reducing the claimant's contractual hours unless alternative duties were performed in the kitchen was unfavourable treatment because of her impaired functions arising in consequence of her disability. Further, the proposal for the claimant to work in the kitchen was a conscious plan to reduce the claimant's hours with a view to getting her to leave (pages 214-215).

25 119. In point 10 it was alleged the claimant had been accused of a breach of discipline at the staff meeting and humiliated the claimant. This was a premeditated plan to dismiss the claimant. On the 2 April Ms Marcella advised Ms Donnachie of a staff meeting that morning where she planned to get rid of the claimant. She asked Ms Donnachie not to disclose her lack of knowledge of the social media policy regarding having friends on Facebook. The claimant was targeted at the staff meeting. The claimant had not seen or received training on the policies. The claimant had a service user as a friend on

Facebook with the permission of the parent who was also a Board member.
The unfavourable treatment was because of the claimant's termination.

120. In point 11 it was alleged there had been a discriminatory dismissal
(resignation). The claimant resigned without notice because of the
5 respondent's conduct (at the staff meeting). The respondent's conduct was,
as admitted by Ms Marcella, a Machiavellian plan to get rid of the claimant
and force her to resign. It was submitted that had the alleged conduct of the
claimant been true then the respondent could have commenced disciplinary
action against the claimant, but they did not do so. This was a deliberate,
10 planned, conscious unfavourable treatment of the claimant because of the
termination of her pregnancy arising from disability.

121. In point 17 it was alleged Ms Marcella told Ms Donnachie that she would
publish personal information about the claimant on social media if the claimant
made a complaint. This was unfavourable treatment because of the claimant's
15 termination.

122. In point 18 it was alleged Ms Marcella and other staff sent to each other
offensive derogatory electronic messages about the claimant including that
the claimant was not disabled and the claimant was faking her symptoms to
get benefits. Ms Marcella also stated to Ms Donnachie that the claimant had
20 stolen £30, that she had no morals, that she was a narcissist and that she
was conning her husband and his mother by saying her illness was so bad
(page 217, 224).

123. Ms Shiels referred the tribunal to the case of **Hall v Chief Constable of West
Yorkshire Police 2015 IRLR 893** and submitted the question for the tribunal
25 to ask itself was whether a matter arising from the disability (that is, the
termination of the pregnancy) has been a significant influence or effective
cause of the treatment. Ms Shiels noted that whilst the claimant's conduct at
the staff meeting on the 2 April, did not arise from her disability, the disability
was an effective cause of her indignation, believing at the time that she was
30 being pushed out of the job and replaced by Ms Donnachie.

124. The respondent, at the Hearing, questioned the claimant about being loud, shouting, playing loud music, stealing £30, breaching confidentiality and adding a service user on Facebook, but the claimant was never spoken to about these matters. Ms Shiels submitted that whilst there was a need for staff in the kitchen, Jeannie would have been the most suitable person to perform those duties, having previously been the kitchen manager.

125. Ms Shiels submitted the treatment could not be justified in this case: a Machiavellian approach cannot be justified.

126. Ms Shiels next dealt with the claim brought under section 20 Equality Act and submitted the provision, criterion or practice was the requirement for the claimant to work in the kitchen or lose hours and income. This disadvantaged the claimant because she was unable to perform work in the kitchen due to her MS. The substantial disadvantage included a reduction in hours and pay. Both Jeannie and Ms Donnachie could have worked in the kitchen. The respondent failed to make a reasonable adjustment. It would have been a reasonable adjustment not to require the claimant to work in the kitchen due to her inability to do so and not to reduce her hours.

127. Ms Shiels next dealt with the pregnancy discrimination claim in terms of unfavourable treatment, section 18(2) Equality Act. It was submitted the same complaints as above (points 2-11 and 17 and 18) were capable of amounting to pregnancy discrimination or direct sex discrimination in terms of section 13 Equality Act.

128. The acts set out at points 2-9 occurred during the protected period to 25 March 2019 based on the pregnancy ending on the 11 March 2019. The other conduct occurred after the protected period. It was submitted that of the conduct occurring after that date, numbers 10 and 11 had been decided upon during the protected period. It was submitted that targeting the claimant at the staff meeting on the 2 April was the implementation of an earlier decision made by Ms Marcella during the protected period to get rid of the claimant. If the tribunal found the conduct in terms of 10 and 11 was not decided upon

during the protected period, then the claimant submitted 10 and 11 were acts of sex discrimination as are 17 and 18.

129. Ms Shiels submitted the existence of a causal connection between the treatment and the pregnancy is important. The question to be asked is, why was the complainant treated less favourably and was her pregnancy an effective cause of the treatment complained of (***O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School 1996 IRLR 372***).

130. Ms Shiels next dealt with the harassment claim and submitted the prohibited grounds relied on were disability and sex. The claimant perceived her dignity to have been violated, and an adverse environment created. It was important to look at the series of events as a whole and the tribunal should not carve up a course of conduct into individual incidents and measure the detriment from each.

131. The tribunal, in considering whether the unwanted conduct had the purpose of creating an adverse environment, will require to analyse Ms Marcella's motive or intention. The tribunal is entitled to draw inferences as to what the true motive or intent actually was. The claimant believed the adverse environment was created in order to get rid of her. Ms Shiels referred the tribunal to the case of ***Driskel v Peninsula Business Services Ltd 2000 IRLR 15***.

132. The conduct complained of was as set out in points 2, 3, 4, 5, 9, 10, 11, 18 and 20.

133. This comment made at point 2 (there are worse things in life than a baby) was unwanted, and it had both the proscribed purpose and effect. Ms Marcella was objecting to the termination and attempting to discourage the claimant from terminating the pregnancy or persuade her not to terminate her pregnancy by guilt tripping her about both her husband and her husband's feelings and ignoring her disability reasons, and her concerns about being able to care for her family. The comments violated her dignity, and related to both disability and sex.

134. In point 3, Mr Blair, unbeknownst to both Ms Marcella and Ms Donnachie, already knew about not only the pregnancy but also the termination. The purpose was to get Mr Blair to change the claimant's mind. The conduct was unwanted. The claimant deliberately did not disclose her pregnancy to others, and nor did Mr Blair. The claimant did not want to have others gossiping and commenting. Ms Marcella and Ms Donnachie both gossiped and commented and thus created the proscribed environment related to pregnancy, and therefore sex, failing which disability.
135. Point 4 was as above, and created a very hostile and offensive environment related to pregnancy and therefore sex, failing which disability.
136. Point 5 (Ms Marcella's irate response) was unwanted conduct, shouting and swearing at the claimant in the presence of Ms Donnachie with the purpose and/or effect of creating the proscribed environment of hostility and humiliation.
137. In point 9, Ms Marcella harassed the claimant related to her disability by telling her that if she did not accept working in the kitchen she would lose her hours and be replaced by someone who could work in the kitchen. This was despite both the claimant and Mr Blair advising that kitchen work was unsuitable to the claimant due to her disability.
138. In points 10 and 11, there was a premeditated plan to dismiss the claimant and a discriminatory resignation. The claimant was targeted and humiliated at the meeting by Ms Marcella. The treatment was related to the termination of pregnancy and disability. It was part of Ms Marcella's plan to get rid of the claimant. Threats of immediate dismissal were made. The meeting was hostile and intimidating and directed at the claimant. The claimant resigned in response to the conduct. The dismissal was an act of harassment.
139. In point 18, Ms Shiels submitted unlawful harassment extends to where a person is subjected to harassment where the treatment arises out of or is closely connected to the previous employment relationship.

140. The conduct of Ms Marcella and other staff was unwanted and had the proscribed effect. It occurred after the end of the claimant's employment and was related to her disability.
141. In point 19 and 20, this was closely connected to the previous employment relationship and the complaints made about disability discrimination.
142. Ms Shiels lastly dealt with the claim of victimisation, and submitted the acts set out at points 10, 11, 13, 14, 17, 18, 19 and 20 amounted to victimisation. The first two acts occurred during the claimant's employment, and the remaining conduct was post-employment victimisation.
143. Ms Shiels submitted the claimant did four protected acts: (i) the claimant, on or about the 21 February 2019, disclosed to Ms Marcella that she was pregnant and considering a termination because of her disability; (ii) on or about the 11 March 2019, the claimant had a discussion with Ms Marcella regarding reasonable adjustments in connection with the proposal the claimant work in the kitchen; (iii) on or about 3 April 2019, the claimant submitted a grievance letter complaining about disability discrimination and failure to make reasonable adjustments and (iv) the claimant commenced early conciliation and brought these proceedings.
144. The protected act must be the reason for the treatment and a finding of victimisation will require consideration of the employer's motivation (conscious and unconscious). A respondent will not be able to escape liability by showing an absence of intention to discriminate, provided the necessary link in the mind of the discriminator between the doing of the acts and the detriment or less favourable treatment can be shown to exist. Ms Shiels referred to the cases of ***Owen & Briggs v James 1982 IRLR 502*** and ***St Helens Metropolitan Borough Council v Derbyshire 2007 UKHL 16***.
145. Ms Shiels referred to section 108 Equality Act in relation to the post-employment victimisation, and to the case of ***Jessemey v Rowstock Ltd 2014 IRLR 368***.

146. In points 10 and 11, this conduct was plan B to get rid of the claimant after she did not resign having had her hours cut. The protected acts were (i) and (ii) above. Ms Marcella had text Ms Donnachie to say "this might be what I can get her on".
- 5 147. In point 13, it was two days after the staff meeting Ms Marcella reported the claimant to the Police. The text messages show Ms Marcella contacted the Police in an effort to pre-empt the claimant from taking any action. Ms Marcella also said "I'll deny it." At page 223 she texted that she was going to charge the claimant with breach of the peace. The protected act was the
10 sending of the grievance.
148. In points 14, 17 and 18 Ms Marcella sent the text messages at page 224 - 230 and at 235 - 238.
149. In point 19, the relevant protected act was the tribunal proceedings generally and the application to add Ms Marcella as a second respondent as stated by
15 Ms Marcella in her evidence.
150. In point 20, the claimant was advised by the stenographer, on behalf of Ms Marcella, that she was there to write the court story following being informed by Ms Donnachie that Ms Marcella was planning to sell a story on the claimant's termination. The Psychiatrist, in her report (page 179) referred to
20 the protected act of the claim to the Employment Tribunal and that the respondent was likely to only have reported the claimant to the Police to gain advantage in the case. Ms Shiels submitted the claimant had proven sufficient facts for the burden of proof to move to the respondent to show the treatment was not because of pregnancy and/or disability.
- 25 151. Ms Shiels invited the tribunal to draw an adverse inference from the fact the respondent could have produced evidence to support what had been said at the hearing, but had not done so.
152. Ms Shiels submitted there had been a failure to provide a written statement of employment particulars and 4 weeks' pay should be awarded (Employment
30 Act 2002, section 38).

153. There had also been a failure to comply with the ACAS Code on Disciplinary and Grievance Procedures. The claimant was not provided with a copy of the grievance procedure and her grievance was not dealt with. This was unreasonable and an uplift of 25% should be made.

5 154. Ms Shiels referred the tribunal to the schedule of loss which had been produced. She submitted the offence and humiliation experienced from a deliberate and malicious course of action would cause greater injury to feelings and so an increased award for injury to feelings should be made. Ms Shiels suggested a sum of £49,300 plus interest.

10 155. There had also been an injury to health. Ms Shiels acknowledged the doctor's letter at page 185, but submitted the MS was likely to have been fairly significantly impacted by some of the rather upsetting events. There was no requirement on the claimant to produce a medical opinion: the claimant's mental health had declined and her MS symptoms had worsened. The claimant had given evidence of a new episode of MS, with new lesions, which had lasted a long time before being brought under control. An award of £5000 should be made.

156. Ms Shiels acknowledged the respondent would argue the claimant was not fit for work and therefore there was no financial loss. Ms Shiels submitted the claimant's position was that she would not have suffered such a bad relapse of MS if these events had not happened.

Respondent's submissions

157. Mr Hay made some observations on the evidence and described the case as being unusual because the tribunal had heard a large amount of evidence and both parties had sought to portray the other in a poor light. He invited the tribunal to scrutinise the evidence carefully. Large tracts of it were in dispute. Ms Marcella and Ms Donnachie sought to blame the other for the extraordinary comments contained in certain of their whatsapp messages. The tribunal would require to consider the content of the messages carefully when considering what evidence it preferred and what facts relevant to the issues are established from that evidence.

158. Mr Hay invited the tribunal to scrutinise the evidence of the claimant's witnesses with particular care. All gave evidence by way of CVP as opposed to being in person. They gave evidence from the comfort of their own homes. The respondent's witnesses each appeared in person at the Employment Tribunal.

159. The circumstances of the claimant giving her evidence by CVP was the subject of extensive submission at the start of the hearing. The respondent did not repeat those submissions other than to observe that the stated basis for the claimant and her witnesses to be adduced by CVP was on the basis of risk of infection from transport to and from the tribunal building. This was called into question by the claimant's travel to Spain disclosed shortly before the hearing. The absence of risk from travel of that sort, as compared with travel to and from the Tribunal has not been adequately explained. The claimant confirmed in evidence that she travelled by taxi to Edinburgh airport, for a flight to Spain. Further, she confirmed she travelled to Spain with the intention of remaining there for the duration of the school summer vacation. She also confirmed she had on no occasion obtained medical opinion advice in connection with the proceedings in the tribunal. This matter cast a shadow over the claimant's credibility and reliability generally.

160. Mr Hay noted that whilst the claimant-maintained composure during her evidence, her evidence in certain respects was not without its difficulties. The claimant did not respect the boundaries of respect of a witness, calling representatives by their first names, even when directed otherwise by the Employment Judge. When asked about the impact of her MS in doing kitchen work, the claimant gave a lengthy answer about the impact of her MS on her currently. That answer failed to distinguish between the state of her symptoms as at her employment as opposed to after her further deterioration after her ferocious attack later in April 2019. This was demonstrative of the claimant being unable to make distinctions between the recollection of events as they were in the past as opposed to her perception of matters currently, particularly when they jarred with suggestions that the claimant would accompany her husband on supply runs.

161. Mr Hay noted further inflexibility with the claimant's evidence on the issue of training. The claimant's position was that she did not get any training whatsoever. She had to accept that she was trained in the use of the coffee machine and shown how to do what was needed to be done on-the-job.

5 162. There was also the striking absence in the claimant's grievance (page 191) to any reference to matters going awry after the claimant's pregnancy had been disclosed to Ms Marcella, and similarly no reference to there having been any absence of support by Ms Marcella of the claimant during her pregnancy. This is a peculiar omission given its proximity to the events in question and by the
10 very fact this grievance was ventilating a variety of concerns the claimant at the time.

163. The claimant took every opportunity to introduce allegations or assertions about the respondent not adhering to safeguard protocols or matters of health and safety, and scandalous allegations about Ms Marcella having assaulted
15 a pupil whilst employed as a teacher, all with casual abandon. She portrayed Ms Marcella in a quite incredible light, as a scheming, manipulative Machiavelli who oppressed her workforce. These allegations have been made by the claimant and/or her mother since some time shortly after her resignation to the respondent's funders and other bodies. The claimant has
20 no evidence to contradict that of the respondent that those complaints were not upheld. The claimant also sought to minimise her outrageous behaviour at the meeting on the 2 April 2019.

164. Mr Hay noted the tribunal would also have to resolve the conflict between the evidence of the claimant and that of Ms McIlroy on the question of whether
25 the claimant told her of the pregnancy and intended termination. Mr Hay invited the tribunal to prefer the evidence of Ms McIlroy, and submitted the claimant had clearly been wrong in her recollection that she had told no-one else about her pregnancy.

165. Mr Hay submitted that whilst the first impression of the claimant's evidence
30 was that it was given with blunt honesty, there was in truth a great deal of gloss being added to the claimant's evidence.

166. Mrs Donnachie presented as an innocent dupe manipulated by Ms Marcella. Mr Hay invited the tribunal to consider the content of the messages between Ms Donnachie and Ms Marcella and to consider whether Mrs Donnachie was as helpless as she suggested in evidence and induced to messages in venomous terms against the claimant and her brother, and her efforts then to crop messages to try to show herself in a better light. Mrs Donnachie accepted she held stronger anti-abortion views than Ms Marcella. She also accepted her work was predominantly in the kitchen, and so it was difficult to reconcile her suggestion that she had been appointed to do the work that had been cut from the claimant.

167. Mrs Donnachie was also at pains to introduce allegations of the respondent not complying with obligations. Mrs Donnachie accepted her brother, Mr Blair, did tell her about the claimant's pregnancy, albeit her position was that that was after she had been told about it by Ms Marcella. This was contradicted by the evidence adduced in examination -in - chief of Mr Blair, who confirmed he had told Mrs Donnachie about the pregnancy.

168. Mr Blair had presented adequately in examination -in-chief (albeit he was unable to resist including allegations against Ms Marcella of sexual assault and there being no PVG checks by the respondent). However, in cross examination he routinely failed to contain smirks at questions, altered his demeanour and read from the bundle unprompted. Mr Blair did accept that Ms Marcella had told staff *"we shouldn't really be adding people on Facebook but didn't get us to sign anything"*.

169. Mr Blair was asked about the claimant's pregnancy in examination-in-chief and confirmed the claimant had told him *"right away, as soon as she found out - I imagine the end of ... during February I was made aware"*. Mr Blair was asked who he had told of the pregnancy and replied *"I never told anyone in work - I kept to myself"*. He was asked if he had told any family, and he replied *"I told my sister really early on and I raised concerns about the effect on her. The neurologist sat and told us that pregnancy could be good but that it was working against her, damaging her. I was unaware everyone knew at work, or that Alison Marcella knew."* Mr Blair was then asked if he told Mrs

Donnachie at work, and replied "no, this was before, before". Later he was asked when the claimant discussed termination with him and he *replied "the February"*. Mr Blair's clear and unprompted evidence was that he had told Mrs Donnachie of the pregnancy and the intention to terminate it, really early on.

170. Mr Blair, in cross examination, attempted to suggest he had been confused by the questions in this chapter of evidence upon realising it was a matter of interest to the respondent. He then reverted to testimony in the same terms as Mrs Donnachie. Mr Hay invited the tribunal to reject this account.

171. Ms Marcella was the main witness for the respondent and was cross examined at length. Her evidence was, at times, difficult, emotional and not in response to the question directly asked. In large part this related to various matters unconnected with the issues in these proceedings. Many of those matters involved serious allegations against her, some of which she found particularly upsetting. It was submitted that Ms Marcella has an unquestioned lengthy career in responsible positions for the welfare of children, first as a teacher and then within broader work for a local authority. She presented as an individual committed to the aims of the cafe and with a particular desire to assist and help vulnerable people and is well intentioned. It was clear she is not on any view Machiavellian in her methods or presentation.

172. Mr Sloss, whilst not always on top of all the detail, was a credible and reliable witness. Mr Gould and Ms McIlroy both gave evidence in a straightforward way. Mr Hay invited the tribunal to accept the evidence of the respondent's witnesses and to prefer where it conflicted with any witness of the claimant.

Disability Discrimination

173. Mr Hay acknowledged the respondent accepted the claimant has, and had at the relevant time, a disability in terms of the Equality Act. The disability did change from relapsing-remitting MS during the currency of the claimant's employment with the respondent, to highly active relapsing and remitting MS once her employment had come to an end. It was submitted the claim was concerned with the impact of the claimant's relapsing and remitting MS as no

evidence had been led to draw a connection between the deterioration of the claimant's condition and the treatment that formed the allegations in this claim.

Did the respondent treat the claimant unfavourably as alleged at points 2 to 12, 17 and 18 of the statutory basis of claim?

174. The test of unfavourable treatment in section 15 Equality Act was whether the claimant had been put to a disadvantage, which is a relatively low threshold.

175. Point 2 - Ms Marcella said to the claimant that her husband would be upset and there were worse things in life than a baby

176. The respondent accepted those words were said by Ms Marcella in the conversation she had with the claimant, when the claimant first disclosed the pregnancy. It was denied the comments were unfavourable treatment: they did not place the claimant at any disadvantage. Mr Hay submitted Ms Marcella's evidence as to the terms of the conversation should be accepted. The context in which the words were said was a general discussion between the claimant as Ms Marcella as to the considerations that arose around the fact of the claimant's pregnancy.

177. Point 3 - Ms Marcella encouraged Ms Donnachie to tell Mr Blair about the pregnancy and termination before the claimant had the opportunity to disclose this to him

178. It was denied Ms Marcella acted in this way. Ms Marcella's evidence should be preferred to that of Ms Donnachie. Mr Blair's own evidence in examination - in-chief was clear to the effect that he had told his sister, Ms Donnachie, of the fact of the claimant's pregnancy and the claimant's intention to have a termination. This supported Ms Marcella's evidence that Ms Donnachie knew of the claimant's pregnancy from a source other than Ms Marcella. Mr Hay submitted that even if Ms Marcella did encourage Ms Donnachie to speak to Mr Blair, that on no view could amount to treatment of the claimant that placed her at a disadvantage.

179. Point 4 - Ms Marcella disclosed the claimant's pregnancy and her intention to have a termination to other members of staff within the workplace. She expressed a view that the claimant was a baby killer

5 180. It was denied Ms Marcella acted in this way and the tribunal was invited to accept the evidence of Ms Marcella. The claimant's evidence was flatly contradicted by the respondent's witnesses: for example, Ms McIlroy was told on the 18 February 2019 by the claimant herself both of her pregnancy and her intention to have a termination.

10 181. The only views Ms Marcella expressed as to the claimant's intention to have a termination were with Ms Donnachie in private whatsapp and text messages. Those messages were sent outwith a work context and on no view amount to treatment of the claimant.

182. Point 5 - Ms Marcella's irate response to the claimant's query about unpaid wages

15 183. It was denied Ms Marcella acted in this way to the claimant, and, even if she did, a passing conversation about wages is not unfavourable treatment as envisaged by section 15.

20 184. Point 6 - Ms Marcella required the claimant to work on the 7th March 2019 despite her being unwell and in pain. The claimant had asked for time off or to take holidays

25 185. The respondent accepted the claimant was rostered to work on the 7 March. The claimant was aware of the rostering in advance. The claimant had to accept in evidence that she had not requested the day off in advance of attending for her shift. The claimant attended the shift of her own volition. The height of the claimant's case is that Ms Marcella ought to have known the claimant would not have been fit to work. Ms Marcella's evidence to the effect that she had not been told of the detail of the termination process, did not have an understanding of medication terminations of pregnancies generally and understood that the claimant was presenting as keen to get on with "life as usual" should be accepted. There was nothing to indicate that,

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notwithstanding the claimant presenting herself as fit to work at the beginning of her shift on 7 March, Ms Marcella was aware that the claimant was not fit and nonetheless required her to work. Ms Marcella had previously told the claimant to take as much time off as she needed and had advised Mr Gough to give the claimant any time that she needed.

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186. Point 7 - Ms Marcella advised the claimant's husband to tell the claimant that she would have to start working in the kitchen or have her hours cut from 3.5 days to 2 days per week

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187. It was denied Ms Marcella acted in this way. Ms Marcella spoke to Mr Blair about the potential for the claimant to work in the kitchen to make up the cut in hours from 3.5 days to 2 days. Mr Blair was Chef and the natural person to consult concerning matters relating to the kitchen. Mr Blair had been asking for assistance in the kitchen. Ms Marcella's evidence should be accepted.

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188. Point 8 - Ms Marcella required the claimant to attend work on Monday 11 March during the protected period

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189. It was accepted the claimant was rostered to work on the 11 March. The claimant was aware of this rostering in advance and had to accept in evidence that she had not requested the day off in advance of attending for her shift. The claimant attended the shift of her own volition. The height of the claimant's case on this point is that Ms Marcella should have known the claimant would not have been fit to work. Ms Marcella's evidence to the effect that she had not been told of the detail of the termination process, did not have an understanding of medication terminations of pregnancies generally and understood that the claimant was presenting as keen to get on with "life as usual" should be accepted. There was nothing to indicate that, notwithstanding the claimant presenting herself as fit to work at the beginning of her shift on 11 March, Ms Marcella was aware that the claimant was not fit and nonetheless required her to work. Ms Marcella told the claimant to go home once she was aware of what had occurred. Ms Marcella had previously told the claimant to take as much time off as she needed, and had advised Mr Gough to give the claimant any time that she needed.

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190. Point 9 - Ms Marcella told the claimant that she could work in the kitchen 1.5 days per week or have her hours cut

191. It was accepted Ms Marcella told the claimant her hours were to be cut from 3.5 days to 2 days per week. Ms Marcella also advised the claimant that she could make up 1.5 days per week in the kitchen if she wished. The matter was not couched in terms of an ultimatum.

192. Point 10 - accused the claimant of breach of discipline at staff meeting and humiliated the claimant This was a premeditated plan to dismiss the claimant

193. This was denied: all of the evidence as to what was said at the meeting in connection with compliance with social media policy was stated in general terms. Ms Marcella directed those comments to everyone present. What was said did not amount to, and could not reasonably have been construed as, an accusation. The claimant brought the focus of the meeting upon herself by her own interjection. It was submitted, in any event, this treatment could not amount to unfavourable treatment. There were obvious and sound reasons for requiring staff not to be connected with service users on social media. This was a reasonable instruction which provided all staff with an opportunity to ensure their compliance. Reference to potential disciplinary action was also generic. It was not a premeditated plan to dismiss the claimant.

194. Point 11 - discriminatory dismissal

195. The claimant was not dismissed, she resigned following her outrageously insubordinate outburst.

196. Point 12 - read out the claimant's grievance to staff, ridiculing the presentation and spelling and describing the claimant as an idiot

197. Ms Marcella's evidence as to the occasions she mentioned the claimant's grievance should be accepted. The respondent did not understand when, or to which staff member (other than Ms Donnachie) the claimant relies. It was submitted that comments to Ms Donnachie were in private discussions and messages were not connected with the claimant's work. In any event, any

such behaviour was not treatment of the claimant, or otherwise related to her employment relationship post-termination.

198. Point 17 - Ms Marcella told staff that she would publish personal information about the claimant on social media if the claimant made a complaint

5 199. The respondent submitted that it was not understood what specific instances the claimant relied upon, and what staff members the claimant relied upon other than Ms Donnachie. It was submitted that comments to Ms Donnachie were in private discussions or messages and not connected with the claimant's work.

10 200. Point 18 - Ms Marcella and other staff sent to each other offensive derogatory electronic messages about the claimant including that the claimant was not disabled and the claimant was faking her symptoms to get benefits

15 201. The respondent accepted private whatsapp messages were sent from 14 - 28 April 2019 (pages 251 - 269). The messages all took place after the end of the claimant's employment and after the claimant's outburst on the 2 April. The messages did not relate to the claimant's employment relationship in the sense of section 108.

20 *Is the unfavourable treatment because of something arising in consequence of the claimant's disability, namely her decision to terminate the pregnancy and her inability/refusal to work in the kitchen*

202. The respondent accepted the claimant's decision to terminate her pregnancy arose as a consequence of her disability albeit the evidential basis for this is sparse. It was also subject to the qualification that the evidence of Ms Marcella was that the claimant had not advised her of the connection between her MS and her disability in discussions around her pregnancy and her decision to have a termination.

203. The respondent also accepted the claimant's refusal to work in the kitchen arose from her disability, albeit the extent of the claimant's ability at the time was not established in the evidence. The claimant in her evidence when questioned about kitchen work gave lengthy answers that conflated her

current, deteriorated position of highly active relapsing-remitting MS with her more moderate, relapsing-remitting MS that she experienced during her employment.

5 204. It was submitted that the proper approach to the causal connection between the unfavourable treatment and the "something" is essentially the same as the causal connection between less favourable treatment and a protected characteristic in a direct discrimination claim (*Pnaiser v NHS England 2016 IRLR 170* at paragraph 31).

10 205. The respondent considered the causal connection between each instance of treatment should it be considered to amount to unfavourable treatment as follows:

15 206. Point 2 - it was denied Ms Marcella's comments were because of the claimant's decision to terminate her pregnancy, but rather were because the claimant had actively sought Ms Marcella's thoughts and comments about whether she should go through with a termination.

20 207. Point 3 - this treatment was connected with Ms Marcella's belief that Mr Blair was unaware of the claimant's pregnancy and her intended course of action, as opposed to the claimant's decision itself. This contrasted with Ms Donnachie who expressed far stronger views against termination of pregnancy more generally.

208. Point 4 - this treatment if established in the terms asserted would be connected with "something" (a).

209. Point 5 - there is no evidence to connect this conversation about wages with either "something" (a) or (b).

25 210. Point 6 - there is no evidence to connect any insistence to work with either "something" (a) or (b).

211. Point 7 - there is no evidence to connect this conversation about potentially working in the kitchen with either "something" (a) or (b).

212. Point 8 - there is no evidence to connect any insistence to work with either "something" (a) or (b).

213. Point 9 - it was denied the decision to cut the claimant's hours was connected with either "something" (a) or (b). Mr Sloss gave evidence that he authorised the reduction on the basis of a need to save costs and an understanding of what the perceived need for front of house cover had been from the outset of the claimant's employment (namely 2 days). This was supported by the fact Ms Donnachie was brought in to provide cover and more hours and was based in the kitchen as opposed to front of house. There was a diminution in need for such hours. It was submitted that even if that was not accepted, the decision was motivated by the adverse view formed of the claimant more generally due to her behaviour at work.

214. Point 10 - this treatment was not motivated by either "something" (a) or (b). The message between Ms Marcella and Ms Donnachie in advance of the meeting did not indicate a motivation for the meeting in question and was, rather, concerned with avoiding a potential conflict with the claimant during the discussion.

215. Point 11 - there was no connection between any conduct of the respondent culminating in the claimant's resignation motivated by anything other than the claimant's outrageous and insubordinate behaviour.

216. Point 12 - any such treatment was motivated by the claimant's outrageous and insubordinate behaviour as opposed by something (a) or (b).

217. Point 17 - as above

218. Point 18 - as above.

25 *Can the treatment be objectively justified, namely was the treatment a proportionate means of achieving a legitimate aim*

219. The respondent did not advance any separate defence of objective justification.

Did the respondent have a duty to make reasonable adjustments and did the respondent fail to comply with that duty

220. It was submitted the claimant had failed to prove the particular disadvantage she suffered at the time of her employment. The respondent made a number of adjustments in respect of allocation of duties that involved manual handling once these became known, being provision of extended breaks, the allocation of other staff to lift heavier objects and not be required to undertake floor cleaning. The claimant had not suggested any particular adjustments.

10 *Pregnancy discrimination, esto sex discrimination*

221. The respondent, in response to the question did the respondent treat the claimant unfavourably as alleged at points 2 - 11, 15, 17 and 18, adopted its submissions (above). In respect of point 15, the respondent submitted that it was not understood how this point differed from point 4, and the respondent adopted its response to point 4 for this point.

Was the claimant treated less favourably because of other pregnancy or because of illness suffered by her as a result of it

222. Mr Hay submitted (with regard to the issue of causation) that the issue goes to the “*real reason, the core reason, the causa causans, the motive*” (Nagarajan v London Regional Transport Ltd 1999 ICR 877). Additionally the protected act need not be the exclusive or sole reason for the detriment, provided the protected act has a significant influence on the detriment meted out. The tribunal does not require to draw a distinction between the conscious and subconscious motivation of the alleged victimiser in this regard.

223. The respondent adopted its submissions in respect of section 15 Equality Act causation for the question of motivation on the grounds of pregnancy or illness of pregnancy. There was no evidence demonstrating the any of the treatment complained of was substantially motivated by the claimant’s pregnancy or any illness from pregnancy.

For acts of alleged pregnancy discrimination which were implemented after 25 March 2019 (the end of the protected period), did the respondent decide upon the conduct during the protected period? If the respondent did not decide upon the
5 *conduct during the protected period, does any of the conduct at 6 above amount to less favourable treatment because of the claimant's sex*

224. The respondent adopted its above submissions

Victimisation

225. The respondent accepted that the four alleged acts constituted protected acts
10 under section 27 Equality Act.

Was the claimant subjected to any of the treatment alleged at points 10-20 by the respondent and if so, was any such treatment a detriment within the meaning of section 27(1) Equality Act

226. The respondent adopted its above submissions in respect of points 10-12,
15 15, 17 and 18. In respect of the remaining points, the respondent submitted:

227. Point 13 - reported the claimant to Police because of the protected act of raising a grievance. The respondent accepted it reported the claimant to the Police for her outrageous and insubordinate behaviour at the meeting of 2 April. This was the reporting of conduct which was admittedly criminal
20 behaviour to which the claimant ultimately pleaded guilty. It was submitted this did not amount to a detriment.

228. Point 14 - Ms Marcella falsely told a member of staff the claimant had stolen £30. The respondent accepted Ms Marcella did this, but submitted Ms Marcella did not knowingly tell a falsehood.

25 229. Point 16 - Ms Marcella falsely told staff the claimant's husband abused her daughters. Ms Marcella's evidence was that she had not told staff anything of the sort.

230. Point 19 - Ms Marcella verbally abused the claimant in public at Greggs. This was accepted.

231. Point 20 - the claimant was advised by the stenographer, on behalf of Ms Marcella, that she was there to "write the court story" following being informed by Ms Donnachie that Ms Marcella was planning to sell a story on the claimant's termination of pregnancy. The respondent accepted it instructed a shorthand writer to attend the claimant's intended trial diet at Hamilton Sheriff Court. This was not a journalist. The purpose of the shorthand writer's attendance was to record the evidence adduced for the trial.

10 *If so, was the claimant subjected to any such detriment because of the protected act/s*

232. The respondent adopted its submissions in respect of motivation/causation above. In respect of items not previously covered, it was submitted:

15 233. Point 13 - the decision to report the claimant to the Police was on the ground of her outrageous and insubordinate behaviour at the meeting on the 2 April. The behaviour was obviously criminal and admitted as such by the claimant in summary criminal proceedings. The decision as to the timing of that reporting was influenced by legal advice which was sought to protect the respondent's position in respect of the quantity and quality of evidence it could
20 adduce on an obviously relevant matter of fact in any tribunal proceedings that may have been raised. The preservation of a party's position in discrimination legislation is conceptually different from motivation because that act has been or is apprehended to be done and does not amount to victimisation **{British Medical Association v Choudhary 2007 IRLR 800}**.

25 234. Point 14 - Ms Marcella mentioned this matter because she had been advised about it from the previous Chair of the Board and considered it to be credible.

235. Point 16 - there was no evidence to make any connection between this comment (if it was said) and any of the claimant's protected acts.

236. Point 19 - as above.

237. Point 20 - the instruction of a shorthand writer was on the basis of legal advice which was sought to protect the respondent's position. The purpose of the shorthand write was to record evidence given in open court at a criminal trial. To that end it was not substantially different from a "watching brief".

5 *For acts of alleged victimisation occurring after the termination of the claimant's employment, does the discrimination arise out of and is closely connected to a relationship which used to exist between the claimant and Ms Marcella and would the conduct, if it occurred during the relationship, contravene the Equality Act 2010*

10 238. It was submitted that the correct question to be determined is whether any discrimination arose out of and was closely connected to a relationship which used to exist between the claimant and the respondent (section 108 Equality Act and **Rowstock Ltd v Jessemey 2014 ICR 550**) and would the conduct, if it occurred during the relationship, contravene the Equality Act 2010.

15 239. Mr Hay referred the tribunal to the case of **Rhys Harper v Relation Group pic 2003 ICR 867** where the House of Lords had considered the issue in respect of the previous legislation. It was considered to cover the incidents of the employment relationship which occur after termination, such as contractual obligations regarding confidentiality and restrictive covenants, pensions, bonuses, references, recourse to internal appeals. It has also been
20 held to apply to during and potentially after tribunal proceedings concerning past employment.

25 240. Mr Hay submitted that in particular the Greggs incident can on no view be said to arise from the previous employment relationship. It was an obviously private matter occurring outside of the workplace during lunchtime. It was outwith the tribunal's jurisdiction to determine.

Harassment

30 241. Mr Hay submitted the EAT had emphasised that it is not the intention of the definition of harassment to include any unreasonable statement, and indeed in determining whether conduct relates to a particular characteristic it is to be determined by context (**Warby v Wunda Group pic UKEAT/0434/11**).

242. It was submitted that properly construed against a context of the claimant's difficult working behaviour more generally and her own unreasonable behaviour, none of the behaviour alleged, even if unwanted, could be said to relate to the claimant's disability. The respondent adopted its submissions in respect of an absence of connection between the relationship of employment and conduct post-termination.

Remedy

243. Mr Hay submitted that if the claimant was successful in any element of her claim, she had suffered no loss of earnings because she had been incapable of work since the deterioration of her MS in April 2019. The claimant had adduced no medical evidence to support the assertion that the deterioration in her condition was as a result of her treatment by the respondent beyond generic hearsay evidence of what MS nurses have said to her. The only medical evidence available was a partial letter from the claimant's treating neurologist (page 185) which included the opinion that flatly contradicted the claimant's assertion. No causal connection was established on the evidence. In any event, given the claimant's extraordinary outburst at the meeting of the 2 April, it was inevitable she would have been dismissed. It was gross misconduct on any view.

244. The claim for injury to feelings was grossly exaggerated. Mr Hay reminded the tribunal the employment relationship had lasted 12 weeks. Any award for injury to feelings would be in the lower band of **Vento**.

Credibility and notes on the evidence

245. The tribunal in this case was presented with fundamentally different versions of all events. The only facts not in dispute were, essentially, that the claimant volunteered for the respondent, became an employee and subsequently resigned. There was a very large degree of hostility between the claimant and Ms Marcella, with accusation and counter accusation (many of which were unrelated to the issues to be determined by the tribunal) being made throughout their evidence. This situation was further exacerbated by (i) the position of Ms Donnachie who had initially supported Ms Marcella, and who

subsequently changed sides to support the claimant and (ii) a variety of phone messages between Ms Marcella and Ms Donnachie, most of which were undated. It was also very difficult to understand whether the messages were sequential and further doubt was cast on this by the fact Ms Donnachie (who
5 subsequently sent the messages to the claimant) omitted to provide some messages to the claimant.

246. We also noted with regard to the group Whatsapp messages that many appeared to be prompted in response to things posted by the claimant and Mr Blair, which were not produced for the tribunal.

10 247. We have set out below our general comments regarding the credibility and reliability of each witness. We have then addressed the key factual issues in dispute and we have set out the evidence heard regarding the disputed points relevant to the issues to be determined by the tribunal and the reasons for our findings of fact. The evidence given which was not material to either the issues
15 to be determined or points of credibility has not been included.

248. We would comment generally that the events in this case took place in early 2019 and parties have had a lengthy period of time to become entrenched in their positions.

The claimant

20 249. The claimant's position was, essentially, that Ms Marcella changed towards her from someone whom the claimant thought was a friend to someone who wanted her out of the cafe. The claimant had been upset with Ms Marcella's reaction on the 11 March when informed the termination process had completed: she felt Ms Marcella should have shown her more consideration.
25 The claimant did not know what Ms Marcella's religious views were, but she thought Ms Marcella wanted her to change her mind about the termination.

250. The claimant also told the tribunal Ms Donnachie had been awful to her. The claimant believed Ms Marcella brought in Ms Donnachie to cover her hours. There had been a fraught atmosphere and allegations had been made about

the claimant stealing and about the claimant and Mr Blair using their daughters as accessories to dress up.

5 251. The claimant argued she had not been told of the Social Media policy regarding having trainees as friends on Facebook, and that she had had the permission of the person's mother to make the trainee a friend. The claimant felt the meeting on the 2 April had been directed at her and that she had been goaded into reacting.

10 252. We noted that towards the end of July 2019, Ms Donnachie provided the claimant with copies of messages from her phone which she had exchanged with Ms Marcella. The claimant's case/evidence was given with the benefit of having read the messages and having pieced together what she believed happened and why it happened. The claimant would, for example, say she "knew" something had happened because there was a message to "prove" it. The claimant, for example, believed Ms Marcella had set up the meeting on
15 the 2 April deliberately to get a reaction from the claimant in the hope the claimant would leave or be disciplined. The claimant's "proof for this was a message from Ms Marcella to Ms Donnachie referring to the meeting and saying *"This might be what I can get her on"*. The claimant could not countenance there being any other explanation for the message. The claimant
20 also sought to blame her behaviour on the 2 April on the fact she had been set up. We did not accept this because, as at the 2 April, the claimant had no knowledge of the messages which had passed between Ms Marcella and Ms Donnachie. The claimant was entirely responsible for the way in which she behaved on the 2 April.

25 253. The tribunal have referred to the social media messages above and considered that whilst helpful to some extent, they had to be regarded with caution. The majority of messages were not dated; some messages had been omitted from the exchange and it was not clear whether all of the messages on a page were from the same conversation.

30 254. There were a number of points where the tribunal found the claimant's evidence to be lacking in clarity: for example (and as set out below in more

5 detail) the claimant's evidence regarding when she knew of the pregnancy, who she told and what she told them was less than clear. There were also occasions when the claimant's oral evidence was not supported by the documents: for example, the claimant told the tribunal she made her decision regarding termination after having spoken to the GP and the MS Specialist Nurse. This was not supported by the fact the GP note on the 20 February records the claimant having done a home pregnancy test and that she was wishing a termination of pregnancy. We took from this that the claimant had already decided she wanted a termination. The claimant attended the
10 Women's Health Clinic that day. This was before the claimant met with the MS Nurse.

15 255. The claimant also invited the tribunal to believe she had explained the termination process to Ms Marcella and therefore Ms Marcella would have known and understood what occurred on the 11 March. We preferred Ms Marcella's evidence regarding this matter. The fact the termination was a two stage process and the fact the procedure was not concluded before the claimant returned to work were not matters known to Ms Marcella.

20 256. The tribunal also attached weight to the fact the claimant's grievance, sent to the respondent the day after the 2 April meeting, focussed on alleged disability discrimination (discrimination arising from disability and reasonable adjustments). There was no mention in the letter of grievance about the pregnancy and termination. This chimed with the subsequent claim to the Employment Tribunal where the claimant indicated the claim concerned disability discrimination. The only reference to pregnancy and termination was
25 in the section entitled "remedy" where the claimant stated she would be claiming compensation for victimisation for events including the manager telling staff she had had a termination and had no morals.

30 257. We attached weight to this because if events occurred as detailed by the claimant in her evidence, it raised a question why these matters were not included in the grievance and claim form. Further, it supported the conclusion that much of the claimant's case had been constructed after having read the messages provided by Ms Donnachie.

Christopher Blair

258. The tribunal did not find Mr Blair to be an entirely credible or reliable witness because he changed his position regarding a key aspect of evidence. Mr Blair told the tribunal in his evidence in chief that he had told Ms Donnachie "really early on" that the claimant was pregnant, and that he told her the claimant was planning a termination. Mr Blair, in cross examination, was referred to this evidence but sought to distance himself from it by saying, "no, *that's not what I meant, I said to Ms Donnachie that I thought [the claimant] might be pregnant: this was before [the claimant] told me.*" Mr Blair stated he had misunderstood what he was being asked. The tribunal considered Mr Blair undermined his credibility by changing his position and his explanation that he had misunderstood the question was not plausible.

15 *Angelina Donnachie*

259. Ms Donnachie told the tribunal she had known Ms Marcella for some time because she had been Mr Blair's teacher and was friendly with her older brother. She added Ms Marcella to her Facebook friends in 2013. Ms Donnachie initially thought Ms Marcella was very friendly and "nice".

20 260. Ms Donnachie placed Ms Marcella at the centre of everything - telling her of the claimant's pregnancy; encouraging her to speak to Mr Blair about the pregnancy and termination; bad mouthing the claimant; plotting to get her out of the cafe and telling Ms Donnachie the claimant was saying things behind her back. Ms Donnachie told the tribunal "*seeds were planted in [my] head*": she believed what she was told by Ms Marcella and she had started to doubt the claimant.

261. Ms Donnachie said she had been frightened of Ms Marcella whom she described as "*telling lies*" and "*not being honest*". Ms Donnachie subsequently told the claimant about the messages exchanged between herself and Ms Marcella and provided copies of the messages to the claimant in mid/end July

2019. Ms Donnachie accepted that not all messages had been sent to the claimant: for example, the messages on page 214 (which were critical of the claimant) had not been provided to her. Ms Donnachie, when asked about this, replied *"it was not relevant for [the claimant] to see such messages when I was under the influence of Ms Marcella"*. Ms Donnachie accepted that to produce part of a text discussion could distort the meaning of it.

262. Ms Donnachie was asked in cross examination about the messages she had sent to Ms Marcella: for example, on the Whatsapp Group chat (page 252) Ms Donnachie posted *"Can not believe how accurate this is"* in relation to a YouTube video about narcissists. Ms Donnachie, on page 255, and in response to someone commenting *".. but is there anything genuine about natalie its hard to tell"*, posted a comment *"... I just don't trust at all, never really did"*.

263. The claimant defriended Ms Donnachie on Facebook on or about 24 April. Ms Donnachie commented (page 261) that she had seen all the nasty posts they had put up and knew full well a lot was aimed at her. Ms Donnachie referred to the claimant and her mother *"being poison"* (page 265) and she described the claimant as being *"calculating and manipulative"* (page 266).

264. Ms Donnachie blamed all of this on Ms Marcella and what she was being told about the claimant. She told the tribunal she had been *"under Ms Marcella's influence"*.

265. Ms Donnachie accepted she had strong views regarding termination and that she had posted pro-life pictures and information on her Facebook (page 210). Ms Donnachie had been *"distraught"* regarding the termination and carried out research regarding MS and pregnancy.

266. There were inconsistencies in Ms Donnachie's evidence: for example, Ms Donnachie, in her evidence in chief told the tribunal that Ms Marcella had told her of the pregnancy and the termination. However, in cross examination, she said Mr Blair told her of the pregnancy and also of the termination and the interplay with MS. The fact it was Mr Blair who told Ms Donnachie of the pregnancy and termination was supported by a message sent by Ms

Donnachie to Ms Marcella (page 211) where Ms Donnachie stated “ *...but I won't say anything about you as he has told me she is pregnant*”.

267. The tribunal, in assessing the credibility and reliability of Ms Donnachie's evidence, took into account the fact she had changed sides. It was not lost on the tribunal that on the one hand Ms Donnachie had said she was “*frightened*” of the claimant but subsequently that she was “*frightened*” of Ms Marcella. It appeared to the tribunal that Ms Donnachie had been prepared to gossip and be underhand about the claimant when it suited her, and, when she subsequently changed sides, she was prepared to gossip and be underhand about Ms Marcella. We concluded, for these reasons, that Ms Donnachie's evidence was neither credible nor reliable and was to be treated with a very large degree of caution.

Jordan McIlroy and Christopher Gould

268. The tribunal found both Ms McIlroy and Mr Gould to be entirely credible and reliable witnesses. They gave their evidence in a straightforward and honest manner and in any dispute between their evidence and that of the claimant, we preferred the evidence of Ms McIlroy and Mr Gould.

John Sloss

269. We also found Mr Sloss to be a credible witness. He accepted that much of the information he had acted on had come from Ms Marcella.

Alison Marcella

270. The tribunal found Ms Marcella to be, on the whole, a credible witness. We found the key aspects of Ms Marcella's evidence to be reliable and we preferred her account of events to that of the claimant.

271. Ms Marcella knew Mr Blair from having been his English teacher in secondary school. She described him as a “really lovely boy” and it was clear she had continued to think highly of him, regarded him fondly and described that she saw him through “rose tinted spectacles”. Ms Marcella knew Mr Blair's family, knew his older brother and became close friends with Ms Donnachie, of whom

she said she would “trust with [her] life” (although of course, that subsequently changed).

5 272. Ms Marcella painted a picture for the tribunal of finding the claimant “*loud, coarse and a bit overbearing*”, but she hoped that in a training environment the claimant may become more appropriate. Ms Marcella gave the claimant the benefit of the doubt on many occasions because of the way she regarded Mr Blair (for example, Ms Marcella had not believed the claimant - “Mr Blair’s wife” - would steal money from the respondent).

10 273. Ms Marcella told the tribunal that she started to receive information from Mr Blair’s brother to the effect the claimant and Mr Blair were trouble and not to be trusted. Ms Marcella ignored this until she and her husband were invited to Ms Donnachie’s home and told the claimant was a liar and a thief and that she would destroy the cafe. Ms Donnachie wanted Ms Marcella to have this information but swore her to secrecy because she was frightened of the claimant. Ms Donnachie told Ms Marcella the claimant despised her and others at the cafe and that she had been bad mouthing trainees.

15 274. Ms Marcella rejected the suggestion she had been the one to raise concerns regarding the claimant and questioned how she would know of the information: the only reason she knew of it was because Ms Donnachie had told her. Ms Marcella accepted she had embarked on “silly conversations” with Ms Donnachie as evidenced by the messages. Ms Marcella also accepted that she had been put in a difficult position by being given the information: on the one hand she had wanted to protect Ms Donnachie, but on the other hand given what she had been told about the claimant, she no longer wanted the claimant to work in the cafe.

20 275. Ms Marcella accepted that she had no longer wanted the claimant to work in the cafe after she’d received this information. She expressly denied that the reason for wanting to get rid of the claimant was because the claimant had MS and/or the pregnancy and/or the termination. Ms Marcella confirmed that her desire to “get rid of” the claimant was because of what she had been told by Ms Donnachie. Further, Ms Marcella considered the pregnancy and

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termination were the claimant's business, but it was the fact Ms Marcella understood, from what she had been told by the claimant, that the claimant either intended not to tell Mr Blair about the termination, or that she intended to be untruthful about the reason for the termination, that upset her.

5 276. There was a suggestion, made by the claimant's side, that Ms Marcella objected to the claimant having a termination and that the reason for her objection was because of her religious views. The claimant appeared willing to make this allegation without knowing what religious views Ms Marcella held.

10 277. Ms Marcella described herself as a Christian. We accepted her evidence that she considered the matter of a termination to be a private matter for the claimant and her husband. We also accepted that the issue for Ms Marcella was not the fact the claimant was having a termination, but the fact she understood the claimant had not told her husband and/or that the claimant planned to tell him it was because of her MS, in circumstances where the claimant had told Ms Marcella it was because they had two holidays planned and were moving house. This evidence was, to an extent, supported by Ms
15 Donnachie when she told the tribunal she *"did not think Ms Marcella agreed with abortion but it was more about the claimant"*.

20 278. We also preferred Ms Marcella's evidence to that of the claimant in finding that the claimant did not provide Ms Marcella with details of the termination process. The claimant was critical of Ms Marcella's response to her on the 11 March when the claimant informed her that the product of the termination had passed. We preferred and accepted Ms Marcella's evidence that she had not really understood what the claimant meant in circumstances where Ms
25 Marcella thought the claimant had been into hospital for a termination on the 6 March. The fact there was confusion about the termination process was compounded by the fact Mr Blair told the tribunal that *"on the day when [the claimant] was in hospital, Ms Marcella continually asked how I was. I wasn't aware she had been told. I told her [the claimant] was in hospital for something
30 different. Ms Marcella sent me home early"*.

279. We next had regard to the key factual issues in dispute, as set out below.

Training

280. The claimant told the tribunal that when she started as a volunteer with the respondent she was not provided with any training and not informed of any policies and procedures. The claimant denied having been given any induction. The claimant told the tribunal that she had not ever seen the Induction Checklist/Programme said to have been carried out by Chris Gould on the 10 December 2018, or the Induction Procedure. She had not been shown any of the policies and procedures referred to in the Checklist and she doubted any policies and procedures had been in place at the time.

281. Mr Blair and Ms Donnachie also told the tribunal they had not been given any training upon commencing work, had not been told of any policies or procedures and had not been given an induction. Mr Blair undermined his position on this when he told the tribunal that although he had never seen the written Social Media policy, Ms Marcella had told him in the past not to add trainees to his Facebook.

282. Ms Marcella told the tribunal that policies and procedures had been in place when she commenced employment with the respondent. She had familiarised herself with the policies and procedures and carried out a review of them to ensure they tied in with what she was trying to do, and to “tweak” them if necessary. Ms Marcella sought advice from the Board, her sister (who has some experience in these matters) and from Voluntary Action North Lanarkshire (VANL). The policies and procedures were kept in a folder on a shelf in the office and were available online. Members of staff and volunteers were encouraged to read them.

283. Mr Gould told the tribunal that he carried out the induction for volunteers and members of staff, and that he had done the claimant’s induction. The document at page 186 was the checklist he used to ensure everything was covered. He provided the claimant with an Induction Pack, which included the checklist and the Induction Procedure (page 198).

284. Mr Gould confirmed that as part of the induction the claimant was informed of the policies and procedures and where to find them.

285. Mr Gould also provided the claimant with training, much of which was done on the job. For example, there was training on operating the coffee machine and the company from whom coffee was purchased also attended to offer training on making coffee and coffee art. There was also training on using the till, which Mr Gould acknowledged was quite complex.

286. We preferred the evidence of Ms Marcella and Mr Gould to that of the claimant, Mr Blair and Ms Donnachie regarding the matter of induction, training and policies and procedures. We preferred their evidence for three principal reasons. Firstly, Mr Gould was an entirely credible and reliable witness. He was straightforward and gave his evidence in a very fair, balanced and honest manner. Secondly, the claimant in cross examination accepted she had been shown how to operate the coffee machine, and how to make a design on the top of a coffee. This was on-the-job training which the claimant needed to have in order to be able to train/assist trainees to do. The claimant denied having been trained on the till but stated "Jason and Chris were at the till a lot". This echoed Mr Gould's evidence that he and/or Jason would be called upon to help with the till because it was quite complex. Thirdly, it was incredible to suggest a charity working with vulnerable youngsters and funded by The Big Lottery would have no policies and procedures in place.

Hours of Employment

287. There was no dispute regarding the fact the claimant started employment with the respondent working 3.5 days per week, and that she was subsequently informed sometime in March that this would reduce to 2 days per week, although 1.5 days in the kitchen could be offered.

288. There was a dispute between Ms Marcella and the claimant regarding how the claimant came to work 3.5 days per week. The claimant's position was that 3.5 days was what she wanted and Ms Marcella had agreed. Ms Marcella's position was that the role was for 2 days but the claimant had been very "pushy" about 3.5 days and so Ms Marcella had agreed because she

was keen to get someone. Ms Marcella was then told by Mr Sloss that there was no need for someone to be employed 3.5 days front of house.

289. The tribunal preferred Ms Marcella's evidence regarding this matter and accepted the claimant was given 3.5 days per week because that is what she wanted and because Ms Marcella was keen for someone to start in the role and hoped the Board would approve it. Ultimately the Board did not approve it.

Pregnancy, termination and who knew what and when

290. The claimant told the tribunal she had an unplanned pregnancy. She had been having horrendous morning sickness and carried out a home pregnancy test. She did not tell her husband straight away but made an appointment with the GP and the MS Nurse. The claimant was asked twice by Ms Donnachie if she was pregnant and denied it. The claimant said she told no-one of her pregnancy (including her husband) until she had decided what to do regarding a termination of the pregnancy. The claimant told Ms Marcella (around the time of carrying out the home pregnancy test) she was pregnant and Ms Marcella responded by asking the claimant what she was going to do. The claimant told Ms Marcella she was considering having a termination. The claimant met with Ms Marcella again and explained that because of the MS medication it was not safe to continue taking it for the baby, and that she was going to have a termination. The claimant stated she had made a decision regarding termination after speaking to the GP and MS nurse.

291. The claimant described Ms Marcella as being "shocked" and that she had said "there's worse things in life than a baby". The claimant agreed but said that with two children she knew how it felt not to be able to do everything with them. The claimant saw her GP on the 20 February and went for a consultation at the Women's Health Clinic that day. The claimant also met with the MS Specialist Nurse on the 27 February, who compiled a report for the Consultant Neurologist. The claimant discussed all options with her husband. The claimant informed Ms Marcella of the date for the termination (6 March) and Ms Marcella had agreed time off for her. The claimant returned

to work on the 10 March and was at work on the 11 March when “the rest of the termination came away”.

292. The tribunal, in considering the claimant’s evidence, noted the lack of dates when things were said to have happened: for example, when did the claimant do the home pregnancy test? The GP record noted on the 20 February 2019 that a positive home pregnancy test had been done and the claimant was wishing a termination of pregnancy. The MS Nurse’s letter to Dr MacDougall dictated on the 28 February, referred to the claimant having been reviewed on the 27 February and at that stage being around six weeks pregnant. Also, when did the claimant tell her husband about it? This was confused by the claimant saying she initially did not tell him until she had decided about termination. But the claimant later said she told him of the pregnancy but not that she was considering termination; but then she stated she discussed all options regarding termination with him. Further, the claimant’s evidence was not consistent with Mr Blair’s because he told the tribunal that the claimant told him of the pregnancy right away and they had discussed termination.

293. The claimant agreed in cross examination that Ms Marcella may have told her to discuss her concerns with her husband; that she had said that whatever the claimant decided she would get the support she needed and that she would get all the time off she needed. This was after the claimant had told Ms Marcella she was going to have a termination. This chimed with Ms Marcella’s evidence.

294. The claimant also agreed she had not asked for time off on the 11 March. She said she had not known the termination would take days so had not asked for time off. This undermined the claimant’s evidence that Ms Marcella knew of the risk the claimant would pass the foetus at work because the claimant had told her. If the claimant had not known that, how could Ms Marcella have known it, particularly as the claimant agreed Ms Marcella was dependent upon the claimant for information regarding complications in the process.

295. Mr Blair told the tribunal that the claimant had become pregnant in early 2019 and that she had told him right away when she found out. The claimant had

had signs of being pregnant (that is, morning sickness) at work. Mr Blair did not tell anyone at work that the claimant was pregnant. He did tell Ms Donnachie “really early on” and raised his concerns that the claimant had been very unwell with the previous pregnancy. He also told Ms Donnachie the claimant was planning a termination.

296. Mr Blair said he and the claimant discussed termination of the pregnancy in February, when they learned of the pregnancy.

297. Mr Blair said he was unaware people (that is Ms Marcella) at work knew. On the day of the procedure Ms Marcella asked him how he was, and he told Ms Marcella the claimant was in hospital for a different reason.

298. Mr Blair was aware of Ms Donnachie’s view regarding termination. He told Ms Donnachie the claimant was planning a termination and had a discussion with her about it Ms Donnachie tried to persuade him to change the claimant’s mind.

299. The tribunal, in assessing Mr Blair’s evidence, had regard to the fact that during cross examination Mr Blair completely changed his position about having told Ms Donnachie of the pregnancy. The question was put to Mr Blair in cross examination that he had discussed termination with the claimant and Ms Donnachie. Mr Blair responded “no *that’s not what I meant. I misunderstood what I was being asked. I said to Ms Donnachie I thought the claimant might be pregnant, this was before the claimant had told me.*” The tribunal concluded this change of position undermined Mr Blair’s credibility on this matter. We considered we were supported in this because the claimant commented in her evidence in chief (in relation to the messages) that she had not been aware, until reading the messages, that Ms Donnachie had spoken to Mr Blair regarding termination and learned he had told her of the pregnancy.

300. Ms Donnachie told the tribunal that she knew in early 2019 that the claimant was pregnant and considering a termination and that Ms Marcella had told her. She had asked the claimant on two occasions at work, when the claimant had been unwell, whether she was pregnant and the claimant had replied

definitely not. Ms Donnachie spoke to Mr Blair about two days prior to the termination to tell him the claimant was boasting about the termination, laughing and joking about it, doing it on his birthday and saying a holiday was more important than a baby. This was all information she said she had been given by Ms Marcella. Ms Donnachie asked Mr Blair if the claimant was keeping the baby and he replied "no she can't because of her MS". He was upset and she left it at that.

301. The tribunal did not find Ms Donnachie's evidence regarding this matter to be reliable. We preferred the evidence of Mr Blair - before he contradicted himself - that he (and not Ms Marcella) told Ms Donnachie of the pregnancy and that the claimant was planning a termination. We considered we were supported in that conclusion by the fact of Ms Donnachie's message to Ms Marcella (page 211) where Ms Donnachie wrote "*Alison, I'm thinking I'm going to talk to Christopher tomorrow about the pregnancy but I won't say anything about you as he has told me she is pregnant. ..*"

302. Ms Marcella told the tribunal the claimant had come to talk to her in private and that this was probably in early March 2019. The claimant had told her of the pregnancy and that she wanted to have a termination, but did not want to tell her husband. Ms Marcella asked if this was because of the MS and the claimant replied no, it was because they were going on holiday to Turkey and Florida and buying a new house and she did not want another child. The claimant said that if she had to tell her husband and Ms Donnachie about the termination, she intended to say that the reason for the termination was because of the MS.

303. Ms Marcella said to the claimant to make sure she was doing the right thing and that there were worse things in life than a baby. Ms Marcella told the claimant to speak to Mr Blair, that he would be upset but he loved her. Ms Marcella told the claimant she would support her whatever she did and that she would get all the time off she needed. Ms Marcella stated she would not be judged by her.

304. Ms Marcella did not tell anyone about the pregnancy or termination: she did discuss it with Ms Donnachie after Ms Donnachie had come to Ms Marcella crying about the fact she knew of the pregnancy and termination. Ms Marcella understood Mr Blair had told her and Ms Donnachie was frantic about it.

5 305. The tribunal noted Ms Marcella could not recall exactly when the claimant had come to talk to her in private. Ms Marcella referred to it being February/March and then went on to say it had probably been March (but in cross examination said it was February). The tribunal concluded the claimant spoke to Ms Marcella to advise her of the pregnancy and that she wanted to have a
10 termination, in February 2019. We reached this conclusion because it was supported by the claimant's evidence that she told Ms Marcella first and had not yet told her husband.

306. The tribunal noted that Ms Marcella's evidence regarding her telling the claimant to discuss it with her husband, and that she would support her
15 whatever her decision and that the claimant could have all the time off she needed, was accepted by the claimant.

307. The material findings of fact made by the tribunal, having had regard to the evidence and the tribunal's assessment of it were:

- 20 • the claimant became pregnant in late January and carried out a home pregnancy test in early February;
- the claimant told Ms Marcella in February of the pregnancy and that she wanted to have a termination, but did not want to tell her husband;
- the claimant told Ms Marcella she did not want to tell her husband of the termination, but that if she did have to tell him, she intended to say
25 the reason for it was because of her MS;
- the claimant told Ms Marcella the reason for the termination was because she had two holidays planned that year, they were moving house and the claimant did not want another baby;

- Ms Marcella made the statement “there are worse things in life than a baby” and the claimant agreed but stated it was not just her to consider;
- Ms Marcella told the claimant to discuss it with her husband, that he would be upset but that he loved her; and that she would support her whatever her decision and that she would be given all the time off she needed;
- Ms Marcella did not tell anyone about the pregnancy or termination although she did discuss it with Ms Donnachie once she knew Ms Donnachie already knew about it;
- the claimant did not tell Ms Marcella details of the termination procedure. This finding is supported by the fact the claimant stated in her evidence that she did not know it would take days;
- Ms Marcella understood the claimant was having the termination on the 6 March and
- the claimant did not either request a day off on the 11 March, or ask for time off.

Reduction to the claimant's days of work

308. The claimant told the tribunal that after the termination she had spoken to Ms Marcella about her hours of work. Ms Marcella, who had already told Mr Blair the claimant could only be given 2 days front of house, told the claimant the Board would not okay 3.5 days front of house, but she could have 1.5 days in the kitchen. The claimant accepted she had been told the reason for this was financial and the Board would not accept giving her 3.5 days front of house. The claimant accepted there was a need for kitchen staff at the time.
309. Mr Blair told the tribunal that Ms Marcella had informed him she was sorry but the claimant's hours would have to be cut. Mr Blair thought this was because the cafe was not busy enough for this amount of hours front of house. Ms Marcella suggested the claimant could work in the kitchen but Mr Blair had stated this was not possible because of the claimant's MS.

310. Ms Marcella told the tribunal that Mr Sloss had carried out a review of payroll, costs and the roles carried out by staff, and questioned her why there were so many front of house staff. She had been told by Mr Sloss the claimant could not be front of house for 3.5 days. Ms Marcella acknowledged that she had informed Mr Blair of the change to the claimant's hours and discussed with him the claimant doing 1.5 days in the kitchen. Ms Marcella did this because Mr Blair was the Kitchen Manager and needed help in the kitchen. Ms Marcella did not know when this was but disputed the dates noted in the claimant's grievance that it had been the 8 March.
311. Ms Marcella accepted she had subsequently spoken to the claimant about it, but again disputed the suggestion this had been on the 11 March.
312. Ms Marcella stated in a message to Ms Donnachie (page 208) that *"My solution is to only give her 2 days as she is job share with Jeanie. Say they won't sanction 3 1/2 days - which she wangled out of me anyway"*.
313. Mr Sloss told the tribunal he had carried out a review upon becoming a Board member. He understood from Ms Marcella that originally 2 days per week had been offered to the claimant but the claimant had said she could only work 3.5 days per week. Mr Sloss confirmed he told Ms Marcella the claimant would have to return to 2 days per week because the respondent could not pay for something it did not really need.
314. The tribunal noted from the evidence that there was no dispute regarding the fact Ms Marcella spoke to Mr Blair and then to the claimant regarding a reduction of hours to 2 days per week, but with 1.5 days being available in the kitchen. There was no certainty when Ms Marcella spoke to Mr Blair and the claimant.
315. There was a suggestion Ms Marcella had contrived a reduction in the claimant's hours of work in the hope the claimant would leave. The claimant, in support of her position, relied on the message on page 208. We, in considering this, acknowledged Mr Sloss made his decision, in part, based on what Ms Marcella had told him, which was that the original contract had been for 2 days. However, the tribunal noted Mr Blair believed the reason for the

reduction was because the cafe was not busy enough and this chimed with Mr Sloss' evidence that they did not need employed front of house staff for that number of days.

316. The tribunal accepted the evidence of Ms Marcella and Mr Sloss and found as a matter of fact that Mr Sloss did review the position upon taking up the post of Treasurer and that there was good reason to reduce the claimant's hours from 3.5 days to 2 days per week.

317. The tribunal further noted the claimant's hours were not in fact reduced before she left employment and she did not go to work in the kitchen.

Discussion and Decision

318. We have set out above the statutory basis of the claims being pursued. We decided to take each of the claims and determine the complaints made.

Pregnancy discrimination/unfavourable treatment - section 18(2) Equality Act

319. The allegations made by the claimant were:

- Point 2 - Ms Marsella said to the claimant that her husband would be upset and there were worse things in life than a baby;
- Point 3 - Ms Marsella encouraged Angelina Donnachie to tell Mr Blair about the pregnancy and termination before the claimant had the opportunity to disclose this to him;
- Point 4 - Ms Marsella disclosed the claimant's pregnancy and her intention to have a termination to Ms Donnachie. She expressed the view the claimant was a baby killer;
- Point 5 - Ms Marsella made an irate response to the claimant's query about unpaid wages;
- Point 6 - Ms Marsella required the claimant to work on the 7 March 2019 despite her being unwell and in pain. The claimant had asked for time off or to take holidays;

- Point 7 - Ms Marsella advised the claimant's husband to tell the claimant that she would have to start working in the kitchen or have her hours cut from 3.5 days to 2 days per week;
- 5 • Point 8 - Ms Marsella required the claimant to attend work on Monday 11 March during the protected period;
- Point 9 - Ms Marsella told the claimant that she could work in the kitchen 1.5 days per week or have her hours cut;
- Point 10 - The claimant was accused of a breach of discipline at a staff meeting and this humiliated the claimant;
- 10 • Point 11 - Discriminatory dismissal (resignation);
- Point 17 - Ms Marsella told staff she would publish personal information about the claimant on social media if the claimant made a complaint and
- Point 18 - Ms Marsella and other staff sent to each other offensive and derogatory electronic messages about the claimant, including that the claimant was not disabled and that she was faking symptoms to get benefits.
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320. We firstly had regard to the terms of section 18(2) of the Equality Act which provides that a person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, s/he treats the woman unfavourably (a) because of the pregnancy or (b) because of illness suffered by her as a result of it. The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins and ends ... at the end of the period of 2 weeks beginning with the end of the pregnancy.

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321. The parties agreed the protected period ended on the 25 March 2019. There was no dispute that in relation to the alleged acts occurring within the protected period (points 2-9) the tribunal had to determine firstly whether the alleged acts occurred and if so, whether they amounted to unfavourable treatment and if so, whether this was because of pregnancy. In relation to the

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conduct which occurred after the protected period ended (points 10, 11, 17 and 18) the tribunal must ask whether those acts occurred and if so, whether the respondent decided upon that conduct during the protected period.

Did the alleged acts occur?

- 5 322. We must determine whether the allegations of unfavourable treatment occurred as stated by the claimant. We considered each of the allegations made by the claimant and had regard to our findings of fact as set out above.
323. The claimant (point 2) complained that Ms Marcella said to her that her husband would be upset and that there were worse things in life than a baby. io Ms Marcella accepted she did say to the claimant "there are worse things in life than a baby". Ms Marcella accepted she had said this to the claimant.
324. The claimant next alleged (point 3) Ms Marcella encouraged Ms Donnachie to tell Christopher Blair about the pregnancy and termination before the claimant had the opportunity to disclose this to him. We found as a matter of 15 fact this did not happen. The tribunal accepted Mr Blair's initial evidence that he had told Ms Donnachie of the pregnancy early on and that he had also informed her of the termination. We also accepted Ms Marcella's evidence that she did not tell anyone of the pregnancy or termination: she only started to discuss the matter with Ms Donnachie after Ms Donnachie had come to her 20 upset about having learned of the pregnancy and termination from Mr Blair.
325. The tribunal, in respect of point 4, that Ms Marcella disclosed the claimant's pregnancy and her intention to have a termination to Ms Donnachie, found this did not happen. The tribunal found as a matter of fact that Ms Marcella did not disclose the claimant's pregnancy or the intention to have a 25 termination to Ms Donnachie. Ms Marcella only disclosed/discussed it with Ms Donnachie after Ms Donnachie had made Ms Marcella aware she knew of the pregnancy and intended termination.
326. The second part of the allegation was that Ms Marcella had expressed the view the claimant was a baby killer. This allegation was based on a message 30 sent by Ms Marcella to Ms Donnachie (page 213) where Ms Marcella wrote 7

think I'm upset because I hear he's upset and she knows that but doesn't give a shit about how he feels and killing his baby on his birthday". We did not accept that Ms Marcella expressed the view the claimant was "a baby killer". We considered there was a subtle but distinct difference between the terms

5 "baby killer" and "killing his baby".

327. We also noted the claimant, during her employment, had no knowledge of this statement being made in a phone message between Ms Marcella and Ms Donnachie. The claimant only learned of this in July 2019 (after her employment had ended) when Ms Donnachie provided the phone messages

10 to the claimant. This allegation was, accordingly, not something the claimant had knowledge of during the course of her employment. The tribunal, had we found this allegation did occur, would have concluded it could not amount to unfavourable treatment in circumstances where the claimant did not know about it during the course of her employment.

15 328. We concluded the allegation at point 4 did not occur.

329. The allegation at point 5 was that Ms Marcella made an irate response to the claimant's query about wages. We preferred the evidence of Ms Marcella that there had been an occasion where the cheque for the claimant's wages had bounced. Ms Marcella went to the Bank to try to remedy the situation and

20 when she returned the claimant was "bawling" at her saying she (Ms Marcella) "didn't give a shit about [her] wages". We concluded, for these reasons, that this allegation did not occur.

330. The allegation at point 6 was that Ms Marcella required the claimant to work on 7 March 2019 despite her being unwell and in pain; and the claimant had

25 asked for time off or to take holidays. There was no dispute regarding the fact the claimant was rostered to work on the 7 March. There was no evidence that the claimant had asked for time off or to take a holiday on the 7 March. The evidence of Ms Marcella, which was not disputed by the claimant, was that the claimant had been told to take all the time she needed. The tribunal

30 did not accept Ms Marcella "required" the claimant to work on any particular day during the process of the termination. We concluded for these reasons

that this allegation did not occur: Ms Marcella did not require the claimant to work on the 7 March and the claimant had not asked for time off or to take a holiday.

5 331 . The allegation at point 7 was that Ms Marcella told the claimant's husband to tell the claimant that she would have to start working in the kitchen or have her hours cut from 3.5 days to 2 days per week. There was no dispute regarding the fact Ms Marcella did speak with Mr Blair to inform him she was going to have to reduce the claimant's hours front of house from 3.5 days to 10 2 days, but that the claimant could make up the hours by working in the kitchen. Ms Marcella spoke to Mr Blair about this because he was the Kitchen Manager. Ms Marcella did not tell Mr Blair to tell the claimant. Mr Blair's evidence was that he told Ms Marcella to discuss it with the claimant, and she did. We concluded for these reasons that this allegation did not occur: Ms Marcella did not tell Mr Blair to tell the claimant, and there was no ultimatum 15 to work in the kitchen or have her hours cut.

20 332. The allegation at point 8 was that Ms Marcella required the claimant to attend work on Monday 11 March during the protected period. There was no dispute regarding the fact the claimant was on the rota to work that day: she had not asked for a day off or time off. We found as a matter of fact that Ms Marcella did not require the claimant to attend work on the 11 March. Ms Marcella had told the claimant she would get all the time off she needed. The claimant had not asked for a holiday that day and did not ask for time off. The claimant's suggestion that Ms Marcella told her, despite her being unwell, that they were short staffed and she would need to come in was not credible in light of the 25 fact Ms Marcella had said she would be given all the time off she needed, and Ms Marcella had told Mr Gould to allow the claimant time off, even if it was at short notice. Further, it did not sit comfortably with Ms Marcella's message to the claimant on the 9 March (page 288) that the claimant should rest up, not worry about work and that "*we will sort it*". We concluded for these reasons 30 that this allegation did not occur: Ms Marcella did not require the claimant to attend work on the 11 March.

333. The allegation at point 9 was that Ms Marcella told the claimant she could work in the kitchen 1.5 days per week or have her hours cut. The discussion Ms Marcella had with the claimant concerned firstly the reduction in hours from 3.5 days to 2 days front of house because the Board would not approve it. Ms Marcella then offered the claimant 1.5 days in the kitchen. The claimant was not “told” she could work in the kitchen, and the discussion was not presented as an ultimatum.
334. The allegation at point 10 was that Ms Marcella accused the claimant of a breach of discipline at a staff meeting and humiliated the claimant: this was a premeditated plan to dismiss the claimant. There was no evidence to suggest Ms Marcella accused the claimant of a breach of discipline at the staff meeting. The evidence from all witnesses was that the issue of friends on Facebook was raised generally and Ms Marcella said whoever was doing it should put it right. Ms Marcella, having spoken to Mr Sloss, ensured the issue was raised generally and not directed at the claimant.
335. The assertion this was a premeditated plan to dismiss the claimant was based on the message sent by Ms Marcella to Ms Donnachie referring to the Facebook issue being what Ms Marcella could “get her on”. However, Ms Marcella’s evidence that she did not have the authority to hire and fire was not disputed. Furthermore, there was no disciplinary action or dismissal of the claimant and the way in which the matter was dealt with at the staff meeting - with Ms Marcella giving staff an opportunity to address the situation if they did have a trainee as a friend on Facebook - supported the fact there was no intention to either discipline or dismiss. We concluded for these reasons that this allegation did not occur: Ms Marcella did not accuse the claimant of a breach of discipline at the staff meeting, or humiliate the claimant.
336. The allegation at point 11 was that there was a discriminatory dismissal (resignation). The claimant accepted she “flipped” at the staff meeting. She was shouting, swearing and waving the butter knife in her hand. The claimant also accepted that one of the statements she made repeatedly at the meeting was to tell Ms Marcella to “*ram the job*”. We considered a reasonable employer would be entitled to accept those words at face value (together with

the other similar statements made by the claimant during her unacceptable and inappropriate outburst) to be a resignation. We concluded firstly that the effective date of termination of employment was the 2 April 2019 and further concluded (below) that the dismissal (resignation) did not occur because of a protected characteristic and was accordingly not discriminatory.

337. The allegation at point 17 was that Ms Marcella told Ms Donnachie that she would publish personal information about the claimant on social media if the claimant made a complaint. Ms Marcella accepted she had made this statement at some point after the termination of the claimant's employment.

338. The allegation at point 18 was that Ms Marcella and other staff sent to each other offensive derogatory electronic messages about the claimant including that the claimant was not disabled and that she was faking her symptoms to get benefits. There was no dispute regarding the fact Ms Marcella and other staff did send each other messages on the Whatsapp group chat.

339. Ms Marcella did write a message (page 224) on the 17 April which appeared to be a message between herself and Ms Donnachie, rather than being on the group whatsapp, where it was said *"Just realised - she is ill to get benefits. If you leave job or get sacked you get nothing. She left work that day and went immediately to doctor. She was fine. But who can question her? Despicable woman"*¹. Ms Marcella did also send a message to Ms Donnachie (page 226) where she wrote *".She worked 5 days before that and then decides she's ill the minute that happened. She went to the doc directly after"*.

340. The messages on the Whatsapp were at page 233 where Ms Marcella referred to getting the claimant charged when she was disabled and stated *"It all suits her narrative"*. On page 238 Ms Marcella wrote *"Thomas told Jordan and me that he saw Natalie today and she was walking fine. Told you it was act to get money from benefits"*. There was also reference to the claimant being a narcissist. These messages were all sent after the termination of the claimant's employment.

341. We, in summary, concluded the following allegations did occur:

- Ms Marcella did say to the claimant that her husband would be upset and “there are worse things in life than a baby”
- The claimant did resign;
- Ms Marcella did tell Ms Donnachie that she would publish personal information about the claimant on social media if the claimant made a complaint; and
- Ms Marcella and other staff did exchange messages about the claimant including that she was faking her symptoms to get benefits.

Did the alleged acts amount to unfavourable treatment

10 342. We next asked whether the allegation at point 2 amounted to unfavourable treatment. The term “unfavourable” in section 18(2) of the Equality Act is not defined and the Code of Practice on Employment does not elaborate on the definition either. We noted the term “unfavourably” in section 15 of the Equality Act (discrimination arising from disability) and in the Code it is noted
15 this often means the disabled person must have been put at a disadvantage. The question to be determined is whether the comment made by Ms Marcella amounted to unfavourable treatment - that is, put the claimant at a disadvantage.

20 343. We asked whether Ms Marcella’s comment that the claimant’s husband would be upset and that “there are worse things in life than a baby” amounted to unfavourable treatment. We, in considering this matter, had regard to the fact the claimant did not disagree with Ms Marcella’s comment when it was made. In her evidence the claimant referred to the comment and went on to say she agreed and had replied to Ms Marcella “that’s right, but it’s not just about me
25 ..” The claimant did not say she had been upset by the comment or that it had prevented her from continuing her discussion with Ms Marcella.

30 344. Ms Shiels, in her submission, submitted Ms Marcella had been opposed to the termination; that the claimant was distressed and emotional and that Ms Marcella’s comments placed unnecessary pressure and guilt on the claimant. We could not accept that submission because it did not reflect the evidence

before the tribunal. We found as a matter of fact Ms Marcella was not opposed to the termination of the pregnancy: rather, she was upset at the claimant taking that action without informing/discussing it with Mr Blair.

345. We did not accept the claimant was distressed and emotional at the meeting.

5 The discussion with Ms Marcella was calm, with both Ms Marcella and the claimant contributing. There was no evidence to support the suggestion the comments made by Ms Marcella placed unnecessary pressure and guilt on the claimant. We concluded, having regard to the context and the claimant's implicit agreement with what had been said, the comments did not put the
10 claimant at a disadvantage: they did not amount to unfavourable treatment.

346. The tribunal did go on to consider whether, if we are wrong above and the comments did amount to unfavourable treatment, it happened because of pregnancy. We concluded that Ms Marcella did not make the comments that the claimant's husband would be upset and that "there are worse things in life
15 than a baby" because of pregnancy. The reason why the comments were made was because Ms Marcella understood from the claimant that she intended not to tell her husband about the termination or, if she did tell him, she intended to be untruthful about the reason for the termination. Ms Marcella was of the opinion the claimant should inform her husband and
20 discuss it with him because he loved her and would understand.

347. We decided to dismiss this aspect of the complaint because the alleged conduct did not amount to unfavourable treatment and, even if it had been unfavourable treatment, it did not occur because of pregnancy.

348. The next allegation (point 11) related to the fact the claimant resigned. We
25 acknowledged that on the face of it resignation can amount to unfavourable treatment. However, in the circumstances of this case, we did not consider it to be unfavourable treatment. We say that because the claimant's behaviour on the 2 April was entirely her responsibility. The claimant was not provoked or set up. We found as a matter of fact that Ms Marcella did not name the
30 claimant when she made it known someone had permitted a vulnerable person to be a friend on Facebook. Ms Marcella dealt with the matter

generally, reminded staff and volunteers of the policy and gave time for the matter to be put right. The claimant could have accepted what was said and ensured she put it right. The claimant chose not to do this. The claimant, instead, challenged Ms Marcella regarding confidentiality and asserted she was allowed to have a vulnerable person as a friend on Facebook. The claimant then, in her own words, "flipped": she stood up, was shouting, swearing and waving the butter knife. She told Ms Marcella repeatedly that she could "*ram the fuckin job*" and also made threats to come after Ms Marcella and the cafe.

349. The claimant sought, having had sight of Ms Marcella's message to Ms Donnachie (page 219) to argue that she had been set up. We acknowledge Ms Marcella told Ms Donnachie she planned to have the meeting and to raise the issue. She also said the claimant did have a trainee as a friend on Facebook and concluded the message by saying "*this might be what! can get her on*". We however could not accept there had been any set-up in circumstances where the matter had been dealt with generally and without reference to the claimant.

350. We accepted Ms Marcella did hope she could get the claimant on this, but this statement has to be seen in the light of what actually happened at the meeting and in the light of the fact Ms Marcella did not have authority to hire and fire. We concluded, for all of these reasons, that the resignation in the circumstances was not unfavourable treatment.

351. We should state that if we are wrong in that, and the resignation was unfavourable treatment, we were entirely satisfied the unfavourable treatment did not occur because of pregnancy (or sex). We say that because the reason for the resignation was the claimant's behaviour in response to the issue of confidentiality and having trainees on Facebook being raised.

352. We next asked, in relation to the two acts which occurred after the protected period (points 17 and 18) whether the respondent decided upon the conduct during the protected period. We were entirely satisfied that this conduct was not decided upon during the protected period. We say that because Ms

Marcella's comment to Ms Donnachie that she would publish personal information about the claimant on social media if the claimant made a complaint was made as a direct consequence of the claimant's threats (made on the 2 April) to bring down Ms Marcella and the cafe. The claimant subsequently acted on those threats by making complaints to The Big Lottery and OSCR and to the local authorities. This was several weeks after the claimant's pregnancy ended, and was not linked to the claimant's pregnancy. Ms Marcella could not have decided upon this conduct during the protected period because the claimant had not yet acted in the way which provoked Ms Marcella to make the comment.

353. Ms Marcella and other staff sent to each other various whatsapp messages about the claimant. We were satisfied this occurred because of the way the claimant had behaved at the meeting on the 2 April and her subsequent behaviour in posting comments on social media. We were entirely satisfied the respondent did not decide upon this conduct during the protected period and we say that because the whatsapp messages were a response to the claimant's conduct, which occurred after the protected period.

354. We decided, for all of these reasons, to dismiss this aspect of the claim.

Sex discrimination - section 13 Equality Act

355. We referred to section 13 of the Equality Act which provides that a person discriminates against another if, because of a protected characteristic, s/he treats the other person less favourably than s/he treats or would treat others. The protected characteristic relied on by the claimant was sex.

356. The claimant argued that a number of the alleged acts of pregnancy discrimination were, in the alternative, acts of sex discrimination. The claimant made this argument in respect of the following alleged acts:

- Point 4 - Ms Marcella disclosed the claimant's pregnancy and her intention to have a termination to Ms Donnachie. She expressed the view the claimant was a baby killer.

- Point 10 - Accused the claimant of breach of discipline at a staff meeting and humiliated the claimant. This was a premeditated plan to dismiss the claimant.
- Point 11 - discriminatory dismissal (resignation).
- 5 • Point 17 - Ms Marcella told Ms Donnachie she would publish personal information about the claimant on social media if the claimant made a complaint.
- Point 18 - Ms Marcella and other staff sent to each other offensive and derogatory messages about the claimant including that the claimant
10 was not disabled and had faked her symptoms to get benefits.

357. We decided, above, that of the acts alleged, only points 17 and 18 occurred.

358. There was no dispute regarding the fact points 17 and 18 occurred after the termination of the claimant's employment. There were no submissions to explain the basis upon which it was said a complaint of direct discrimination
15 based on events which occurred after dismissal, could be pursued. Further, and in addition to this point, the reason for the treatment was not because of sex. The reason for the treatment was as set out above.

359. We decided to dismiss this aspect of the claim.

Discrimination arising from disability - section 15 Equality Act

20 360. The allegations made by the claimant were:

- (i) Point 2 - Ms Marsella said to the claimant that her husband would be upset and there were worse things in life than a baby;
- (ii) Point 3 - Ms Marsella encouraged Angelina Donnachie to tell Mr Blair about the pregnancy and termination before the claimant had the
25 opportunity to disclose this to him;
- (iii) Point 4 - Ms Marsella disclosed the claimant's pregnancy and her intention to have a termination to Ms Donnachie. She expressed the view the claimant was a baby killer;

- (iv) Point 5 - Ms Marsella made an irate response to the claimant's query about unpaid wages;
- (v) Point 6 - Ms Marsella required the claimant to work on the 7 March 2019 despite her being unwell and in pain. The claimant had asked for time off or to take holidays;
- (vi) Point 7 - Ms Marsella advised the claimant's husband to tell the claimant that she would have to start working in the kitchen or have her hours cut from 3.5 days to 2 days per week;
- (vii) Point 9 - Ms Marsella told the claimant that she could work in the kitchen 1.5 days per week or have her hours cut;
- (viii) Point 10 - the claimant was accused of a breach of discipline at a staff meeting and this humiliated the claimant;
- (ix) Point 11 - Discriminatory dismissal (resignation);
- (x) Point 17 - Ms Marsella told staff she would publish personal information about the claimant on social media if the claimant made a complaint
- (xi) Point 18 - Ms Marsella and other staff sent to each other offensive and derogatory electronic messages about the claimant, including that the claimant was not disabled and that she was faking symptoms to get benefits.

361. We had regard to the terms of section 15 of the Equality Act which provides that a person discriminates against a disabled person if s/he treats the disabled person unfavourably because of something arising in consequence of the disabled person's disability and s/he cannot show that the treatment in question is a proportionate means of achieving a legitimate aim.

362. The claimant relied on two "somethings", namely: (a) termination of the pregnancy and (b) inability to work in the kitchen.

363. Mr Hay, in his submissions, accepted the claimant's decision to terminate her pregnancy arose as a consequence of her disability and accepted the claimant's refusal to work in the kitchen arose as a consequence of the disability.

5 364. There are four elements to a section 15 claim:

- there must be unfavourable treatment;
- there must be something that arises in consequence of the claimant's disability;
- the unfavourable treatment must be because of (that is, caused by) the something that arises in consequence of the disability and
- that alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

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Did the alleged acts occur

15 365. We firstly asked whether the acts alleged by the claimant occurred. We decided above that points 2, 11 (insofar as there was a resignation), 17 and 18 occurred, albeit points 17 and 18 occurred after the termination of employment.

Did the acts which occurred amount to unfavourable treatment

366. We decided above that allegation 2 did not amount to unfavourable treatment.

20 367. We decided above that allegation 11 did not amount to unfavourable * treatment.

25 368. The allegation at point 17 was made by Ms Marcella to Ms Donnachie after the termination of the claimant's employment. There was no evidence to suggest to the tribunal when the claimant learned of the comment. We decided, on the face of it, allegation 17 did amount to unfavourable treatment.

369. The allegation made at point 18 did amount to unfavourable treatment. We reached that conclusion because these matters occurred after the termination of the claimant's employment.

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If the acts were unfavourable treatment, was that treatment because of something arising in consequence of the claimant's disability

370. The tribunal, in relation to point 2 (Ms Marcella's comment that the claimant's husband would be upset and that there were worse things in life than a baby) asked whether the treatment (if it was unfavourable) was because of the claimant's decision to terminate her pregnancy (which arose as a consequence of the claimant's disability). We concluded the treatment was not because of the claimant's decision to terminate her pregnancy. Ms Marcella regarded the matter of the termination as a private matter for the claimant and her husband and told the claimant she would be supported whatever her decision. The reason Ms Marcella made the comment was because she understood (based on what the claimant had told her) that the claimant intended not to tell her husband about the termination, or, if she did tell him, she intended not to be truthful about the reason for the termination.

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Ms Marcella did not make the comment because of something arising in consequence of the claimant's disability (that is, the termination) but because she considered the claimant should inform her husband and discuss it with him.

371. We acknowledge Ms Marcella and Ms Donnachie exchanged whatsapp messages regarding the termination and made comments about it. Those messages were part of the overall evidence to be considered in this case. The tribunal accepted Ms Marcella's evidence that she considered it a private matter for the claimant (and her husband); she respected their decision and honestly said to the claimant that she would be supported whatever her decision. The issue of concern for Ms Marcella was not the fact the claimant was having a termination but the fact Ms Marcella understood the claimant

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was not going to tell Mr Blair about it, or was going to be untruthful about the reason for the termination. It was this which upset Ms Marcella and which was referred to in the messages.

5 372. We next asked, in relation to point 11 (resignation) whether, if this was unfavourable treatment, it was because of the claimant's decision to terminate her pregnancy or her refusal to work in the kitchen. We concluded, for the reasons set out above, that the resignation was not because of either of these matters.

10 373. We next asked, in relation to point 17 (Ms Marcella told Ms Donnachie that she would publish personal information about the claimant on social media if the claimant complained) whether this unfavourable treatment was because of the claimant's decision to terminate her pregnancy or because of the claimant's refusal to work in the kitchen. We concluded the treatment was not because of the claimant's decision to terminate her pregnancy and we further
15 concluded the treatment was not because of the claimant's refusal to work in the kitchen. We reached these conclusions because the reason for Ms Marcella making the comment was because the claimant had, at the meeting on the 2 April, made it clear she intended to come after/destroy Ms Marcella and the cafe. These comments were made by the claimant during her tirade,
20 which was unrelated to either the termination of the pregnancy or the refusal to work in the kitchen. The claimant's outburst related to the claimant feeling she was the target of Ms Marcella's comments about staff and volunteers not having trainees as friends on Facebook. In fact the claimant stated that she felt everything at the meeting had been targeted at her.

25 374. We next asked, in relation to point 18 (Ms Marcella and other staff sent to each other offensive and derogatory electronic messages about the claimant including that the claimant was not disabled and the claimant was faking her symptoms to get benefits) whether, if that unfavourable treatment was because of the claimant's decision to terminate her pregnancy and/or the
30 claimant's refusal to work in the kitchen.

375. We concluded the treatment was not because of the claimant's decision to terminate the pregnancy or because of her refusal to work in the kitchen. We reached that conclusion because we were satisfied (i) none of the messages referred to those matters; (ii) the messages were sent because of the claimant's behaviour generally and at the meeting on the 2 April and (iii) they were also a response to messages posted by the claimant.

376. The claimant's behaviour at the 2 April meeting was witnessed by most of the other employees and volunteers. The claimant, by her own admission, had been shouting and swearing at that meeting and waving the butter knife. The claimant made it clear at that meeting that not only could Ms Marcella "ram" the job, but that the claimant would be coming after Ms Marcella and seeking to destroy the cafe. The other employees, in the whatsapp messages, expressed views about the claimant and her behaviour.

377. We, in conclusion, decided the allegation at point 2 did occur but did not amount to unfavourable treatment. Further, even if it had amounted to unfavourable treatment, the reason for the unfavourable treatment was not because of something arising in consequence of disability. We next concluded that although the resignation occurred, it did not amount to unfavourable treatment and, even if it had amounted to unfavourable treatment, it did not occur because of something arising in consequence of disability.

378. We also concluded the allegations at point 17 and 18 amounted to unfavourable treatment, but the reason for the unfavourable treatment was not because of something arising in consequence of disability. We decided to dismiss this complaint for these reasons. (We should state the tribunal acknowledged the allegations at points 17 and 18 occurred after the termination of the claimant's employment. The tribunal, given its conclusion the unfavourable treatment was not because of something arising in consequence of disability, did not continue to examine any issue of "close connection" with employment, referred to in submissions by the respondent's representative. We further acknowledged the claimant's representative solely argued these points as a section 15 Equality Act claim, and made no

submissions regarding the fact the allegations occurred after the termination of the claimant's employment.)

Failure to make reasonable adjustments - section 20 Equality Act

5 379. We had regard to the terms of section 20 of the Equality Act which provides that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

10 380. The claimant identified the provision, criterion or practice to be requiring her to work in the kitchen. The tribunal did not accept there was a "requirement" for the claimant to work in the kitchen. Ms Marcella told the claimant the Board would not authorise 3.5 days front of house and the claimant's hours would reduce to 2 days. However, the claimant could be offered 1.5 days in the kitchen. There was no "requirement" to work in the kitchen, but there was an
15 offer to do so, which the claimant could accept or reject. The claimant rejected it.

20 381. We acknowledged that if the claimant had accepted the offer, or if she had expressed an interest in it, there would have been a need for Ms Marcella and the claimant to discuss what adjustments would be required to allow the claimant to work in the kitchen. Matters did not get to that stage because the claimant refused the offer.

382. The PCP has not been established and in those circumstances we dismissed this aspect of the claim.

Harassment - section 26 Equality Act

25 383. The allegations of harassment made by the claimant were:

- (i) Point 2 - Ms Marsella said to the claimant that her husband would be upset and there were worse things in life than a baby;

- (ii) Point 3 - Ms Marsella encouraged Angelina Donnachie to tell Mr Blair about the pregnancy and termination before the claimant had the opportunity to disclose this to him;
- (iii) Point 4 - Ms Marsella disclosed the claimant's pregnancy and her intention to have a termination to Ms Donnachie . She expressed the view the claimant was a baby killer;
- (iv) Point 5 - Ms Marsella made an irate response to the claimant's query about unpaid wages;
- (v) Point 9 - Ms Marsella told the claimant that she could work in the kitchen 1.5 days per week or have her hours cut;
- (vi) Point 10 - The claimant was accused of a breach of discipline at a staff meeting and this humiliated the claimant;
- (vii) Point 11 - discriminatory dismissal (resignation);
- (viii) Point 18 - Ms Marsella and other staff sent to each other offensive and derogatory electronic messages about the claimant, including that the claimant was not disabled and that she was faking symptoms to get benefits.
- (ix) Point 19 - Ms Marsella verbally abused the claimant in public at Greggs and
- (x) Point 20 - The claimant was advised by the Stenographer, on behalf of Mrs Marsella, that she was there to "write the court story" following being informed by Mrs Donnachie, that Ms Marsella was planning to sell a story on the claimant's termination of her pregnancy.

384. We had regard to the terms of section 26 Equality Act which provides that a person harasses another if s/he engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

385. We also had regard to the terms of section 108 Equality Act which deals with discrimination after the employment relationship has ended. Section 108(2) provides that a person must not harass another if the harassment arises out of and is closely connected to a relationship which used to exist between them and the conduct, if it occurred during the relationship, would contravene the Act.

386. The claim brought by the claimant related to the protected characteristic of disability. We noted Ms Shiels, in her submission to the tribunal, argued the protected characteristics of disability and sex were relied upon. We could not accept that submission in circumstances where the statutory basis of claim made clear that the allegations which were identified as being acts of harassment were brought as claims under section 26 Equality Act because of the protected characteristic of disability.

387. There are three essential elements to a harassment claim under section 26(1) Equality Act and they are:

- unwanted conduct;
- that has the proscribed purpose or effect and
- which relates to a relevant protected characteristic.

388. We addressed each of the above elements in turn.

20 *Was there unwanted conduct*

389. We decided (above) that of the alleged acts said to have taken place during the claimant's employment, only allegations 2 and 11 (insofar as there was a resignation) occurred. We asked, in relation to point 2, whether Ms Marcella's comment that the claimant's husband would be upset and that there were worse things in life than a baby was unwanted, that is, unwelcome or uninvited. We (for the reasons which are set out above) concluded this conduct was not unwanted. We considered there was support for that conclusion from the fact the claimant agreed with the statement Ms Marcella

made, and, she did not complain about this in her grievance or in the claim form as initially presented.

5 390. We next asked, in relation to point 11, whether the resignation was unwanted conduct. This was a difficult question to answer in circumstances where there was no evidence to suggest it was unwanted by the claimant. The claimant did not ever express regret at what had happened, or seek to retract her resignation. We acknowledge, in saying this, that matters quickly progressed after the claimant had left. In the circumstances, and given what we have said above, about the claimant being solely responsible for the way in which she
10 behaved on the 2 April, we concluded the resignation was not unwanted conduct.

391. We further decided that of the acts alleged to have taken place after the termination of employment, acts 18 and 19 occurred. We accepted those acts were unwanted conduct, that is conduct unwanted by the claimant.

15 392. We, in considering whether the allegation at point 20 (the claimant was advised by the Stenographer, on behalf of Ms Marcella, that she was there to "write the court story" following being informed by Ms Donnachie that Ms Marcella was planning to sell a story on the claimant's termination of pregnancy) occurred, acknowledged that this allegation related to the
20 claimant's attendance at Hamilton Sheriff Court on the 2 July 2019.

393. We, in considering this allegation, preferred Ms Marcella's evidence to that of the claimant, and found that it was Mr Jason Marcella, acting on legal advice, who had hired a shorthand writer to attend Hamilton Sheriff Court. The purpose of this was not to "write the court story" but to take notes of the trial
25 in case it assisted the legal representative in preparations for the employment tribunal case. We, having had regard to the allegation made, concluded, there was no stenographer, the person present was not present on behalf of Ms Marcella and the person present was not there to write the court story. We concluded, because of this, that this allegation, as asserted, did not happen.

30 394. We noted the claimant further alleged she had been told by Ms Donnachie that Ms Marcella was planning to sell a story on the claimant's termination of

pregnancy. We did not find this aspect of the claimant's evidence to be credible and we preferred Ms Marcella's evidence that reference to her selling a story was "ludicrous nonsense" and there had never been an intention to publish any story.

- 5 395. We should state that if we had found the conduct, as asserted, occurred, and that it was unwanted and had the proscribed effect, we would have dismissed this aspect of the claim because it was not related to the protected characteristic of disability.

Did the unwanted conduct have the proscribed purpose or effect

- 10 396. We decided above that allegation at point 2 was not unwanted conduct. We should state that even if we had found it to be unwanted conduct, we would not have found it had the proscribed purpose or effect. We reached that conclusion because there was no evidence to support any finding that, at the time of these events, it created an intimidating, hostile, degrading, humiliating
15 or offensive environment for the claimant. The claimant was not upset by what Ms Marcella had said and subsequent messages (pages 287 - 289) demonstrate this.

397. We decided to dismiss this aspect of the complaint because allegation 2 did not amount to unwanted conduct and, even if it did, it did not have the
20 proscribed purpose or effect.

398. We found the resignation was not unwanted conduct, but we did go on to consider whether, if it was unwanted conduct, it had the proscribed purpose or effect. We concluded the resignation did not have the proscribed effect. We say that because it was not the resignation which soured subsequent events;
25 it was what the claimant had said in her tirade against Ms Marcella. We should say that if we are wrong in this, we would still have dismissed this aspect of the claim because the resignation did not relate to the protected characteristic of disability.

Did the post-employment allegations constitute harassment and if so did they arise out of and were closely connected to a relationship which used to exist between them (section 108 Equality Act)

399. The allegation at point 18 related to the Whatsapp messages sent by Ms Marcella and other staff. The following messages were, in particular, identified by the claimant:-

- the photograph at page 271
- the reference to "Beast" at page 251
- the "Seven Mind Games Played By the Narcissist: How often have you felt manipulated by a narcissist?" (page 249) and the comments that this described a certain "witch to a T";
- Ms Marcella's message (page 238) that *"Thomas told Jordan and me that he saw Natalie today and she was walking fine. Told you it was act to get money from benefits"*
- Ms Marcella's message on the 17 April (page 224) saying *"Just realised she is ill to get benefits. If you leave your job or get sacked you get nothing. She left work that day and went immediately to doctor. She was fine. But who can question her? Despicable woman"*
- Ms Donnachie's message (page 224) saying *"Thing is because she has diagnosis they would believe her because relapses are possible! .."*
- Ms Marcella responded (page 226) *"She will even have your Mum convinced she is ill. She worked 5 days before that and then decides she is ill the minute that happened. She went to doc directly after incident"*.
- Ms Marcella's message (page 230) where she stated *"I actually can't handle these evil people... I feel like I've totally had enough. Think I might need to find a way to retaliate"*.

- Ms Marcella's message (page 235) where she stated "*Geeze me the boak too cos I'm sure she isn't ill. Far too convenient and coincidental. Poor wee Natalie and her big bad boss getting her charged when she is so disabled. It all suits her narrative/lies. I didn't support her at work and now she'll get sick pay instead of nothing and everybody feels sorry for her and she can sit on her a**e and your mum and her husband can run after her! Sickening! It is indeed her soul that is sick so your mum should do some spiritual warfare for her rather than pray for her lies.*"

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400. We accepted the messages would have been unwanted by the claimant. We next asked whether the messages had the proscribed purpose or effect. We considered they would have had the proscribed effect of creating a humiliating environment for the claimant.

15 401. We next asked whether the conduct related to a relevant protected characteristic (that is, disability). We considered the first three messages noted above, and the message sent by Ms Marcella at page 230, were not related to the protected characteristic of disability. They were a reference to the claimant and her personality as perceived by the other members of staff.

20 402. The remaining messages sent by Ms Marcella and Ms Donnachie were related to the disability. This is evident from the content of the messages.

403. The messages were sent within a period between the 14 and 28 April 2019, that is, after the claimant's employment terminated on the 2 April 2019. The issue for the tribunal was whether the offending Whatsapp messages arose out of, and were closely connected to, the employment relationship which used to exist between the claimant and the respondent. We noted the terms "arose out of" and "closely connected to" are not defined in the Equality Act. We, in considering this question, had regard to the case of **Nicholls v Corin Tech Ltd EAT 0290/07** where the EAT had to consider whether comments made by a respondent to the claimant in the corridor outside an employment tribunal hearing amounted to post-employment harassment. The EAT in that

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case looked at the purpose of the comments made and whether they were intended, or calculated, to deter the claimant from proceeding with the claim.

404. The tribunal considered the messages arose out of Ms Marcella and others doubting the veracity of (a) what they had been told by the claimant and (b) the claimant's actions. This is evident, for example, from the reference in the message to the claimant having been fit to work, but attending the doctor immediately after the 2 April meeting; and querying whether the claimant had done so in order to claim benefits (knowing she would be dismissed for her behaviour at the meeting on the 2 April).

405. The tribunal further considered the messages arose out of the claimant's subsequent behaviour in posting messages and acting on the threat to destroy Ms Marcella and the charity. The tribunal did not see the messages posted by the claimant but we noted the reference to them by Ms Donnachie and other staff in the Whatsapp messages.

406. The tribunal next asked whether the conduct was closely connected to the previous employment relationship. We, in considering this question, concluded the conduct was not closely connected to the previous employment relationship, but was closely connected to the falling out which had occurred between the claimant, Ms Marcella and Ms Donnachie. The conduct arose from and was closely connected to the breakdown of personal, and family, relationships. We decided, for this reason, to dismiss this aspect of the claim.

407. The allegation at point 19 (Ms Marcella verbally abused the claimant in public at Greggs) occurred on the 23 June 2020, approximately two and a half months after the claimant's employment had terminated. We accepted Ms Marcella's evidence that she said to the claimant "look at that fat beast" and, upon leaving the shop, commented to Mr Blair about "that fat beast" and how could she do that to a charity. We also accepted that Ms Marcella had, in the period leading up to this incident, recently lost her mother during lockdown and was "not in a good place". Ms Marcella referred in her evidence to also having received information from the respondent's solicitor to advise the claimant was seeking to "sue [me] personally" (that is, add Ms Marcella as a

second respondent to the proceedings). However, the application to join Ms Marcella as a second respondent to the proceedings was not made until August 2020. We accordingly concluded Ms Marcella had, in her evidence to the tribunal, been confused regarding the timing of this.

5 408. We accepted the comments made by Ms Marcella amounted to conduct which was unwanted by the claimant. We also accepted the comments had the proscribed effect. However, the comments made by Ms Marcella at Greggs were not related to the protected characteristic of disability.

10 409. We did go on to ask whether, if this conduct had been related to the protected characteristic of disability, it arose out of and was closely connected to a relationship which used to exist. We concluded in relation to this conduct, that it arose from the fact Ms Marcella was having to deal with the aftermath of the claimant's complaints to The Big Lottery and others. We were entirely satisfied the incident did not arise out of and was not closely connected to a relationship
15 which used to exist. We say that because the conduct arose out of the actions of the claimant in seeking to destroy Ms Marcella and the cafe. We also, in reaching our conclusion took into account the fact the conduct post-dated the termination of the claimant's employment by some 14 months.

20 410. Accordingly, and for these reasons, we decided to dismiss this aspect of the complaint.

411. We decided, for all the reasons set out above, to dismiss the complaint of harassment.

Victimisation - section 27 and section 108 Equality Act

412. The allegations made by the claimant were:

- 25 (i) Point 10 - accused the claimant of breach of discipline at staff meeting and humiliated the claimant: this was a premeditated plan to dismiss the claimant;
- (ii) Point 11 - Discriminatory dismissal (resignation);

(iii) Point 13 - Reported the claimant to the Police because of the protected act of raising a grievance;

(iv) Point 14 - Ms Marsella falsely told a member of staff the claimant had stolen £30;

5 (v) Point 17 - Ms Marsella told Ms Donnachie she would publish personal information about the claimant on social media if the claimant made a complaint

(vi) Point 18 - Ms Marsella and other staff sent to each other offensive and derogatory electronic messages about the claimant, including that the
10 claimant was not disabled and that she was faking symptoms to get benefits.

(vii) Point 19 - Ms Marsella verbally abused the claimant in public at Greggs and

(viii) Point 20 - The claimant was advised by the Stenographer, on behalf
15 of Mrs Marsella, that she was there to "write the court story" following being informed by Mrs Donnachie, that Ms Marsella was planning to sell a story on the claimant's termination of her pregnancy.

413. We had regard to the terms of section 27 of the Equality Act which provides
20 that a person victimises another if s/he subjects the other to a detriment because they have done a protected act or s/he believes them to have done, or that they may do, a protected act.

414. Section 27(2) sets out what amounts to a protected act, and it is the bringing
25 of proceedings under the Act; giving evidence or information in connection with proceedings under the Act; doing any other thing for the purposes of or in connection with the Act or making an allegation (whether express or not) that a person, or another person, has contravened the Act.

415. Section 108 of the Equality Act deals with relationships that have ended and provides that a person must not discriminate against another if the discrimination arises out of and is closely connected to a relationship which

used to exist between them and conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene the Act. Section 108(7) Equality Act specifically excludes complaints of post-termination victimisation. However, the tribunal was referred to the case of

5 ***Rhys-Harper v Reiaxion Group pic 2003 ICR 867*** where the House of Lords decided section 4(2) of the Disability Discrimination Act had to be interpreted as covering incidents of discrimination (including victimisation) that arise from the employment relationship but occur after its termination. So, an employer can be liable for the victimisation of a former employee, provided that the

10 tribunal is satisfied the victimisation had a sufficient connection with the terminated employment relationship. The test to be applied is very similar to that which applies under section 108 Equality Act.

416. The first issue to be determined is whether the claimant did a protected act/s and if so, when.

15 417. The claimant asserted she had done the following protected acts:

(a) On or around the end of February or start of March 2019, the claimant disclosed to Ms Marcella that she was pregnant, that this was the reason for her morning sickness and that she would be terminating the pregnancy due to her disability. The claimant requested time off work

20 for the termination procedure and made a request to take holidays during that time.

(b) On or around the 11 March 2019, the claimant had a discussion with Ms Marcella about reasonable adjustments for her disability in connection with the proposal that she work in the kitchen or have her

25 hours reduced.

<c) On or around 3 April 2019, the claimant submitted a grievance letter complaining about disability discrimination under the Equality Act 2010 and

(d) the claimant commenced early conciliation with ACAS (26 June 2019) and brought these proceedings in the Employment Tribunal against the respondent.

418. Mr Hay, in his submissions, accepted the above acts constituted protected acts in terms of section 27(d) Equality Act. We decided, given there was no dispute that the claimant had done the protected acts alleged, to proceed on that basis.

419. We next considered whether the alleged acts of victimisation occurred. We have already decided above, preferring the evidence of Ms Marcella to that of the claimant, that points 10, 11 (discriminatory dismissal) and 20 did not occur.

420. The allegation made at point 13 was that Ms Marcella reported the claimant to the Police because she raised a grievance. There was no dispute regarding the fact Ms Marcella did report the claimant's behaviour at the meeting on the 2 April to the Police, and so we concluded that in this respect the allegation did happen. The issue of whether Ms Marcella took that action because of the grievance, falls to be considered below.

421. The allegation made at point 14 was that Ms Marcella falsely told a member of staff that the claimant had stolen £30. We preferred and accepted Ms Marcella's evidence regarding this matter. Ms Marcella told the tribunal that the previous Chairman had spoken to her to advise that he "thought he saw [the claimant] stealing £30 from the till but he could not be sure". Ms Marcella told Ms Donnachie that the previous Chairman had said this, but that she (Ms Marcella) did not believe it of Mr Blair's wife. We, on the basis of this evidence, found the allegation did occur albeit not strictly in the terms asserted.

422. The tribunal noted, in relation to the allegation at point 17, that Ms Marcella accepted she had said this to Ms Donnachie. In relation to point 18, some offensive messages were sent regarding the claimant. In relation to the allegation at point 19, Ms Marcella did verbally abuse the claimant at Greggs.

423. The tribunal, in summary, concluded the following allegations happened:

- (point 13) Ms Marcella reported the claimant to the Police regarding the 2 April meeting;
- (point 14) Ms Marcella told Ms Donnachie what she had been told by the previous Chairman;
- 5 • (point 17) Ms Marcella told Ms Donnachie she would publish personal information of the claimant on social media if the claimant made a complaint;
- (point 18) Ms Marcella and other staff did exchange messages on the group Whatsapp;
- 10 • (point 19) Ms Marcella did verbally abuse the claimant at Greggs and

424. These allegations all post-date the termination of employment. We found as a matter of fact the claimant's employment terminated on the 2 April following her behaviour at that meeting. We considered the employer was entitled to rely on the unambiguous words said and repeated several times by the claimant at the meeting that Ms Marcella could "ram the fuckin job".

425. We acknowledged the claimant sought to argue that her employment ended at a later date. The claimant in support of her position relied on the P45 (page 277) which stated her employment had ended on the 6 April 2019. We do not know who completed the P45 or why that date was provided. We did not consider this document undermined our above conclusion. (We should state that if we are wrong in this we have, below, addressed allegation point 13 as an act of alleged victimisation and post-employment victimisation).

If allegation 13 occurred prior to the termination of the claimant's employment, was it an act of victimisation in terms of section 27 Equality Act

426. The claimant sought to argue that Ms Marcella took the action of reporting her to the Police because she had done the protected act of raising a grievance. There was no dispute regarding the fact the meeting at which the claimant "flipped" took place on the 2 April, the claimant sent in her letter of grievance

on the 3 April and Ms Marcella reported the events of the 2 April to the Police on the 3rd or 4th April.

427. We acknowledged that reporting someone to the Police amounted to a detriment. The issue for the tribunal to determine was one of causation: did Ms Marcella take that action because the claimant had done the protected act of raising a grievance.

428. We had regard to the cases to which we were referred by both representatives (*Pnaiser v NHS England; Owen & Briggs v James*). We also had regard to the cases of *Nagarajan v London Regional Transport 1999 ICR 877* and *Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065*. We took from these cases that the essential question for the tribunal to ask is what, consciously or subconsciously, motivated the respondent to subject the claimant to detriment. We noted that in most cases this will require an inquiry into the mental processes of the employer. We further noted that if a protected act has a significant influence on the employer's decision making, discrimination will be made out and for an influence to be significant, it did not have to be of great importance.

429. We, in considering the question of what motivated the respondent to report the claimant to the Police, had regard to Ms Marcella's evidence (which we accepted) when she told the tribunal that following the meeting on the 2 April she had thought about reporting the matter (that is, the claimant's conduct) to the Police but felt conflicted because of her relationship with Ms Donnachie. Ms Marcella/the respondent sought legal advice following receipt of the grievance (dated 3 April). The advice received was to the effect the respondent did not need to deal with the grievance because the claimant had, by her actions, terminated her employment the previous day and that the matter of the claimant's conduct on the 2 April should be reported to the Police in order to protect the charity.

430. The tribunal also had regard to the message sent by Ms Marcella to Ms Donnachie (page 222) where there was discussion about what had happened at the meeting on the 2 April and Ms Marcella was questioning what the

claimant could do to her. Ms Donnachie told Ms Marcella she had no idea, but said that she should be prepared, whereupon Ms Marcella said *"I think I'll phone police about her tomorrow to pre-empt her"*. The messages were not dated but follow on from messages sent on the 2 April. The tribunal inferred this tended to suggest Ms Marcella's comment about going to the Police tomorrow, was sent on the 2 April, before the grievance had been received.

431. We also had regard to the fact the claimant had, during her outburst on the 2 April, threatened to come after Ms Marcella and destroy the charity. This was reflected in the messages exchanged between Ms Marcella and Ms Donnachie (page 222\ where Ms Marcella questioned what the claimant could do to her, and stated she thought she would phone the Police tomorrow to "pre-empt her". This threat made by the claimant was also reflected in the legal advice received that a report should be made to the Police in order to protect the charity.

432. We, in considering this evidence, attached importance to the fact Ms Marcella was minded to report the matter to the Police on the 2 April, prior to the grievance being received. We acknowledged that whilst the grievance prompted the respondent to seek legal advice, it was not the grievance which prompted Ms Marcella to go to the Police. We say that because the issue which was uppermost in the mind of Ms Marcella was the claimant's threat, made on the 2 April, to destroy the charity. The action of going to the Police was taken to protect the charity: to pre-empt the claimant from acting on her threat to destroy the charity.

433. It is evident from the facts set out above that there was a chain of events which occurred in close proximity and that the grievance was part of that chain of events. In the circumstances we asked ourselves whether the grievance had a significant influence on Ms Marcella's decision to go to the Police. We decided after careful consideration that the grievance did not have a significant influence on Ms Marcella's decision to report the matter to the Police. The real/core reason Ms Marcella reported the matter to the Police was because she was motivated to protect the charity from the claimant's threat to destroy it and she acted on legal advice to do so.

434. We decided, for these reasons, to dismiss this aspect of the claim.

Post termination victimisation

435. We decided (above) that the allegations at points 13, 14, 17, 18 and 19 occurred. The acts occurred after the termination of the claimant's employment. We, having had regard to the case of ***Rhys-Harper v Relaxion Group plc*** 2003 ICR 867 and the terms of section 108 Equality Act, noted that a post-employment claim has two elements. The claimant must show that:

- s/he has been subjected to prohibited conduct (discrimination, harassment or victimisation) and
- despite the termination of the employment relationship, there was still a sufficiently close connection between the prohibited conduct and that relationship.

436. We next took each of the allegations (above) and asked whether the claimant had been subjected to prohibited conduct and if so, was there still a sufficient close connection between the prohibited conduct and that relationship.

437. We decided (above) that the allegation at point 13 (Ms Marcella reporting the claimant to the Police) was not an act of victimisation. The claimant was not subjected to prohibited conduct.

438. The allegation at point 14 (Ms Marcella told Ms Donnachie what she had been told by the previous Chairman regarding the claimant stealing £30). This allegation was undated. Ms Marcella referred to the previous Chairman having told her this in October 2018 when the claimant was volunteering. Ms Donnachie referred to being told this when she "first started in the cafe", which was January 2019. We concluded from the fact the allegation is undated and the fact the evidence from Ms Marcella and Ms Donnachie suggested the incident occurred prior to any of the protected acts, that this could not be an act of victimisation, because the protected acts, which post-dated the incident could not have been the reason for the conduct. We decided the claimant was not subjected to prohibited conduct.

439. The allegation at point 17 (Ms Marcella told Ms Donnachie she would publish information on social media if the claimant made a complaint). This allegation was also undated. Ms Marcella told the tribunal she had made this statement after the claimant had left and she thought it may have been in May.

5 440. We noted the claimant had, by May 2019, done three protected acts. The claimant did not clarify whether a particular protected act was relied upon, or whether they were all relied upon. The first protected act occurred in February 2019, some three months prior to the alleged detrimental treatment. We, in considering whether there was a causal link between the protected act and
10 the comment made by Ms Marcella had regard to the following factors. Firstly, there was no evidence to suggest what the causal link between the two events was; secondly, Ms Marcella told Ms Donnachie she would publish information on social media if the claimant made a complaint (our emphasis). The fact the claimant told Ms Marcella of her pregnancy and intention to have a termination
15 three months earlier had nothing whatsoever to do with the claimant making a complaint. Ms Marcella's comment was related to the fact of the claimant's threats, made at the meeting on the 2 April, to destroy Ms Marcella and the charity.

441. We reached the same conclusion regarding the second protected act
20 (discussion regarding reasonable adjustments in March 2019).

442. The third protected act was the raising of the grievance on the 3 April 2019. We asked whether the raising of the grievance was the real reason Ms Marcella had made this comment. We, in considering this matter, had regard to two points. Firstly, we had regard to the fact the grievance was raised on
25 the 3 April, and Ms Marcella's comment was made in May. It seemed to the tribunal unlikely that Ms Marcella would make a comment saying she would publish information on social media if the claimant made a complaint, when the claimant had already done so. Secondly, Ms Marcella, in her evidence, told the tribunal she thought she had made the comment in May "when all the
30 complaints started to come in". The claimant did make a number of complaints (for example to The Big Lottery and to local authorities) and this evidence suggested that the reason for Ms Marcella's comment was these complaints.

443. We decided, for these reasons, the claimant was not subjected to victimisation.

444. The allegation at point 18 (Ms Marcella and other staff exchanged offensive messages on the Whatsapp group). The Whatsapp messages produced to the tribunal were for the period 14-28 April 2019. The claimant argued the messages were sent because of the protected act of raising the grievance.

445. We firstly considered whether the messages (which are set out above and not repeated here) subjected the claimant to a detriment. We accepted they did.

446. We next considered whether these detrimental comments were made because the claimant had raised a grievance on the 3 April. We, in considering this issue, had regard firstly to the fact we found the only person, other than Ms Marcella, who knew of the claimant's grievance was Ms Donnachie. We, in making this finding, relied on the evidence of Ms Marcella, and Mr Gould who told the tribunal he was not aware the claimant had put in a grievance. We acknowledged Ms Donnachie told the tribunal that Ms McIlroy and Mr Gould had been called into the office separately and the grievance had been read out to them, but we did not find this evidence to be either credible or reliable. We say that because Ms Donnachie would not have any knowledge of what happened in the office because she was not present. Further, the allegation that Ms Marcella had read out the claimant's grievance to staff, was withdrawn. We accordingly concluded that any comments made by staff members other than Ms Marcella and Ms Donnachie could not have been because of the grievance.

447. Secondly, we had regard to what was said in the messages between Ms Marcella and Ms Donnachie. The comments stem from what happened on the 2 April when the claimant shouted and swore at the meeting and waved a butter knife. The comments challenge the claimant's behaviour in being fit to attend work and behave in this way, but then going directly to her doctor following the incident. They also seek to cast doubt on whether the claimant was as ill as suggested and her motive in attending the doctor.

448. Thirdly, we had regard to the fact that Ms Marcella and Ms Donnachie had been exchanging messages for some time regarding the claimant. The fact they believed the claimant was "conning" people was a theme in the messages before the grievance was raised.

5 449. We, having had regard to the above points, asked ourselves what was the reason for these comments being made: what motivated Ms Marcella to write in those terms. We concluded that the reason why Ms Marcella wrote in those terms was because she thought the claimant was, to use a colloquial expression, "at it" and she had thought so for some time. The grievance was
10 not the reason, was not a factor, why the messages were sent. The grievance had been sent in on the 3 April: the respondent had received advice they did not need to deal with it: matters had moved on.

450. We decided for these reasons that the claimant was not subjected to victimisation.

15 451. The allegation at point 19 (Ms Marcella verbally abused the claimant at Greggs) did occur. We accepted Ms Marcella's evidence that she had called the claimant a "fat beast". We also accepted this subjected the claimant to a detriment.

20 452. The claimant asserted the reason for this treatment was because she had brought proceedings in the Employment Tribunal and, specifically, because she had made an application to join Ms Marcella as a second respondent to the proceedings.

25 453. We, in considering the reason for the conduct, had regard to the fact the claimant presented her claim to the Employment Tribunal in June 2019 and made an application to amend the claim and join Ms Marcella as a second
30 respondent in August 2020. The claimant also presented a second claim to the Employment Tribunal, regarding post-termination victimisation, to be relied upon should the application to amend not be successful. We noted the claim form made reference to the incident at Greggs happening on the 23 June 2020.

454. The application to amend the first claim form and join Ms Marcella as a second respondent to the proceedings was not made until the 19 August 2020. Accordingly, as at the date of the incident, there had been no application to, or indication of, Ms Marcella being joined as a second respondent to the proceedings. We acknowledge Ms Marcella made reference, in her evidence, to the reasons why she was upset at the time of the incident including the application to join her as a second respondent to the proceedings, but she also added that “it was fast and furious coming at me, so maybe I got confused”. We accepted Ms Marcella had got confused.
455. The question for the tribunal to determine is whether Ms Marcella acted as she did on the 23 June 2020 because the claimant had presented a claim to the Employment Tribunal on the 26 June 2019. We took into account the fact that this incident occurred almost a year after the claim had been presented and in that period no case management action had been taken to progress the claim because of action required to set aside a Rule 21 Judgment and allow a late response to the claim. We refer to this because it demonstrates nothing appeared to have happened with the claim to provoke Ms Marcella's comment being made.
456. Ms Marcella, in her evidence, referred to there being a “relentless vendetta to destroy [me]”. There was reference to the complaints made to The Big Lottery, OSCR, local authorities and schools regarding the respondent and/or the fitness of Ms Marcella to be involved. Ms Marcella also referred to having lost her mother in April 2020 during lockdown, and also the loss of an uncle and cousin. Ms Marcella described herself as “not being in a good place”. Ms Marcella, in particular, spoke of her failure to understand the claimant's apparent desire to destroy the respondent, a charity which is involved in such good work.
457. The tribunal must determine what caused Ms Marcella to act as she did: what was the reason for it? Was the fact of the tribunal claim having been raised a factor? We decided, having had regard to the above points, that the fact the claimant had brought tribunal proceedings was not the reason for the conduct. The reason for the conduct was because Ms Marcella was “not in a good

place” (for the reasons set out in her evidence) and she reacted to give voice to her feelings of disgust at the claimant seeking to destroy the charity. This was supported by the fact Ms Marcella commented to Mr Blair, on the way out, how could he stand by and watch that fat beast do that to a charity.

5 458. We concluded, for these reasons, that the claimant was not subjected to victimisation.

459. We concluded, with regarding to the post-termination complaints of victimisation that the tribunal did not get to the stage of considering whether there was a sufficiently close connection between the prohibited conduct and the terminated relationship because the claimant was unable to show she had
10 been subjected to victimisation. We decided, for this reason, to dismiss this aspect of the claim.

460. The tribunal decided, for all of the reasons set out above, to dismiss this claim in its entirety. We acknowledge the claimant did not have a statement of
15 employment particulars, but an award for this may only be made if the tribunal makes an award in respect of proceedings to which the section applies (Employment Act 2002 section 38). We have made no such award and therefore no award can be made for the failure to provide a written statement of employment particulars.

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Employment Judge: L Wiseman
Date of Judgment: 21 December 2022
Entered in register: 21 December 2022
and copied to parties

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