EMPLOYMENT TRIBUNALS

Claimant: Ms Z

Respondents: (1) Middleton Murray Limited (in liquidation) (R1)
(2) Ian Greaves (R2)
(3) Tyrone Corsinie (R3)
(4) Danny Harrer (R4)
(5) Sharon Palmer (R5)
(6) Julie Deschamps (R6)
(7) Hiscox Insurance Company Limited (R7)

Heard at: London Central (in person) **On**: 14, 15, 16, 20 & 22 June and 7 & 8 July 2022

Before: Employment Judge E Burns
Ms N Sandler
Mr P Secher

Appearances:

For the Claimant:	In person
For the First, Second, Third, Fourth and Fifth Respondents:	Did not attend
For the Sixth Respondent:	Mr Pullen, pro bono Counsel
For the Seventh Respondent:	Helen Bell, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that all of the Claimant's claims fail and are dismissed.

REASONS

THE CLAIMS AND ISSUES

1. In this Judgment, we refer to the First Respondent as R1 in this judgment, but to each of the individual respondents by name. The seventh Respondent is referred to as R7.

2. The purpose of the hearing was to decide liability in relation to three claims arising from the Claimant's employment with the R1. That employment commenced on 31 July 2017 and finished when the Claimant resigned with immediate effect on 29 March 2018.

3. The litigation had a long and complicated procedural history prior to reaching the final hearing. It is not necessary to recite that entire history here. The claims were presented as follows:

   (a) The Claimant presented her first claim, under case number 2201668/2018 (Claim 1) against R1, Ian Greaves and Tyrone Corsinie on 11 March 2018. We do not know the dates when she commenced and finished early conciliation.

   (b) The Claimant presented her second claim under case number under case number 2204671/2018 (Claim 2) against R1, Mr Greaves, Mr Corsinie Tyrone, Danny Harrer, Sharon Palmer, Julie Deschamps and a further respondent on 24 May 2018. We do not know the dates when she commenced and finished early conciliation. The claim against the additional respondent was struck out on 5 January 2022.

   (c) The Claimant presented her third claim against R7 under case number 2200424/2021 on 1 February 2021 following a period of early conciliation which started and ended on 27 January 2021.

4. At a preliminary hearing held on 15 and 16 September 2021, the Tribunal made an Order under Rule 50(3)(a) that the Claimant's medical evidence and condition should not form part of any public hearing, or otherwise be disclosed to the public by any party, and that the public record should refer only to the Claimant having a "medical condition." When drafting this reserved judgment, the panel initially sought to limit our references accordingly. We have, however, found it necessary to include more detail than this allows. Accordingly, we have decided on our own volition to make a further Rule 50 order and anonymise the Claimant. This is made to protect her Article 8 rights. In making this order we have considered the competing rights in Article 6 and Article 10. Our decision is that the Claimant's Article 8 rights override those rights in this case.

5. We have also made a decision under Rule 50 to anonymise the names of some third parties referred to in the evidence. These were learners that the Claimant taught. It is not necessary to know their names to understand our decision. We have anonymised them because we believe them to be minors.

6. The issues to be determined were as set out in the case management order of Employment Judge Davidson following discussion at a case management hearing on 11 April 20219. That order was sent to the parties on 10 May 2019. The issues which were identified are set out in the appendix to this judgment.

7. The list of issues provided somewhat generic descriptions of the conduct about which the Claimant made allegations. In addition, it does not specify the adjustments sought by the Claimant. We sought to address this during the course of the hearing. The precise detail of how we have approached this is set out in our analysis and conclusions section. The respondents present at the hearing accepted that the Claimant met the definition of a disabled person contained in the Equality Act 2010.

8. The Claimant's claim against R7 is brought pursuant to the Third Parties (Rights against Insurers) Act 2010 (the Act). R7 does not dispute that the Tribunal has jurisdiction to consider the claim brought against it pursuant to the Act. It accepts that it has a potential liability under the Act to the Claimant if:

   a) she succeeds in establishing liability against R1 (not the other respondents) for disability discrimination; and

   b) there is a determination that such acts of disability discrimination caused her personal injury.

9. We are satisfied, having reviewed the relevant legal provisions and the insurance policy that this position is legally correct.

10. The Claimant gave us detailed opening and closing submissions in writing. We note that in addition to the claims referred to in the list of issues, these specifically refer to her bringing the following:

    (a) Claims under the Data Protection Act 1998;

    (b) Claims under section 3(1) of the Management of Health and Safety at Work Regulations 1998;

    (c) Claims for constructive dismissal under section 95(1)(c) and section 136(1)(c) of the Employment Rights Act 1996.

11. The Tribunal has no jurisdiction to consider the first two of these and we confirmed this to the Claimant at the hearing. We have not therefore made any findings in relation to such claims.

12. One of the Claimant's claims did originally refer to a claim for constructive unfair dismissal claim under the Employment Rights Act 1996. The Claimant withdrew the claim at an earlier stage in the proceedings, however, because she did not have the requisite two years' service to being such a claim under section 108 of the Employment Rights Act 1996. She was given permission to substitute a complaint of wrongful dismissal for it (1693). We have not therefore made any finding in relation to constructive unfair dismissal pursuant to the Employment Rights Act 1998.

13. Finally in relation to the issues, the Claimant's submissions also made reference to two cases: *Green v Deutsche Bank* (no citation) and *Majrowski v Guys and St Thomas's NHS Trust [2006] UKHL 34.* The first is an

unreported case in which a claimant was awarded damages for personal injury by the High Court. The decision appears to be based on normal tortious principles and/or a breach of the Protection from Harassment Act 1997. *Majkowski* is the leading case on the Protection from Harassment Act 1997. The employment tribunal has no jurisdiction to consider claims under the Protection from Harassment Act 1997 and we have therefore made no finding in relation to any such claim.

THE HEARING

14. The hearing was attended by the Claimant, Ms Deschamps and R7. None of the other respondents were in attendance. The Tribunal, having satisfied ourselves that the missing respondents had been served notice of the hearing and their absence was voluntary, decided to proceed in their absence.

15. The Claimant and Ms Deschamps gave evidence. There were no other witness statements.

16. The Claimant brought a bundle of 975 pages with her. R7's solicitors had prepared a trial bundle with pages numbered from 1 to 3229. (This amounted to 3243 digital pages).

17. The Claimant objected to the use of R7's bundle. The Tribunal decided that the bundle prepared by R7 should be used during the hearing, but where required, in the interests of justice, reference could be made at any time to the Claimant's bundle. The Tribunal's reasons for this decision were essentially pragmatic. The bundle prepared by R7's solicitors was available in sufficient numbers in hard and soft copies and was fully indexed.

18. In reaching this decision, the Tribunal was satisfied that the bundle prepared by R7's solicitors:

    (a) contained all of the documents contained in the Claimant's bundle (this was checked by the Judge); and

    (b) had been prepared in accordance with the order at paragraph 13 of the case management order made by Employment Judge Stout dated 5 January 2022 (sent to the parties on 6 January 2022).

19. There were a few occasions where it was necessary to refer to the Claimant's bundle during the hearing. The Tribunal did this whenever requested by the Claimant and, on its own volition, where it considered reference to the Claimant's bundle to be in the interests of justice.

20. During the course of the hearing some additional documents were admitted into evidence with the agreement of the parties. This included the audio recordings of two meetings, namely the Grievance Hearing of 19 January 2018 and the Grievance Appeal Hearing of 22 February 2018. Transcripts of the recordings were also admitted into evidence. The Claimant had prepared a transcript of the recording of the grievance hearing and R7 had prepared a transcript of both recordings.

21. The Tribunal read the evidence in the bundle to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision below.

22. The Claimant presented as clearly unwell at the start of the hearing. This was not unexpected as her ability to participate in a hearing had been discussed at previous preliminary issues. The Tribunal had previously of its own violation, sought a medical report from her GP. The Claimant provided a brief updated report for the purposes of the hearing.

23. When we say that the Claimant presented as unwell, we mean that she was almost non-verbal initially. She appeared unable to contribute to the early case management discussions other than through nodding or shaking her head and giving short one or two word answers.

24. We were satisfied, however, that the Claimant understood what was happening at the hearing throughout the course of it as she did speak when an issue arose that seemed to be important to her. She also demonstrated awareness of the contents of the bundle and when she wanted to locate a document, we were able to find it. We note that she took no notes during the course of the hearing.

25. We are also satisfied that she was able to give her best evidence in the circumstances. Our perception was that the Claimant was at her most able during the middle to end of being cross examined. Unfortunately, her health deteriorated again after this. We comment further on how we have taken into account her medical condition and the fact that her medication affects her memory when assessing her evidence below.

26. At times, the Claimant became visibly distressed. This manifested itself in self-harming behaviour (scratching at her arms) and we could see that she had plasters on her arms as the hearing progressed. We checked with her whether she felt able to carry on and each time she confirmed that she did.

27. With the agreement of all the parties present, and based on the advice contained in two reports from the Claimant's GP, adjustments were made to the hearing timetable and process to accommodate the effects of the Claimant's medical condition and the medication she takes as follows:

    (a) The hearing was conducted in person.

    (b) We sat for shorter days (no more than five hours) and in addition to our normal breaks, gave the Claimant breaks whenever she requested them or became distressed.

    (c) The Claimant was accompanied by a support worker throughout most of the hearing. The Respondents were not permitted to approach her outside the hearing room.

(d) We allowed the Claimant to take her time when answering questions during cross-examination. When the Tribunal asked the Claimant questions, these were asked only through the Judge.

(e) When Ms Deschamps gave evidence, rather than the Claimant asking her questions, the Claimant identified the questions she wished to be put to Ms Deschamps in writing, which the Judge then asked Ms Deschamps.

(f) The hearing was adjourned to enable the Claimant to prepare written submissions.

28. Although the Claimant appeared in person at the hearing, she was provided with assistance 'behind the scenes' by someone. It was unclear to the Tribunal panel who exactly this was as the evidence available to us as to his or her identity was contradictory. We did not consider it was necessary for us to reach a conclusion on this point. We refer in this judgment to the person as the Claimant's friend.

29. The assistance led to the Claimant giving us long written submissions, all of which contained the following closing statement:

"*I am not a Lawyer or legally trained. This email and letter was written on the Claimant's behalf and she has authorised it*."

The written submissions were often very long, verbose and repetitive and difficult to understand. In addition, many of the points raised in the submissions appeared to be misconceived and based on a misunderstanding of the Tribunal's previous decisions and process. As the Claimant's friend was not present, we were unable to seek clarity from him or her on the points, but did our best to understand and address all the points in them.

CLAIMANT'S APPLICATIONS

30. Prior to the start of the hearing, the Claimant's friend had made several written applications which the panel considered in chambers after having reading into the case. Before hearing any evidence, Employment Judge E Burns went through the provisional view of the panel in relation to each of the applications, including saying which ones we thought had been dealt with previously. Having done this, we asked the parties if they wished to make any submissions, including whether we had missed anything. Neither party did, so we confirmed that our provisional view represented our final decisions on the points and proceeded accordingly.

31. The applications were as follows:

(a) An application that we strike out the responses of the respondents who were not present. The Claimant had made this application previously and it had not been granted previously, but we treated it as being made afresh now that we had reached the final hearing. We declined to grant it.

(b) An application that we strike out the responses of the respondents who had not served witness statements. We noted that this had been previously dealt with by Employment Judge Stout who had informed the Claimant that there is no obligation on a party to provide a witness statement unless they intend to rely on it. We confirmed to the Claimant that we would assess the case based on the evidence before us, which would take into account the absence of witness evidence from the other respondents. In one of her written submissions, the Claimant criticised R7 for not applying for witness orders for the missing witnesses. We explained that R7 was not obliged to do so and that if the Claimant had wanted witness orders to be made, she could have applied for these herself.

(c) An application in relation to documentation that the Claimant said was missing. In particular she cited a lack of investigation meeting minutes, and materials (i.e. signed statements) and grievance meeting minutes. As the position of the respondents was that this material did not exist, we explained to the Claimant that she could raise this in cross examination with the relevant witness and make submission points in relation to it, but we could not order something to be disclosed that did not exist.

(d) An application against Croner in relation to historical issues. As Croner were not representing any party at the hearing we said we would not address this. We note that Croner had previously represented R1 and purported to represent some of the other individual respondents. If the Claimant wishes to pursue this, she should say so in correspondence sent within 28 days of the date this reserved judgment is sent to her.

(e) An application objecting to the second witness statement served by Ms Deschamps. We noted that this had been dealt with previously by Employment Judge Stout who had confirmed Ms Deschamps had leave to rely on it.

(f) An application to strike out the response of Ms Deschamps. We noted that this had been dealt with by Employment Judge Stout.

(g) An application in relation to the settlement agreement signed by Ms Deschamps containing a confidentiality provision. We noted that had been dealt with by Employment Judge Stout.

(h) An application regarding Ms Deschamps' failure to disclose additional diary entries and her suspension letter. We noted that had been dealt with by Employment Judge Stout.

FINDINGS OF FACT

32. Having considered all the evidence, we find the following facts on a balance of probabilities.

33. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

34. This was an unusual case as the circumstances meant that the witness evidence we heard was almost entirely one sided. A further difficulty arose because the Claimant's witness statement was very difficult to comprehend. We were, however, helped by the fact that we had a number of contemporaneous documents available to us. Where matters are disputed and there are gaps in the documentary evidence that should have been filled by a missing respondent or missing respondent witness, we have resolved the dispute in favour of the Claimant.

35. When considering the reliability of the Claimant's witness evidence, we observed that she was very reluctant to accept almost all points put to her during cross examination. This was the case even where the points were ones that we would have thought she could agree easily. We did not interpret this as evasive, however. Instead, we attributed it to the Claimant's distrust, both of her own memories of what took place and the litigation process. We considered that it was not surprising that the Claimant was unable to recollect details given the length of time it had taken for the case to reach a final hearing and her medical condition.

36. We found the audio recordings of the two meetings, namely the Grievance Hearing of 19 January 2018 and the Grievance Appeal Hearing of 22 February 2018 to be extremely helpful, however. These were made at a time when the Claimant was able to articulate her concerns and we have relied heavily upon them to aid our understanding of her version of events and her case. The differences between the woman that we heard on the recordings and the woman who appeared before us at the hearing was very striking.

Background

37. R1 was an apprenticeship training provider and apprenticeship levy consultancy. The Claimant was employed as a Tutor by R1 between 31 July 2017 and 29 March 2018. Prior to joining R1, the Claimant had considerable experience of the work involved.

38. The courses the Claimant was required to teach were short, lasting no longer than around six weeks. They were designed to provide assistance to young people who were not in work or education. The aim of R1's intervention was to enable the students to obtain work placements.

39. The Claimant reported to Ian Greaves who was her line manager. He in turn reported to Tyrone Corsinie. The Claimant did not work at R1's Head Office, but at site which R1 rented from a third party. The Claimant had a set of keys for the site and was provided with a mobile phone and tablet by R1 in order to be able to perform her work.

40. All of the other respondents were also employees of R1 during the Claimant's employment. They held the following roles:

- Mr Corsinie, was the Head of Delivery, Quality & Compliance
- Danny Harrer, was the Sales Director
- Sharon Palmer, was the Finance & Payroll Manager
- Ms Deschamps, had worked for R1 since 30 May 2017, but on 16 January 2018 her job position increased in scope and she effectively became the Head of HR.

41. It is relevant to note that Ms Deschamps was suspended in the afternoon of 7 February 2018. We find that her access to the respondent's IT systems, including email removed from her at this time and she did not further work after her suspension. We note that she was copied into an email dated 13 February 2018 which was sent to the Claimant by Ms Palmer. We do not consider this indicates that Ms Deschamps was working on this date. We find that this occurred because Ms Palmer 'replied all' to an email the Claimant had sent to her and Ms Deschamps (147). Ms Deschamps was summarily dismissed on 29 March 2018.

42. R1 had compulsory employer's liability insurance with R7 during the Claimant's employment (2304 – 2505).

43. The relevant part of the policy for the purposes of this case is found at page 2347 of the bundle and says:

What is covered

Claims against you	If any **employee** brings a claim against **you** for **bodily injury** caused to them during the **period of insurance** arising out of their work for **you** within the **geographical limits**, **we** will indemnify **you** against the sums **you** have to pay as compensation. The amount **we** pay will include **defence costs** but **we** will not pay costs for any part of a claim not covered by this section.
Criminal proceedings	If any governmental, administrative or regulatory body brings any criminal action against **you** during the **period of insurance** for any breach of statute or regulation directly relating to any actual or potential claim under this section, **we** will pay the costs incurred with **our** prior written consent to defend such an action against **you**.
Claims against principals	If, as a result of **your business**, any party brings a claim, which falls within the scope of **What is covered**, Claims against you, against a customer of **your business** for whom you are providing services under contract or agreement and **you** are liable for that claim, **we** will treat such claim as if made against **you** and make the same payment to such customer that **we** would have made to **you**, provided that the party to be indemnified: a. has not, in **our** reasonable opinion, caused or contributed to the claim against them; b. accepts that **we** can control the claim's defence and settlement in accordance with the terms of this section; c. has not admitted liability or prejudiced the defence of the claim before **we** are notified of it; d. gives **us** the information and co-operation **we** reasonably require for dealing with the claim.

Bodily injury is defined on the same page as meaning death or mental injury or disease.

44. According to information available on Companies House, R1 entered into a creditors' voluntary liquidation on 3 December 2020.

Relevant Employment Documentation

45. A copy of the Claimant's contract of employment was contained in the bundle at page 301, together with a copy of her job description at page 336. It is relevant to note that the termination clause provides that the employer must give the employee one week's notice during the three probationary period and one month thereafter by the employer (304). The Claimant passed her probationary period.

46. At the time of the Claimant's employment, R1 had an Employee Handbook (Version September 2017) which contained the following relevant policies and procedures:

(a) Bereavement Leave and Other Time off (804)
(b) Sickness /Injury, Absence Payments and Conditions Policy (806)
(c) Company Mobile Phone Policy (812)
(d) Grievance procedure (831)
(e) Equal opportunities policy (832)
(f) Harassment Policy (836)
(g) Data Protection Policy (839)
(h) Leaving the Company (844)

47. The Grievance procedure was as follows:

"It is important that if you feel dissatisfied with any matter relating to your employment you should have an effective means by which such a grievance can be aired and, where appropriate, resolved.

Nothing in this procedure is intended to prevent you from informally raising any matter you may wish to mention. Informal discussion can frequently solve problems without the need for a written record. However, if you wish to raise a formal grievance you should normally do so in writing from the outset.

You have the right to be accompanied at any stage of the procedure by a fellow employee who may act as a witness or speak on your behalf to explain the situation more clearly.

If you feel aggrieved at any matter relating to your work (except personal harassment, for which there is a separate procedure following this section), you should first raise the matter with the person specified in your Statement of Main Terms of Employment, explaining fully the nature and extent of your grievance. You will then be invited to a meeting at a reasonable time and location at which your grievance will be investigated fully. You must take all reasonable steps to attend this meeting. You will be notified of the decision, in writing, normally within ten working days of the meeting, including your right of appeal.

If you wish to appeal you must inform a Director or member of the Senior Management Team within five working days. You will then be invited to a further meeting, which you must take all reasonable steps to attend. As far as reasonably practicable, the company will be represented by a more

senior manager than attended the first meeting (unless the most senior manager attended that meeting).

Following the appeal meeting you will be informed of the final decision, normally within ten working days, which will be confirmed in writing."

48. R1 also had a Complaints Policy which applied to members of the public, including learners doing its courses. A copy was contained in the bundle at page 306, but unfortunately was not legible.

The Claimant's Disability

49. The Claimant's medical condition was first diagnosed by a doctor over ten years before starting her employment. According to her medical records this was on 4 September 1996 (3168). She says that she first experienced symptoms of it a year before this, but it was not until September 1996 that she felt able to speak to a medical professional about it.

50. The Claimant told us that the effects of her medical condition varied in the time that she has been diagnosed. Since being diagnosed she has worked and raised a child. However, stress in her personal life or work life have at times triggered episodes when she has become unwell and she has been unable to manage everyday life. She provided some examples of the ways in which the medical condition can affect her. She currently takes a high dose of medication to treat the medical condition.

51. The Claimant did not inform R1 or anyone at R1 that she had the medical condition until 3 January 2018.

Chronology of Events

52. The Claimant told us when giving evidence that she considered she had a 'professional relationship' with her line manager, Mr Greaves until 5 December 2017. However, her perception changed as a result of two incidents: the first being an interaction between them which occurred on 5 December 2017 and the second being an email exchange on 19 December 2017. There were also calls between the two dates, but her main allegations about the conduct of Mr Greaves stem from the interactions on 5 and 19 December 2017

53. The Claimant provided more detail of the background to her complaints at the Grievance Hearing conducted on 19 January 2018. Having listened to the recording of the grievance hearing, we consider the following to be relevant.

The Early Autumn Cohort

54. The Claimant began teaching a particular cohort of learners in around late September/ early October 2017. The cohort included two young women, AL and DB. In addition, DB's sister, NB was part of the same cohort. The Claimant found their behaviour to be very challenging.

55. An issue arose involving NB, which led to concerns being raised to Mr Greaves (R2) about the Claimant. He asked the learners to prepare statements in the form of emails commenting on the Claimant. We do not know if we have seen all of the emails, but four dated 30 October 2017, from several members of the Claimant's cohort were contained in the bundle and were received from students with the initials AL (116), DB (1888), TS (114) and RB (115).

56. Although the emails from TS and RB were complimentary about the Claimant, the emails from AL and DB were not. Mr Greaves did not show the Claimant the emails or speak to her about them at the time. He did, however, tell her that a safeguarding concern had been raised and that she should not worry about it. During a meeting with her about the matter, the Claimant raised concerns with Mr Greaves about the behaviour of the cohort and also about being a lone worker.

57. The Claimant felt that Mr Greaves was not supporting her as a line manager should. She did not think he was being nurturing or helpful. She began to feel concerned about the way he spoke to her and perceived it was different to the way she heard him speak to one of her colleagues, Natasha Jones, who was also a relatively new tutor working for R1.

58. A little while later, an interaction then occurred between the Claimant and AL when AL became angry with the Claimant. The Claimant said she did not feel able to discuss the incident with Mr Greaves at the time.

59. At around this time, on 15 November 2017, the Claimant attended her GP surgery for a review of her mental health plan. The GP has noted that the Claimant told her that she "*doesn't feel 100% at the moment, job is stressful and struggling to manage*" (2544)

60. The Claimant's cohort changed to a new cohort of learners shortly after this. R1 had a process in place to seek feedback from the previous cohort and, through that process, feedback was sought from the learners previously being tutored by the Claimant about their experiences. Via this process, a complaint from AL about the Claimant reached Louise Cooper, Client Services Assistant on 23 November 2017. A copy of the complaint was not contained in the bundle.

61. Ms Cooper forwarded the complaint to Mr Corsinie who asked Mr Greaves to address it. He did this with the Claimant around a week later. While providing feedback to the Claimant following an observation, he mentioned that a complaint had been received, He did not share a copy of the complaint with the Claimant. She assumed it was about the difficult interaction she had had with AL and recounted this to him. According to the grievance transcript, Mr Greaves typed a note of what the Claimant told him. We have not seen a copy of that note. She heard nothing further until 5 December 2017.

5 December 2017

62. On 5 December 2017, Mr Greaves visited the site where the Claimant worked and informed her that AL and DB were meeting with him there later that day.

63. Mr Greaves later made a note of the interactions that occurred that day (the Review Note). According to the date and time on the Review Note, it was prepared that day between 12:15 and 1:20 pm. We consider it to be a reliable contemporaneous document.

64. The Review Note says the following:

> *"I met with AL and DB who had a complaint against [the Claimant], their tutor. I thanked them for coming in and apologised for any wrong they felt they had experienced. I then asked AL to read her original complaint from an email she sent into Client Services which she did. I asked if there was anything else they wanted to add to it and they said no.*
>
> *I asked the learners what their expectation was and they said they did not want anyone to lose their job, but they did not want anyone to experience what they did, they felt [the Claimant] did a bad job as a teacher. The learners feel as though it was a bad experience and that [R1] should get someone who can handle the job.*
>
> *DB felt that most of the class, including the two who left had bad experiences and that they were set up to fail. DB felt that she was not given any assistance and that [the Claimant] was rude and trying to belittle her. DB felt that [the Claimant] did not explain things properly and she is not able to do the job. AL agreed that {the Claimant] is not able to handle the job.*
>
> *Both AL and DB have now been placed and are awaiting word on their start date. DB said that she was asked to come in today but that she had to rearrange as she had this meeting today. I offered to lay I liaise with Mohammed on this, but at the end of the meeting, they said they would do it themselves.*
>
> *I asked them if they wanted [the Claimant] to come in and apologise and they said yes, that it would help in terms of closure. They believe that [R1] is a nice company and has helped her to get a job, but they don't want people to go through what they have, because other people would not be able to deal with it as they have.*
>
> *I asked if [the Claimant] had a part to play in getting them ready for work, and AL agreed but still thought the job was not for her as she has ways that are brutal. AL said that even if they made it difficult for [the Claimant] that they should not be treated badly. Both AL and DB said that if the Claimant came in and apologised it would be awkward, but they would want the closure.*
>
> *I then left the room to speak to [the Claimant] about it. I asked her to excuse herself from the class and explained what DB and AL wanted. [the Claimant]*

refused as she felt that she had done nothing wrong. She explained how the learners had treated her and that she was feeling stressed and in fear for her safety as they had family members in gangs or in prison.

She said that she had done everything she could to support the learners even working in her gap week to help them to finish their work. [The Claimant] explained how she had been supported by the Office Manager on site and a lawyer from one of the companies in the building, who had seen how upset she had been at times. I tried to explain to her what to say and gave her an example from my own experience, however, [the Claimant] got agitated to the point of tears and had to excuse herself to go to the washroom.

I went back to the room where AL and DB were and explained to them that [the Claimant] would not be able to meet with them at that time.

While speaking to them, [the Claimant] came in with the Office Manager and said she would speak to the learners with the Office Manager as a witness. I told her that that would not be possible as I was the witness and her manager and that we couldn't bring someone into the situation from outside the company. I thanked the Office Manager and [the Claimant] escorted her back outside.

I went back to AL and DB and I said that [I] would forward the case to HR and someone would get back to them with the next step. AL said she didn't want to come back into waste her time and I said we could call her and I thanked them for coming in (112-113).

65. The Review Note was not shared after the meeting with AL, DB or the Claimant. They were therefore not given an opportunity to read and verify its contents. The Claimant saw the Review Note prior to preparing her subsequent grievance. We know this because the Claimant's grievance letter quotes from the Review Note. According to the recording of the Grievance Hearing conducted on 19 January 2018, the Review Note was posted to the Respondent's on-line HR system and the Claimant was able to access and read it there.

66. The Claimant described the interactions she had with Mr Greaves on 5 December 2017 in some detail at the Grievance Hearing. Her version of events is largely consistent with the Review Note.

67. In the recording, the Claimant said that Mr Greaves had approached her and said that AL and DB would like her to apologise to them. He did not instruct her to apologise, but told her that sometimes learners say thing about tutors and the best way to diffuse the situation was to apologise. She refused, however, because she did not feel she had anything for which she needed to apologise. She confirmed that she became distressed when speaking with Mr Greaves and spoke to him about how she had not been sleeping. She also confirmed that she did later meet with the two learners that same day, but did not apologise.

68. The Claimant explained to us that she had been expecting a classroom observation that day and so was already slightly on edge before Mr Greaves approached her to ask her to apologise. She found the interaction very stressful because she was not provided with any copies of any complaints so she did not understand what she was being accused of having done. That was the main reason why she did not agree to apologise.

Calls and Ongoing Status of the Complaint

69. When giving evidence at the hearing the Claimant told us that Mr Greaves rang her after the interaction on 5 December 2017 and again asked her to apologise because AL and DB were not happy. We do not find that this occurred on that same day, but that the Claimant has muddled the dates up when this took place. According to the version of events which is captured in the recording, we find that Mr Greaves did ring her and ask her to apologise around a week later. This would have been on or around 12 December 2017. At this point in time the complaints appear to have still been active.

70. We have been unable to establish what happened to the complaints after this. We know that no action was taken against the Claimant in respect of the complaint. There was some discussion of it at the grievance hearing at which time it appears to have been unresolved. We think the most likely thing that occurred was that there was no follow up as the learners no longer wished to pursue it.

19 December 2017

71. On 19 December 2018, the Claimant and Mr Greaves again spoke on the telephone. She described the call as follows when speaking about it at the grievance hearing:

"I had a call from Ian a couple of weeks before Christmas and it was a very sort of "hi Z, how are you"? I said I'm fine and he asked me did you receive the email from Mohammed, I said what email, he said "come on Z, you know about the email"? I said I'm sorry Ian what email, he said to me the email., don't you know the 3rd of every week this is exactly how he said it, the third of every week your meant to send in CV's to Recruiters, I said ,I did not know that, he said "come on Z you know that, Come on Z, you've been here long enough, I said Ian I didn't know that" (taken from pages 27 – 28 of the Claimant's transcript of the recording).

72. In her evidence to us, the Claimant told us that Mr Greaves "screamed" at her during this conversation. We do not find that he did. Although the Claimant referred at the Grievance Hearing to Mr Greaves having a "bullying tone" during the call, she did not say he had screamed at her. We find that had he done so, she would have said this had this occurred. In addition, the Claimant told Mr Corsinie that during the call she had put Mr Greaves on speaker phone and he spoke directly to the learners in her class about ensuring they uploaded their work onto R1's on-line system. This action is incompatible with a description of Mr Greaves screaming at her.

73. Following the telephone conversation, Mr Greaves sent the Claimant an email (timed at 14:47) which the Claimant described at the grievance hearing as passive/aggressive and different to how he normally communicated with her. The email included the following sentence:

"*You mentioned that you had received the email about the CV's and you said that they were all completed and [Mr Koroma] would have them by the end of the day."* (366)

74. On receipt of this email the Claimant searched through her email system to see if she had received an email from Mr Koroma. She also spoke to Mr Koroma to ask him if he had sent her email. He told her that he had not and if he had needed CVs from her, he would have rung her and asked for them.

75. The Claimant emailed Mr Greaves at 18:41 later that same day saying:

"*Thank you for your email earlier on.*

1. *As discussed the CVs have been sent* to *Mr Koroma*
2. *Just to confirm I carried out a search of all emails from Mr Koroma and there is no record of a request for CVs for this group.*
3. *Please can you forward me a copy of the email which you referred to by the close of business on Wednesday 20th December 2017.*

….

7. *I am extremely concerned why you are not asking me to progress the learners by the end of the week to 20%, when this has not been the custom or practice for the last 2 cohorts. Moreover, the learners are to finish on Thursday, so you have set me an unachievable goal – that is you have set me up to fail. I consider your actions to be harassment and please desist immediately."* (336)

76. The Claimant's reply confirms that there was a telephone discussion with Mr Greaves about CVs and she agreed to ensure these were sent to Mr Koroma. It emphasises however, that she rejected his assertion that Mr Koroma had sent her an email about the CVs. Our finding is that no such email was ever sent.

77. Mr Greaves tried to speak to the Claimant by phone the following day. When she did not call him back as requested, he emailed her. She emailed him back on 21 December 2017 saying, "*At present I do [not] wish to have a one to one conversation with you without another member of staff present from HR or TC. At present I am feeling harassed, anxious and stressed from your contact*." Mr Greaves replied saying: "*It would be great to have a conversation with you as it looks like we got out wires crossed. I'm sorry that you feel harassed, anxious and stressed but if you give me a call when you feel ready, we can discuss it. (1237)*

Sickness Absence and Grievance

78. The Claimant and Mr Greaves had no further interactions because of the Christmas break. She took some leave over Christmas but was then absent on sick leave from 3 to 9 January 2018. She presented a fit note dated 2 January 2018 to R1 that recorded that she was not fit for work. The reason for her absence was said to be "Stress related symptoms." (109)

79. The Claimant sent her fit note and a formal grievance to Mr Corsinie on 3 January 2018 (110). The grievance letter is dated 3 December 2017, but this was a typo on the part of the Claimant (100 – 108).

80. The Claimant began the grievance letter by informing R1 that she had depression and considered herself to be disabled under the Equality Act 2010. She said that she wished to lodge a formal complaint under the Equality Act 2010 against Mr Greaves for victimisation, harassment and bullying.

81. Although set out in a number of different points, the Claimant's grievance was about the interactions she had had with Mr Greaves on 5 and 19 December 2017.

82. With regard to the 5 December 2017 interaction, the Claimant alleged that Mr Greaves had colluded with AL and DB in the making of a false complaint against her which besmirched the Claimant's professional reputation. Her grievance also alleged that he had (a) failed to investigate the veracity of the allegations, (b) predetermined the outcome of any investigation by himself apologising to AL and BD and telling them that the Claimant would also apologise to them and (c) bullied the Claimant when asking her to apologise. (Points 6 (a) – (p) and 7).

83. With regard to the 19 December 2017 interaction, the Claimant alleged that Mr Greaves had falsely stated the Claimant had accepted that she received an email from Mr Koroma which said that she had not responded to a request for the CV of learners when no such email existed (points 8, 9 and 10 of the grievance).

84. The Claimant indicated that in order to resolve the matter she required the following outcome form her grievance:

    a) *"This treatment by [Mr Greaves has caused me to become ill. Therefore, please would [Mr Greaves] immediately desist from his acts of detriment against me?*

    b) *Please would [Mr Greaves] withdraw his allegations against me?*

    c) *Please could I have a new manager?"*

85. Although the grievance refers to the Equality Act 2010, we note that it does not accuse Mr Greaves of discriminating against the Claimant on the grounds of any protected characteristics. It accuses him of bullying and harassing her, but does not say that such bullying or harassment is related

to any protected characteristic. Finally, the letter refers to Mr Greaves victimising the Claimant. The grievance letter accurately summarises the definition of victimisation found in section 27 of the Equality Act 2010 (point 5) and says, that "The Equality Act (the Act) places a duty [on employers] to ensure that they do not subject another person to a detriment because have made a formal complaint" (point 4). However, it does not say that the Claimant has made a previous formal complaint and does not accuse Mr Greaves of being motivated to act badly towards because she has made a prior formal complaint against him.

86. The Claimant visited her GP on 9 January 2018. Her medical notes reveal that she discussed her employment with her GP. The Claimant told us that she did not instigate the discussion. She said that her GP could see that she was very stressed and asked her if she wanted to change her job, to which she had responded positively. The Claimant was concerned at that time about not being in a job, however, as this would have resulted in her losing her home.

87. The Claimant returned to work on 10 January 2018. In view of her grievance, she was temporarily assigned to the line-management of Joy Lamina. Ms Lamina conducted a return to work interview with her that day (2296). The Claimant told Ms Lamina that her absence was due to depression and she considered the condition amounted to a disability. The return to work form prompted Ms Lamina to ask the Claimant if there was anything R1 could do to support the Claimant's return to work. The form notes the following:

"Z has requested that instead of receiving SSP that her annual leave be taken into consideration as not getting her full pay will put her in financial hardship. This will then have an impact in her wellbeing. Z is aware that this is out of good will as this is not company policy, Z will keep this confidential and is aware that this is a oneoff. A has also requested that the most important support is to be there, have someone in the office and heaters in the office."

We note that the Claimant did not say that she wanted the temporary change in her line management to be made permanent.

88. On 15 January 2018, Ms Palmer sent the Claimant a letter inviting her to attend a grievance meeting (139). The grievances had been forwarded to her by Mr Corsinie.

89. The Claimant replied to the email the following day (16 January 2018) to confirm her attendance at the meeting. She asked that she be provided with copies of the signed witness statements of AL, DB and Mr Koroma and if she could record the hearing (139).

90. Ms Deschamps was promoted to the role of Head of HR on 16 January 2017.

91. Ms Palmer responded to the Claimant's email (copying Ms Deschamps in) on 18 January 2018. She confirmed that the Claimant could record the

hearing and attached "*the original complaint that came into Client Services from AL, as requested*." In addition, she said:

"We understand that DB was at this time supporting AL as her companion when [R2] spoke to her.

We have left a message for [Mr Koroma] to come back to us and we are still waiting for him to respond and will advise you as soon as we have any new information." (138).

92. In fact, the information Ms Palmer set out in this email was incorrect. Although AL was the only leaner to have submitted a formal complaint via the feedback process, DB had also previously complained about the Claimant.

Grievance Hearing

93. The grievance hearing took place on Friday 19 January 2018 at 2 pm as planned. It lasted around an hour.

94. Mr Corsinie conducted the hearing and Ms Deschamps was present to take notes. In fact, Ms Deschamps did not produce a note of the hearing afterwards, because the hearing had been recorded. She made some handwritten notes for her own use. She ceased to be in possession of these later as a result of her subsequent suspension and dismissal.

95. We also find that Ms Deschamps did not have a copy of the Claimant's grievance during the hearing or copies of the documents Mr Corsinie had. Her involvement as note taker had been arranged only the day before. Ms Deschamps was not aware that the Claimant had a medical condition that she was asserting was a disability in advance of the Grievance Hearing. She learned about this at the Grievance Hearing.

96. From the recording of the hearing, we find the following occurred. First, Mr Corsinie checked that the Claimant was happy to attend the meeting unaccompanied. She confirmed that he was. He was very supportive and sensitive to the Claimant's concerns and to the fact that she had shared that she had a history of mental illness. He gave her a full opportunity to present her version of events and explain her concerns. The Claimant described in her own words what had happened on 5 and 19 December 2017 and why she was unhappy with the behaviour of Mr Greaves. She also explained that the cohort that had included AL and DB had been very difficult.

97. When asked a direct question about how she was currently feeling the Claimant replied to say that she was not feeling stressed at that time as she had a much better cohort of leaners and was happy with her current line management. She said she felt that both Mr Corsinie and Ms Lamina were very supportive.

98. There was also a discussion about whether the Claimant could be line managed by Mr Greaves going forwards. She said that she would not be happy with him continuing to be her line manager. When asked if their

relationship was reparable, however, she did not say that it was not. She said that would behave professionally towards him. The Claimant made no mention of wanting a new line manager as a reasonable adjustment.

99. The Claimant also said, during the course of the meeting, that the reasons her grievance used the terms "bullying", "harassment" and "victimisation" was because her partner had written it for her. She explained that he understood the terms because he was a tribunal case worker who supported people who are marginalised with employment cases. We interpret her comments as meaning that she understood that the terms had technical legal meanings, but that she could not expand upon them herself.

100. Ms Deschamps played hardly any role in the grievance meeting at all.

101. On 22 January 2018 (16:41) Ms Deschamps sent the Claimant an email with an update about the outcome from the grievance meeting She explained that as Mr Greaves was on paternity leave, she was seeking the Claimant's agreement to an extension of time to provide an outcome.

102. It is notable that Ms Deschamps uses "*we*" in the email and refers to "*our investigation*" it in (149). Ms Deschamps told us that she did not get involved in the conducting any of the subsequent investigations and the outcome of the grievance was decided solely by Mr Corsinie She said that her use of the words "we" and "our" in the email was professional because she was writing on behalf of R1 rather than because she had any actual involvement in deciding the grievance. She told us that she provided him with assistance in drafting the outcome letter, but that was essentially limited to ensuring that he had covered all the relevant points raised in the grievance letter rather than in relation to the substantive content.

103. We find, as a matter of fact, that the role of Ms Deschamps was limited notwithstanding what she had said in the earlier email. We make this finding because the outcome letter is signed only by Mr Corsinie and uses the first person throughout. There is no suggestion in it that Ms Deschamps was a joint decision maker. In addition, the rationale in the letter reflects what Mr Corsinie said at the Grievance Hearing and is captured in the recording.

104. With regard to the extent of the investigation conducted by Mr Corsinie, the bundle did not contain any investigation notes created by him. Ms Deschamps was able to confirm that he met with Mr Greaves in late January to get his version of events, but that she was not present at that meeting. She was aware of it because she met Mr Corsinie shortly after it took place. We note that the outcome letter records that Mr Corsinie spoke to Mr Koroma, but makes no reference to any other investigations undertaken by him. We find it likely that when they met. Mr Corsinie disclosed to Mr Greaves that the Claimant had informed R1 of her medical condition

105. The Claimant replied to Ms Deschamps' email of 22 January 2018 on the same day at 5:39 pm. She confirmed that she was happy that time be extended for the outcome. In addition, she said the following:

"*However, as you are aware this is not a matter of lack of communication between myself and [Mr Greaves]. It has been documented and evidenced that Mr Greaves deliberately committed the following acts of victimisation, harassment and bullying:-*

For example:

(a) [Mr Greaves attempted to mislead – that is, that I had not actioned a non-existent email from Mohamed Koroma

(b) By email: [mr greaves] attempted to mislead that is that I confirmed to him that I had never received the aforementioned 'non-existent' email

(c) IG attempted to mislead that is, that there had been a complaint from DB

[Mr Greave's] ongoing acts of detriment have had a negative effect upon my health and caused my disability - that is my depression to be exacerbated. Therefore, to resolve this matter: I request the following 'Reasonable Adjustments under the Equality Act 2010 – that is the appointment of another line manager for me in order that I will not be excluded from work because of my disability.

The following case law is salient with regard to an Employer failing to address the above detriments:

a) Helen Green v Deutsche Bank
b) *William Majtowski v Guys and St Thomas's NHS Trust*" (158)

106. Ms Deschamps could not recall if she had forwarded this email to Mr Corsinie. She thought she probably had done so.

Grievance Outcome

107. Mr Corsinie sent the grievance outcome, in the form of a letter dated 31 January 2018, to the Claimant by email of 1 Feb 2018 (16:18) (134 – 137). In the letter he provides a response to each of the numbered points 6 (a – p), 7, 8, 9 and 10 contained in the Claimant's grievance letter.

108. In relation to the issues arising out of the interactions on 5 December 2017, his conclusions were that Mr Greaves did not collude with AL or DB to generate a false complaint against the Claimant. Mr Corsinie explained why he considered this to be the case in some detail.

109. With regard to the issue of Mr Greaves apologising to the learners, Mr Corsinie said, "*We have a duty of care to ensure any complaint raised by a young learner is addressed…. It would be a natural course of action to thank the learner for attending the meeting and to apologise to them for any wring they felt that had experienced.*" He added, "*I would expect from any of my team to follow our complaint procedure and to show empathy for a bad experience an individual felt that may have had."*

110. Mr Corsinie then acknowledged that Mr Greaves should have provided the Claimant with a copy of the complaint given her time to review and consider it before asking her to apologise. In his letter Mr Corsinie explained that "*I do consider Mr Greaves could have been a little clearer on how he conducted his investigation with you and explain the procedure. At this time, it is my belief that Mr Greaves was reaching into possible solutions with the learner and not giving you a direction [to apologise*].

111. Mr Corsinie concluded saying that he did not consider Mr Greaves' conduct towards the Claimant on 5 December 2017 amounted to bullying or harassment. He noted that Mr Greaves had in fact tried to show empathy with the Claimant by sharing his own experience of having been complained about with her. Finally, he conceded that Mr Greaves should not have sought to escalate the complaint to HR following the interaction on 5 December 2017, but should instead have directed it to the head of Client Services.

112. With regard to the interactions on 19 December 2017, Mr Corsinie agreed that Mr Koroma had not sent an email to the Claimant asking her for CVs. He said:

"*This has been addressed with Mr Greaves and explained that communication must be clear and articulated to all parties. However, sending CVs by the end of the third week of the placement team is part of the process which all tutors must adhere to."*

His conclusion was that Mr Greaves had not harassed, bullied or victimised the Claimant in relation to this incident, but instead had followed R1's processes.

113. We note that Mr Greaves does not expressly say whether his conclusion was that Mr Greaves had lied deliberately to the Claimant or there had been a misunderstanding or miscommunication by Mr Greaves. We interpret this paragraph as saying the latter.

114. In addition, we consider he added the additional sentence about sending CVs in order to emphasise that even if there had been no email from Mr Koromoa, Mr Greaves was not acting inappropriately chasing up the CVs. We note that the Claimant's position was that there was no such process, but we do not accept her evidence on this. Although there may have been no written process, it is entirely plausible that there was an expectation that by the third week of the programme, something would be provided to the placement team so that they could start the process of looking for placements for the learners.

115. He concluded the outcome letter by saying:

"[R1] are committed to the well-being of all our employees and are committed to working with you and [Mr Greaves] to put into place the below

actions. I would like to meet with you to discuss the best way forward, please contact me at your earliest convenience so that this can be arranged.

May I suggest that the following action points are addressed to ensure that this type of situation does not happen again.

- *We conduct mediation sessions (one:one, then joint) to work on a solution to create a better understanding of how you and [Mr Greaves] work together;*
- *This will include a trial period of 2 months, with support put into place for you and [Mr Greaves] to implement a working solution for both parties. This will be reviewed at the end of the two months;*
- *The business will ensure another member of the team attends the Wandsworth branch, during the week as additional support;*
- *a follow up meeting is held between you and me to review what support you will require regarding your well-being and to support you in managing conflict;*
- *R1 will be running workshops for all R1 Managers in how to conduct an investigation, address conflict including an understanding of basic employment law in March 2018. This will give our Manager further tools to and serve as a refresher on how to manager Employee Relations moving forwards."*

116. Finally, he set out what the Claimant should do if she wished to appeal against the outcome.

117. We note that Mr Corsinie did not address the point raised in the Claimant's email of 22 January 2018 regarding requiring a permanent change of line manager as a reasonable adjustment in the outcome letter. As he was not present, we were unable to ask him about this. Ms Deschamps told us Mr Corsinie developed this plan on his own without her assistance. She told us that he was the kind of manager that wanted to mend relationships and she thought this was the basis for the plan.

118. The Claimant interpreted the reference to a trial period as somehow making her subject to a performance review process. This was a perverse interpretation in our judgment, The trial period was simply to enable R1 to monitor how the line management relationship was, so that if necessary, R1 could put other measures in place if it remained strained.

Appeal

119. The Claimant submitted an appeal to Mr Harrer on Sunday 4 February 2018 (118 – 133). It was a lengthy 16 page document headed:

"*Re: Letter of Appeal against the Grievance Decision Letter*
Re: Formal Complaint against the Grievance Decision Letter
Re: Reasonable Adjustment Request under the Equality Act 2010"

120. In the letter, the Claimant stated that she considered the grievance decision letter to be a "*further act of ongoing victimisation*" and accused Mr Corsinie of "*attempting to mislead*."

121. The letter quoted the parts of the grievance outcome letter to which the Claimant objected with her reasons. In essence, the Claimant said that she disagreed with all of the findings Mr Corsinie had made in relation to the approach adopted by Mr Greaves with regard to the complaints by AL and DB and insisted that Mr Greaves was guilty of bullying and harassing her. As with the grievance letter, the appeal letter did not assert that the bullying and harassment was related to any particular protected characteristic.

122. The appeal letter also raised a new issue, which was an assertion that as DB had not complained about the Claimant, her views should not have been taken into account by Mr Greaves when conducting his investigatory steps. The letter noted that R1 had confirmed to her that DB only attended the meeting to support AL and that it has received no complaint from DB.

123. The letter also said that the Claimant considered herself to be "*a victim of fraud by false representation*" and quoted section 2 of the Fraud Act 2006. The reason for this assertion was because Mr Corsinie had "de facto confirmed that [Mr Greaves] had lied about [Mr Koroma] sending an email, it follows that he also lied when he stated that Z had confirmed receiving [Mr Koroma's] email.

124. The letter concluded by saying:

> "*Z has previously requested that you institute the Reasonable Adjustments in order for this matter to be resolved and that she is not excluded from work because of her disability. However it has been shown in your Grievance Hearing Decision letter that [R1] and its agents have chosen to continue further acts of detriment against her. Therefore please be aware that this matter had been lodged with ACAS as part of the Employment Tribunal process against the following prospective respondents:*
>
> *(a) R1,*
> *(b) Mr Greaves*
> *(c) Mr Corsinie.*

125. The final paragraph set out four things that the Claimant wanted R1 to do the following to resolve the matter:

a) Ensure an Occupational Health Assessment was carried out
b) Remove Mr Greaves and permanently appoint another Line Manager "to prevent further harassment"
c) Carry out "disciplinary meeting/s"
d) To receive apologies from both Mr Greaves and Mr Corsinie

Fit Note dated 5 February 2018

126. On Monday 5 February 2018, the Claimant emailed Ms Deschamps attaching a fit note. The fit note was dated 5 February 2018 and covered a

3 month period form 5 February to 4 May 2018. The box saying, "you may be fit for working taking account of the following advice" was ticked as was the box saying, "workplace adaptations". The sick note said: "*Needs assessment by employer's medical assessor to assess personality issues at work and effect in patient*." (156)

127. In her covering email, the Claimant said that her disability was being exacerbated by the Grievance Hearing decision letter and R1's failure to deal with the grievance in a fair manner. She added: "*The Statement of Fitness for Work also states that I am fit for work provided that you seek an Occupational Health Report. Therefore, I am returning to work on the basis that R1 are seeking to obtain an Occupational Health Report"* The Claimant asked that the email be placed before Mr Harrer for his consideration as he was conducting the Grievance Hearing Appeal and confirmed that he had consent to make contact with the Claimant's GP.

128. The Claimant continued to attend work following submission of the fit note.

129. Ms Deschamps was not aware what arrangements R1 had with any occupational health providers. Her diary notes of 5 February 2018 record receipt of the Claimant's grievance appeal and there is a reference on the same page to occupational health. She replied to the Claimant's email with two emails asking for her authorisation to obtain a medical report. Copies of the emails were captioned in the bundle but not the documents attached to them. The first email was sent on 5 February 2018 at 13:58 (155) which appears to attach a letter and consent form to gain the Claimant's permission to obtain a doctor's report. The second was sent on 6 February at 14:23 (153) and appears to attach a letter requesting authorisation to obtain a doctor's report.

130. Ms Deschamps told the tribunal that she must have processed the fit note by uploading it on the R1's on-line HR system or it would not be available for the purposes of the hearing.

131. The Claimant says she completed the consent form and sent it back to R1. She kept a copy of the consent form which shows it was signed by her on 6 February 2018 (335). The Claimant has not produced a covering email showing that she emailed the consent form back, however.

132. Ms Deschamps has no recollection of receiving the Claimant's consent form. She was suspended from work on 7 February 2018 (817) and subsequently dismissed on 29 March 2018. Her access to the Respondent's email or HR system was removed during her suspension and after the termination of her employment.

133. Ms Deschamps explained to us that while she was working for R1 she kept a diary. It continued to be in her possession after her suspension and termination. This was useful for her because she pursued legal action against R1. Once the legal action came to an end, however, she destroyed the diary. At that time, she was unaware of the claim by the Claimant at the time. Her diary entries for 5 and 7 February 2018, which were included in

the bundle at the hearing, survived for the purpose of this litigation only because they were used in the other litigation and were kept by the lawyer representing her.

134. We find, on the balance of probabilities, that the Claimant did not provide R1 with a copy of the signed consent form. We are sure that she meant to return it, but the absence of a covering email leads us to believe that she did not do. In addition, our finding is reinforced because she made no reference to having returned the consent form in any of her subsequent correspondence with the Respondent or at the Grievance Appeal hearing.

Grievance Appeal Hearing

135. Ms Deschamps emailed the Claimant on 7 February 2018 at 13:19 attaching an invite letter from Mr Harrer to a Grievance Appeal hearing on 13 February 2018 (533). This was shortly before Ms Deschamps' suspension. As a result of her suspension, the Grievance Appeal hearing was slightly delayed and in fact did not take place until 22 February 2018. The Claimant was unaware that Ms Deschamps had been suspended. She was simply informed via a telephone call from Ms Palmer that it would need to be delayed (147).

136. Mr Harrer, as Sales Director, was more senior than Mr Corsinie. He was accompanied at the Grievance Appeal Hearing by Ms Palmer who attended in the capacity of note taker. As with the Grievance meeting, the Claimant was given permission to make an audio recording of the meeting. The Tribunal had a transcript of the meeting and was able to listen to the recording. In addition, Ms Palmer's handwritten notes were contained in the bundle (166) as well as the typed notes she produced later (161).

137. The appeal was conducted by way of a review rather than a rehearing. Mr Harrer told the Claimant that is what he intended to do. The Claimant was able to go through all of her concerns at the hearing.

Grievance Appeal Minutes

138. Ms Palmer sent the Claimant the typed notes of the appeal meeting on 27 February 2018. The Claimant emailed her on Thursday 1 March 2018 at 7:15 saying that she had compared the notes with the audio recording she had taken and that she considered they contained omissions, were not in chronological order and contained incorrect statements ns. She asked to be provided with a copy of Ms Palmer's handwritten notes by "Thursday 29 February 2018" (1993). This was a somewhat odd request because 2018 was not a leap year and there was no 29 February and the request was being made on 1 March 2018 in any event.

139. Ms Palmer replied at 11 am the same day to explain that she was not in HQ that day due to adverse weather conditions and so was unable to scan over the handwritten notes. She said she would send them as soon as she returned (1993). The Panel notes that the reference to the adverse weather conditions was to the occasion in 2018 when the "Beast from the East" hit the UK which led to widespread heavy snowstorms. Ms Palmer asked that the Claimant send her the detail of the omissions and the audio recording

so that she could amend her notes. The Claimant replied to say that she was busy with work commitments and would send Ms Palmer the recording and details of the commissions "*in due course*." Ms Palmer confirmed that the deadline for the outcome for the grievance appeal would be extended accordingly.

140. On Tuesday 6 March 2018, at 07:49 the Claimant emailed Ms Palmer to raise a formal grievance about not having received Ms Palmer's handwritten notes. She said that she considered the failure to send her the handwritten notes constituted a "further act of victimisation, bullying and harassment under the Equality Act 2010." She requested a copy of the handwritten notes by 1 pm that day (1996 – 1996). The Claimant told us that she did not believe that Ms Palmer had been unable to scan the minutes to her from home because R1 had a paper free policy and she had been issued with a mobile scanner. She accepted in cross examination that whether Ms Palmer had been issued with the same piece of equipment was not within her knowledge.

141. Ms Palmer replied to reiterate that the only reason she had not sent the minutes to the Claimant was because of the ongoing adverse weather conditions. She noted that the Claimant had not sent the details of the omissions or the recording to her and asked when these would be available. She then sent a follow up email the following day, 7 March 2018, attaching her handwritten minutes and repeating her request for the recording and details of the commission (1995).

142. The Claimant was not happy with the explanation from Ms Palmer and replied (copying in Mr Harrer) that same day to say that the particular matter had caused her further pain and distress and that she wanted a written apology from Ms Palmer (1998). Mr Harrer replied to the email asking that the Claimant provide details of the parts of the minutes which she believed had been missed by 5 pm on Monday 12 March 2018 so he could issue a final outcome decision by 5 pm on 14 March 2018 (2000). The Claimant thanked Mr Harrer for his email.

Request for Compassionate Leave

143. On 8 March 2018, the Claimant asked Ms Lamina for a period of compassionate leave. By this she meant a period of paid leave where she would not have to work, but would be paid in full, unlike sick leave which would not be paid in full. She described her request as a "Request for a Reasonable Adjustment under the Equality Act 2010 for Compassionate Annual Leave due to the stress dealing with the Grievance Appeal exacerbating my [medical condition] which is a disability. The Claimant's request was refused. She was told that if she was not fit and able to attend work then she should take sick leave (190 – 191).

144. The Claimant submitted a fit note the following day, 9 March 2018, which was dated 9 March 2018. It signed her off as not fit to work for three weeks until 29 March 2018, giving the reason as "*depression due to work stress*" (180)

145. On the same day, the Claimant emailed Ms Lamina raising a further formal grievance about the following:

    (A) Failure to Make a Reasonable Adjustment under the Equality Act 2010

    (B) Victimisation by R1 and Mr Corsinie because I have caried out a protected act under the Equality Act 2010 – that is by naming them as prospective Respondents under the Equality Act 2010 in February 2018.

    (C) Victimisation – Failing to obtain an Occupational Health Report – R1 has previously been made aware that I suffer from depression and has failed to obtain an Occupational Health Report even though I have asked for one

    (D) *Victimisation – R1 has disregarded the Equality Act and by email dated 8 March 2018 timed at 16:58 (form Joy Lamina) has stated it's company policy of not providing Compassionate Annual leave usurps parliamentary legislation -that is Reasonable Adjustments under the Equality Act 2010.*"(187)

146. A similar email was sent on 10 March 2018 (186).

147. We note that the Claimant does not say, in either email, that she had already provided a signed consent form enabling R1 to proceed with the occupational health referral.

148. On 12 March 2018, the Claimant emailed Mr Harrer attaching a letter which she asked to be treated as "a complaint of victimisation under the Equality Act 2010 against Ms Palmer." The letter then set out the additions that the Claimant wanted to make to the notes of the appeal hearing (2010).

149. Mr Harrer acknowledged receipt of the letter later the same day (2006). This led to the Claimant writing him a further email the following day. Mr Harrer did not reply to the email. On the morning of 14 March 2018, the Claimant sent him another email accusing him of "fraud by omission" for not dealing with 13 March 2018 email (198).

Grievance Appeal Outcome

150. Mr Harrer emailed the Claimant at 15:41 on 14 March 2018 with the outcome of her grievance appeal (194 -196). His conclusions were:

- As had been highlighted in the Grievance Outcome letter he believed that R1's processes could have been managed better

- Mr Corsinie's recommended actions were *"sufficient and correct"*

- The Claimant had provided insufficient evidence beyond "*speculation and hearsay*" that Mr Corsinie's decision was unfair or was made in collusion with Mr Greaves

151. He added that in response to the requests she had made, the position was as follows:

(a) He was happy to agree to an apology for how the experience had made her feel, but the apology was in no way an admission of guilt by any party

(b) He did not agree that she should have a change of line manager. He said that he considered the action plan set out by Mr Corsinie was suitable with regard to Mr Greaves managing her

(c) He indicated that the Claimant's request for an Occupational Health Assessment would be actioned through the correct channels.

Claimant's Resignation

152. The Claimant was due to return to work on 29 March 2018 at the end of her certified period of sick leave. She did not do so. She had been offered a new role on 26 March 2018, which she accepted. A copy of the contract of employment she signed was contained in the bundle on page 1094. She did not apply for the role formally, but was introduced to it by a friend of hers. All that she had to do to obtain the new role was to provide the new employer with a copy of her CV and have a brief telephone interview.

153. On 29 March 2018, the Claimant printed a record of her sickness absence off from the R1's HR system (193). The printout shows two periods of absence as follows:

Start date	End Date	Days Lost	Status
09/03/2018	29/03/2021	15	open
02/01/2018	09/01/2018	6	closed

154. Ms Deschamps told us that R1's HR system used the information inputted about sickness absence to calculate a Bradford Factor score for each of its employees. This was why the fit not of 5 February 2018 was not referred to in this list.

155. On 29 March 2018, the Claimant emailed R1's Chief Executive Officer attaching a letter of resignation (192). The email was sent at 22:22. The attached letter of resignation ran to 59 pages (199 – 257). On the same date the Claimant also raised a further grievance, made a complaint about R1 to Wandsworth safeguarding and appears to have reported R1 to the police.

156. The Claimant's reason for resigning was expressed to be because:

(a) R1 had fundamentally breached her contract by not carrying out the grievance procedures in line with her contract and/or by discriminating against her because of her disability;

(b) R1 was responsible for "an anticipated breach of contract" arising from the requirement to continue with Mr greaves as her line manager. The Claimant described Mr Greaves as someone "who has made multiple fraudulent allegations against me." She added that "he has used a child without her consent to carry out the frauds" and "In addition, Mr Greaves and other employees of R1 conspired to defraud."

(c) A "breach of trust and confidence listing ten examples of this

(d) "Last straw doctrine". The letter stated that the Claimant had been subjected to "abuse treatment" and breach of contract on numerous occasions culminating in the grievance outcome.

157. Within the body of the letter the Claimant expressly withdrew any consent to R1 making any deductions form her final wages that were due. She said that she believed that she had a remaining entitlement to 17 days holiday (220).

158. We note that Friday 30 March 2018 was a bank holiday, as was Monday 2 April 2018. The Claimant commenced the new role with a different employer on 3 April 2018.

Return of Property and Holiday Pay

159. On 3 April 2018, Ms Palmer wrote to the Claimant acknowledging receipt of her resignation and telling her she would be paid her entitlement to 5.5 days holiday on 1 May 2018 (267 – 268).

160. On 4 April 2018, the Claimant returned the keys she had in her possession to the site where she worked to the Office Manager on site (266).

161. The Respondent was unaware of this. On 9 April 2018, Ms Palmer wrote to the Claimant to remind her that as she was no longer employed, she was required to return all company equipment and keys in her possession. Ms Palmer asked the Claimant to contact her or Ms Lamina about this matter before Friday 13 April 2018. The Claimant did not do so.

162. Ms Palmer wrote to the Claimant again on 17 April 2018 saying R1 would withhold her holiday pay unless it received the company equipment and office keys in her possession by 23 April 2018 (261). The Claimant did not respond by contacting Ms Palmer as requested. R1 withheld the Claimant's holiday pay.

163. On 31 January 2015, R1 was ordered to pay the outstanding holiday pay by Employment Judge Pearl (687). Payment of the outstanding amount was made to her account on 15 February 2019.

164. The Claimant has continued to retain the mobile phone and tablet provided by R1 to her. The Claimant says that she informed R1's legal representatives that she had returned the office keys and that she had the items in her possession and wanted to return them and expected R1's

solicitors to inform R1. The Claimant was unable to produce any emails which showed that she told R1's representative about the keys being returned. Photographs of the other items showing they were in her possession in July 2018 were contained in the bundle, however. These were produced for the purpose of confirming to R1's legal representatives that that she continued to have the items at the time the photographs were taken.

THE LAW

Definition of a Disabled Person under the Equality Act 2010

165. Disability is a protected characteristic under section 4 of The Equality Act 2010 (the Act).

166. In order to be disabled for the purposes of the Equality Act 2010, a person must meet the requirements in section 6 of the Equality Act 2010. These are supplemented by the provisions of Part 1 of Schedule 1. The tribunal should also have reference to the "Employment: Statutory Code of Practice" and the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" published by the Equality and Human Rights Commission (ECRU).

167. Section 6(1) of the Equality Act 2010 says that a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

168. There are four key questions:

- Does the person have a physical or mental impairment?
- Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- Is that effect substantial?
- Is that effect long-term?

169. The EHRC Guidance tells us that physical or mental impairment should be given its ordinary meaning (paragraph A3).

170. "Day-to-day activities" are things people do on a regular or daily basis. This can include general work-related activities, but not unusual or specialised activities.

171. "Substantial" effect means more than minor or trivial (section 212(1) Equality Act 2010).

172. When considering adverse effect, any medical treatment [or other measures] is to be disregarded (paragraph 5(1), Schedule 1, Equality Act 2010)

173. According to paragraph 2(1)(a) – (c) of Schedule 1 of the Equality Act, the effect of an impairment will be considered to be long term if:

- It has lasted for at least 12 months;
- It is likely to last for at least 12 months; or
- It is likely to last for the rest of the life of the person affected.

Paragraph 2(2) says that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

Harassment

174. Section 40(1)(a) of the Act provides that an employer must not, in relation to employment by it, harass a person who is one of its employees.

175. The definition of harassment is contained in section 26 of the Act.

176. Section 26(1) of the Equality Act 2010 provides:

"A person (A) harasses another (B) if

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

177. The unwanted conduct must be shown "to be related" to the relevant protected characteristic. The EHRC Code at paragraph 7.9 states that 'related to' should be given a broad meaning 'a connection with the protected characteristic'.

178. The shifting burden of proof rules set out in section 136 of the Act can be helpful in considering this question. The burden is on the Claimant to establish, on the balance of probabilities, facts that in the absence of an adequate explanation from the respondent, show she has been subjected to unwanted conduct related to the relevant characteristic. If she succeeds, the burden transfers to the respondents to show prove otherwise.

179. If A's unwanted conduct (related to the relevant protected characteristic) was deliberate and is shown to have had the *purpose* of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out. There is no need to consider the effect of the unwanted conduct.

180. If the conduct was not deliberate, it may still constitute unlawful harassment. In deciding whether conduct has *the effect* of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, we must consider the factors set out in section 26 (4), namely:

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that affect.

181. The shifting burden of proof rules can also be helpful in considering the question as to whether unwanted conduct was deliberate.

Direct Discrimination

182. Section 39(2) of the Equality Act 2010 prohibits an employer discriminating against one of its employees by dismissing him or by subjecting the employee to a detriment. This includes direct discrimination because of a protected characteristic as defined in section 13.

183. In subsection 212(1) of the Equality Act, a *detriment* does not include conduct that amounts to harassment. It must be one or the other – it cannot be both. This provision is disapplied, however, by section 212(5) where it is not possible to pursue a claim for harassment related to a particular characteristic, such as being married.

184. Section 13 of the Equality Act 2010 provides that 'A person (A) discriminates against another (B) if, *because of* a protected characteristic, A treats B less favourably than A treats or would treat others'.

185. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.

186. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

187. We must consider whether the fact that the claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

188. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of a protected characteristic. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was.

189. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.

190. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's race. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

191. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd* v *Wong [2005] EWCA Civ 142; [2005] IRLR 258* and we have followed those as well as the direction of the court of appeal in the *Madarassy* case. The decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the Equality Act 2010.

192. The Court of Appeal in *Madarassy*, states:

'*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination*.' (56)

193. It may be appropriate on occasion, for the tribunal to take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.) It may also be appropriate for the tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).

194. In addition, there may be times, as noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, where we in a position to make positive findings on the evidence one way or the other and the burden of proof provisions are not particularly helpful. Where we adopt such an approach it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but

properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment.

195. The tribunal's focus "*must at all times be the question whether or not they can properly and fairly infer… discrimination*.": *Laing v Manchester City Council*, EAT at paragraph 75.

196. Allegations of discrimination should be looked at as a whole and not simply on the basis of a fragmented approach *Qureshi v London Borough of Newham* [1991] IRLR 264, EAT. We must "*see both the wood and the trees*": *Fraser v University of Leicester* UKEAT/0155/13 at paragraph 79.

Discrimination Arising from Disability

197. Subsection 15(1) of the Equality Act 2010 provides that:

A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim

198. Limb (a) involves a two stage test:

- Did the claimant's disability cause, have the consequence of, or result in, "something"?

- Did the employer treat the claimant unfavourably because of that "something"?

It does not matter which way round these questions are approached.

199. According to subsection 15(2), subsection 15(1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability. It is not necessary, however, for A to be aware that the "something" arises in consequence of B's disability (*City of York Council v Grosset* [2018] EWCA Civ 1105).

200. The concept of unfavourable treatment is unique to section 15. In the case of *Williams v Trustees of Swansea University Pension and Assurance Scheme and another* [2018] UKSC 65, the Supreme Court said it was a similar to a detriment. In particular, there is a requirement that the disabled person "must have been put at a disadvantage." No comparator or comparison is required.

201. Known as the test of objective justification, the leading case on limb (b) is *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110, ECJ. The Court held that, to justify an objective which has a discriminatory effect, an employer must show that the means chosen for achieving that objective:

- correspond to a real need on the part of the undertaking
- are appropriate with a view to achieving the objective in question, and
- are necessary to that end.

202. A balancing act is required. The discriminatory effect of the treatment has to be balanced against the employer's reasons for it. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so (*Homer v Chief Constable of West Yorkshire* [2012] UKSC 15)

203. When determining whether or not a measure is proportionate it is relevant for the tribunal to consider whether or not a lesser measure could have achieved the employer's legitimate aim (*Naeem v Secretary of State for Justice* [2017] UKSC 27). The tribunal should consider whether the measure taken was proportionate at the time the unfavourable treatment was applied (*The Trustees of Swansea University Pension & Assurance Scheme and another v Williams* UKEAT/0415/14).

204. The tribunal is required to make an objective assessment which does not depend on the subjective thought processes of the employer. This question is not to be decided by reference to an analysis of the employer's thoughts and actions. The question is whether the treatment, objectively assessed, at the time it occurred, a proportionate means to achieve a legitimate aim irrespective of the process adopted by the employer.

205. We must also consider the guidance contained in the EHRC Statutory Code of Practice that is relevant to this question. This is contained, in particular at paragraph 5.12 which states that:

"*It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations."*

The guidance in paragraphs 4.28 – 4.32 is also relevant.

Indirect Discrimination

206. The reference to discrimination in section 39(2) of the Equality Act 2010 includes indirect discrimination as defined in section 19.

207. Subsection 19(1) of the Equality Act 2010 provides that:

"A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's."

208. Subsection 19(2) provides that for the purposes of subsection 19(1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(a) A cannot show it to be a proportionate means of achieving a legitimate aim.

209. In establishing whether a PCP places persons of a protected characteristic at a particular disadvantage, the starting point is to look at the impact on people within a defined "pool for comparison". The pool will depend on the nature of the PCP being tested and should be one which suitably tests the particular discrimination complained of (*Grundy v British Airways plc* [2008] IRLR 74. The EHRC Employment Code provides useful guidance on this question. A strict statistical analysis of the relative proportions of advantaged and disadvantaged people in the pool is not always required. Tribunals are permitted to take a more flexible approach.

210. The claimant must also establish that she is actually put to the disadvantage.

211. Indirect discrimination is not unlawful where it can be objectively justified. The burden is on the respondent to prove justification. This involves two questions:

(a) Can the respondent establish that the measures it took was in pursuit of a legitimate aim that corresponded to a real business need on the part of the employer?

(b) If so, can the respondent establish that the measures taken to achieve that aim were appropriate and proportionate i.e. did it avoid discriminating more than necessary to achieve the legitimate aim?

(*Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317, *Enderby v Frenchay Health Authority and another* [1994] IRLR 591, *Homer v Chief Constable of West Yorkshire Police* [2012] IRLR 6001)

Reasonable Adjustments

212. Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer.

213. Section 20(3) provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places a disabled person at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage.

214. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.

215. The duty to make reasonable adjustments only arises where the employer has knowledge (actual or constructive) that its employee is disabled and likely to be placed at a substantial disadvantage as (Paragraph 20 (1)(b) Schedule 8 of the Equality Act 2010).

216. In *Environment Agency v Rowan* 2008 ICR 218 and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4* the EAT gave general guidance on the approach to be taken in reasonable adjustment claims.

217. A tribunal must first identify:

- the PCP applied by or on behalf of the employer
- the identity of non-disabled comparators; and
- the nature and extent of the substantial disadvantage suffered by the claimant in comparison with the comparators

218. Once these matters have been identified then the tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

219. The phrase PCP is interpreted broadly. The EHRC Code says (paragraph 6.10):

"[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."

220. In *Lamb v The Business Academy Bexley* EAT 0226/15 the EAT commented that the term "PCP" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".

221. There are some limits to what can constitute a PCP. In particular there has to be an element of repetition, actual or potential. A genuine one-off decision which was not the application of policy is unlikely to be a "practice": *Nottingham City Transport Ltd v Harvey* [2013] All ER(D) 267 (Feb), EAT. In that case the one-off application of a flawed disciplinary process to the claimant was not a PCP. There was no evidence to show that the employer routinely conducted its disciplinary procedures in that way.

222. In *Ishola v Transport for London* [2020] ICR 1204 the Court of Appeal said that all three words "provision", "criterion" and "practice" "..carry the connotation of a state of affairs (whether framed positively or negatively and

however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."

223. The test of reasonableness imports an objective standard. The tribunal must examine the issue not just from the perspective of the claimant, but also take into account wider implications including the operational objectives of the employer.

224. The Statutory Code of Practice on Employment 2011, published by the Equalities and Human Rights Commission, contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be taken into account in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

225. Consulting an employee or arranging for an Occupational Health or other assessment of his or her needs is not in itself a reasonable adjustment because such steps do not remove any disadvantage (*Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664, EAT; *Project Management Institute v Latif* [2007] IRLR 579, EAT)

Victimisation

226. Section 39(4)(d) of the Equality Act 2010 provides that an employer must not victimise its employees. The definition of victimisation is contained in section 27 of the Act.

227. Section 27(1) of the Act provides that:

'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.'

228. The definition of a protected act is found in section 27(2).

229. If the tribunal is satisfied that a claimant has done a protected act, the claimant must show any detriments occurred because she had done a protected act.

230. The analysis the tribunal must undertake is in the following stages:

(a) we must first ask ourselves what actually happened;

(b) we must then ask ourselves if the treatment found constitutes unfavourable treatment;

(c) finally, we must ask ourselves, was that treatment because of the claimant's protected act.

231. A detriment can encompass a range of treatment from general hostility to dismissal. It does not necessarily entail financial loss, loss of an opportunity or even a very specific form of disadvantage.

232. The test for detriment was formulated in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 where it was said that it arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work.

233. The EHRC Employment Code, drawing on this case law, says: '*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage……. However, an unjustified sense of grievance alone would not be enough to establish detriment*." (paragraphs 9.8 and 9.9). Accordingly, the test of detriment has both subjective and objective elements.

234. The essential question in determining the reason for the claimant's treatment is what, consciously or subconsciously, motivated the respondent to subject the claimant to the detriment? This is not a simple "*but for*" causation test, but requires a more nuanced inquiry into the mental processes of the respondent to establish the underlying "core" reason for the treatment. In overt cases, there may be an obvious conscious attempt to punish the claimant or dissuade them from containing with a protected act. In other cases, the respondent may subconsciously treat the claimant badly because of the protected act. A close analysis of the facts is required.

235. It is only if the necessary link between the detriment suffered/dismissal and the protected act can be established, the claim of victimisation will succeed. The protected act need only be one of the reasons. It need not be the only reason (EHRC Employment Code paragraph 9.10).

236. The shifting burden of proof found in section 136 of the Equality Act sets applies. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the reason for any unfavourable treatment was because of the claimant's protected act. If the claimant succeeds, discrimination is presumed to have occurred, unless the respondent can show otherwise.

237. Although section 108(7) of the Equality Act 2010 suggests that employees are not able to bring claims for post termination victimisation, this is not the correct position as confirmed in the case

Wrongful Dismissal

238. Wrongful dismissal is a breach of contract claim. It arises where an employee's employment is terminated by the actions of her employer otherwise than in accordance with the terms of her contract of employment.

239. In can arise in cases where the employee complains of a breach by the employer of the implied term not to act, without reasonable and proper cause, in a manner calculated or likely to destroy or seriously damage mutual trust and confidence and resigns in response to that breach.

ANALYSIS AND CONCLUSIONS

Was the Claimant disabled and, if so, when did the Respondents have knowledge of this?

240. In our judgment, the Claimant was disabled for the purposes of the Equality Act 2010 throughout her employment with R1. She was initially diagnosed with depression in 1996 and since then has had recurring episodes of severe illness together with periods of stability and wellness. When she is unwell, if unmedicated, there is a substantial impact on her ability to carry out normal day to day activities.

241. The Claimant first told R1 that she had depression in the grievance dated 3 January 2018. The grievance was sent to Mr Corsinie and so he learned about on that date. As Ms Palmer was responsible for HR at this time, she was also aware of the contents of the grievance from 3 January 2018 onwards. Ms Deschamps became aware of the Claimant's disability at the grievance meeting on 19 January 2018. We have made a finding that Mr Corsinie told Mr Greaves when he met with him as part of his investigations into the Claimant's grievance. This was between 19 and 31 January 2018. Finally, Mr Harrer learned about the Claimant's medical condition when he received the appeal.

242. We have considered whether Mr Greaves should have realised that the Claimant had a history of depression based on what she told him on 5 December 2017. When giving her evidence to the hearing, the Claimant told us that she did not tell Mr Greaves that she had a history of depression, but did tell him that she was suffering from stress and not sleeping. He also observed that she became agitated to the point of tears while he was speaking to her. In our judgment, this was not sufficient to treat Mr Greaves as having constructive knowledge that the Claimant was disabled.

Disability Discrimination Allegations

243. We turn now to the Claimant's direct disability discrimination pursuant to section 13 of the Equality Act 2010 and discrimination arising from disability claims pursuant to section 15 of the Equality Act 2010. With the exception of the claim of discriminatory dismissal, claim, the same conduct is relevant for both types of claims, which are argued in the alternative.

Bullying and Harassment – Allegations 4(a), 12(a) and 21(a)

244. In the list of issues, the first allegation is that the Claimant was subjected to bullying and harassment by Mr Greaves. This allegation is argued to be direct disability discrimination, discrimination arising from disability and also, in the alternative to be disability related harassment pursuant to section 26 of the Equality Act 2010

245. During the course of the hearing, we clarified that within this allegation, which is put broadly in the list of issues, the Claimant wished to include a number of sub allegations. Ms Bell, when making her submissions, identified the following seven allegations:

(i) Mr Greaves made false allegations against the Claimant on 5 December 2017 in connection with the complaints made by AL and DB

(ii) Mr Greaves predetermined the outcome of any investigation into the complaints by himself apologising to AL and DB

(iii) Mr Greaves requested the Claimant apologised to AL and DB before any investigation had occurred

(iv) Mr Greaves told the Claimant to apologise to AL and DB. This is said by the Claimant to have occurred on 5 December 2017 and in a subsequent telephone call on 12 December 2017

(v) Mr Greaves should have but did not investigate the allegations against the Claimant made by AL

(vi) Mr Greaves misled the Claimant when he stated that both AL and DB had made complaints against her

(vii) Mr Greaves made a false allegation against the Claimant in his email of 19 December 2017

Although not expressly pleaded, we also considered two further allegations as we considered it was in the interests of justice for us to do so, based on what the Claimant said when giving her evidence as to what had upset her. The allegations were:

(viii) The tone in which Mr Greaves spoke to the Claimant during their call on 19 December 2017

(ix) Mr Greaves failed to apologise once it had been established that Mr Koroma had not sent her an email

246. As can be seen from our findings of facts, we found that complaints had been made against the Claimant by both AL and DB. AL's complaint had been made formally, via R1's feedback process. However, prior to this AL and DB had been asked, along with other learners in the cohort to prepare written statements summarising how they felt about the Claimant in response to the issue that had arisen with NB. These contained complaints about the Claimant. It was therefore factually correct for Mr Greaves to tell the Claimant that both AL and DB had made complaints against her, although it would have been helpful if he had been more careful to explain this background to her. The allegations in (i) and (vi) above were therefore not made out on their facts.

247. Mr Greaves did not investigate the allegations before he himself made an apology to the learners and asked the Claimant to apologise to them. We did not find that at any point he told the Claimant to apologise to them and so the allegation at (iv) was not made out on its facts. On the Claimant's own evidence, he only ever suggested to her that she should apologise rather than tell her to do so and he acknowledged that it was her right not to apologise. We found he did do this and therefore the allegation at (iii) was made out on the facts.

248. It is important that the apology that Mr Greaves gave to the learners was not one in which he admitted that the Claimant had done anything wrong. He simply apologised that the learners were feeling upset and suggested the Claimant did the same. His aim in doing so was to diffuse the situation with the outcome that the complaint would go away and the learners would not wish to take it any further. As such, he did not prejudge the outcome of any future investigation and the allegation at (ii) failed on the facts. Whether the approach adopted by Mr Greaves was the correct approach at the time under R1's policy is difficult for us to determine as we are unable to read the policy. In the absence of witness evidence from the relevant respondents, we found the allegation at (v) to be made out on the facts.

249. Turning to what occurred on 19 December 2017, the allegation at (vii) was made out on the facts. Our finding, because one was never located, was that Mr Koroma had not emailed the Claimant to ask her for CVs and therefore when Mr Greaves said in his email to the Claimant that she had received it, this was incorrect. It was also true that Mr Greaves never personally apologised to the Claimant. We found that the sub - allegation at (ix) was therefore made out on the facts.

250. We did not find that the tone of Mr Greave's phone call with the Claimant on 19 December 2017 to have been inappropriate and we have explained this in the facts section above. The sub-allegation at (viii) therefore failed on the facts.

251. Based on our analysis above, our conclusion was that only the sub-allegations (iii), (v), (vii) and (ix) were made out on the facts. We reminded ourselves that the original broad allegation was bullying and harassment by Mr Greaves. We interpreted this as an allegation of bullying and harassment as such terms are used in ordinary parlance rather than legally. However, we did not consider it was constructive for us to separately analyse whether the four incidents amounted to bullying or harassment in a non-legal sense. Instead, we decided we should consider the conduct against the relevant legal tests which involved considering whether any of the conduct was "related to" or "because of" disability. Alternatively, we considered whether the conduct was because of something arising from the Claimant's disability.

252. Our decision, in relation to all of the four sub-allegations, was that the conduct was not because of disability or something arising from the Claimant's disability or related to disability and therefore the Claimant's claims of disability related harassment and direct discrimination and

discrimination arising from disability in relation to these allegations failed. Our reasons were as follow.

253. We had three general reasons which applied to all of the sub-allegations. The first of these was that there was nothing inherent in any of the conduct, in relation to the language used or the particular act or omission that connected it to the Claimant's disability.

254. In addition, it was significant that at the time of allegations iii, v and vii, Mr Greaves was not aware that the Claimant was disabled. We have found that he only became aware that the Claimant was disabled after the grievance hearing and before the outcome letter was prepared. This means, however, that he did have knowledge of the Claimant's disability for the purposes of allegation ix.

255. We also noted that the Claimant's claim for direct discrimination was based on her assertion that Mr Greaves treated her less favourably than her non-disabled colleague, Natasha Jones. However, she presented no examples of how or when this occurred. She simply made this assertion under oath and said that Mr Greaves spoke to Ms Jones differently to the way he spoke to her. We had no information about whether Ms Jones was the subject of any complaints, nor were we told whether in fact she was not disabled.

256. Turning to the specific allegations, although Mr Greaves was not present at the hearing to explain what motivated him to act as he did, his reasoning so far as the incidents on 5 December and 12 December 2017 is set out clearly in his note prepared on 5 December 2017. We were therefore in a position to make a clear finding as to why he acted as he did. Our finding was that he acted as he did not because the Claimant was disabled, or because of anything arising from her disability, but because he was trying to diffuse the complaints made by AL and DB. We have seen no evidence that leads us to conclude that he would have behaved any differently where the complaint was made against a non-disabled employee. His conduct was not related to disability. Sub allegations iii and v therefore fail as allegations of direct disability discrimination, disability related harassment and discrimination arising from disability.

257. Turning to sub-allegation vii, we have considered why Mr Greaves said in his email of 19 December 2017 that the Claimant had confirmed to him that she had received an email from Mr Koroma when this was not the case. Mr Greaves was not present at the hearing to explain this and, unlike in the case of the review notes form 5 December 2017, there was nothing in the bundle created contemporaneously by him that provides an explanation. We therefore approached the question of why he did this on the basis that, as argued by the Claimant, it cannot have been a misunderstanding on his part, but was instead a deliberate lie.

258. Even if we adopt this explanation for Mr Greaves' motivation, it does not lead us to conclude that the conduct was because of or related to the Claimant's disability, or in the alternative because of something arising from the Claimant's disability. Mr Greaves did not know the Claimant was

disabled. The Claimant presented no evidence to suggest that the reason for the lie was because she was disabled or because of something arising from her disability or that the lie related to her disability. Applying the burden of proof provisions found in section 136 of the Equality Act 2010, the Claimant has not, on the balance of probabilities established facts form which we could conclude that the Respondent committed an act of unlawful discrimination. This claim therefore also fails.

259. Finally, turning to sub-allegation (ix) although Mr Greaves was told that the Claimant had a disability, she presented no evidence that this was the reason that he did not apologise to her.

260. The most plausible reason, in our judgment, for the lack of an apology, was that he was writing for the grievance outcome before approaching the Claimant and was never asked to make such an apology. Mr Greaves temporarily ceased to be the Claimant's line manager while her grievance was being considered. She did not have any direct contact with him in order for him to be able to apologise to her personally before her resignation. Mr Corsinie had concluded that Mr Greaves had not lied deliberately, but instead was guilty of miscommunication only and wanted to get the Claimant and Mr Greaves working together again via mediation. We do not consider he would have instructed Mr Greaves to apologise as this would likely have arisen in the mediation. Mr Harrer said in the appeal outcome that he was happy to provide an apology on behalf of R1, without making any admission of liability and so was effectively apologising on Mr Greave's behalf.

261. This reason for the lack of apology was not because or related to the Claimant's disability, nor was it because of something arising from her disability. This claim therefore fails.

Review Meeting on 5 December 2017 – Allegations 4(b) and 12(b)

262. The next allegation we considered was the allegation at 4(b) and 12(b) concerning the conduct of the meeting between Mr Greaves and the Claimant on 5 December. It follows from our reasoning above that any criticism that can be levied at Mr Greaves in relation to the way he approached and conducted the meeting can not be said to be because of the Claimant's disability or anything arising from it. Mr Greaves did not know the Claimant was disabled and there was nothing inherently discriminatory about his conduct. The claims based on this allegation therefore failed.

Grievance Process – Allegations 4(b) and 12(b)

263. The next allegation at 4(c) concerns the conduct of the grievance process.

264. When giving her evidence, the Claimant made a number of criticisms of the grievance process and the conclusions reached. For each criticism, we analysed first whether it was valid and constituted a detriment and then if it did, whether the conduct of Mr Corsinie and Mr Harrer would have been different if the Claimant had not been disabled. Our factual finding was that Mr Corsinie and Mr Harrer were the relevant decision makers and not Ms

Deschamps nor Ms Palmer which is why we focused on Mr Corsinie and Mr Harrer's decisions when analysing this allegation.

265. As explained below, we do not consider that the Claimant's criticisms of the grievance process were valid. In addition, our conclusion is that there was no direct disability discrimination or discrimination arising from the Claimant's disability in this regard.

266. By way of general points, we note that although both Mr Corsinie and Mr Harrer were aware that the Claimant was disabled, but there was no evidence before us that they were motivated to treat her detrimentally because of this or thought badly of her as a result. Having listed to the recordings of the grievance and appeal hearings both of them were empathetic about the Claimant's mental health condition and spoke about wanting to ensure that she was supported.

267. There was also nothing before us to suggest that they colluded with either Mr Greaves or each other and we consider they approached the grievance and appeal seriously and in good faith. In addition, we consider the outcomes they reached to be reasonable ones based on the evidence before them.

268. Turning to the specifics, the process followed by Mr Corsinie was in line with R1's own internal policy as well as the ACAS guidance. While the grievance was ongoing, the Claimant's line management was temporarily changed which was in her favour.

269. Mr Corsinie was a manager who was more senior than Mr Greaves and was therefore in a position to make findings that were negative towards Mr Greaves. On her own evidence the Claimant was given a full opportunity to explain why she was aggrieved and took that opportunity. Mr Greaves allowed her to record the grievance meeting. We were able to listen to the recording and find that she fully articulated her concerns. No notes were made of the grievance hearing, but this was not a significant process flaw given that a recording was made.

270. Following the grievance hearing, Mr Corsinie undertook follow up investigations. He did not prepare written notes of the follow up meetings nor did he ask the people he spoke with to prepare written statements. Although it would have been good practice to have made written records, their absence does not lead us to conclude that the investigation meetings did not take place. Mr Corsinie instead recorded the findings of his investigations in his detailed outcome letter. Although the Claimant did not like the conclusions Mr Corsinie reached, he did reach a conclusion on all of the points she raised.

271. Thus far, we do not consider any criticism of the process can be validly made, nor is there any evidence that Mr Corsinie's conduct constituted less favourable treatment of the Claimant when compared to how he would have conducted himself had the grievance been raised by a hypothetical non-disabled comparator.

272. We also consider that all, but one of Mr Corsinie's conclusions were entirely clearly explained and correct based on the evidence before him. We say all but one, because one of his conclusions was not as clear as it could have been. Mr Corsinie did not make a clear express finding as to whether Mr Greaves had deliberately lied on his email of 19 December 2017. However, our interpretation of what he said in his outcome letter is that he thought the Mr Greaves was not lying but had misunderstood what the Claimant had told him.

273. There is no evidence to suggest that Mr Corsinie reached this conclusion because of the Claimant's disability or something arising from her disability. On reaching this conclusion, we considered the possibility that Mr Corsinie may have made a stereotypical assumption about this matter based on that the fact that Mr Greaves, as far as we were aware did not have a mental health condition but the Claimant did. This was not something the Claimant asked us to consider, but we did so in order to ensure that we were being as fair to her as possible given that she was unwell during the hearing and acting in person. There was no evidence to support this. In our judgment, Mr Corsinie's reached the particular finding he reached because he considered this to be the most likely and plausible explanation for Mr Greave's email. We conclude he would have reached the same conclusion in the same circumstances had the Claimant not been disabled.

274. The Claimant was also unhappy that Mr Corsinie did not change her line manager as an outcome to the grievance. We do not consider he reached this decision because of her disability or anything arising from her disability. We find, based on what Ms Deschamps told us about Mr Corsinie's management style, that he proposed instead, what he thought was a sensible plan to repair the damaged relationship between the Claimant and Mr Greaves. We consider it was a well thought out plan, designed to support the Claimant and Mr Greaves to work well together, but with built-in safeguards if the relationship remained strained. There was no evidence before us to suggest that Mr Corsinie would have reached a different decision about the Claimant's ongoing line management had she not been disabled.

275. Turning to the grievance appeal, this too was conducted in accordance with R1's policy and the ACAS guidance. The person dealing with the matter, Mr Harrer, was more senior that Mr Corsinie and therefore in a position to override the conclusions Mr Corsinie had reached. The Claimant was able to tell Mr Harrer her concerns in detail and was again able to record the meeting where she did this.

276. Mr Harrer approached the appeal as a review rather than conduct a fresh investigation. This was in accordance with R1's policy. We do not consider that there was any evidence that the reason he did not re-investigate the Claimant's complaint was because she was disabled or because of anything arising from her disability. Mr Harrer explained how he was going to approach the matter at the start of grievance appeal hearing and did what he said he would do.

277. With regard to Mr Harrer's findings, in our judgment these were appropriate based on the approach he had adopted. There was no evidence before us to suggest that he would have reached any different findings had the Claimant not been disabled.

278. In his outcome, Mr Harrer addressed the point about the change of line management expressly and upheld Mr Corsinie's outcome that the Claimant should not have a change of line manager. She was unhappy about this, but we have seen nothing to suggest that Mr Harrer would have reached a different decision for a non-disabled hypothetical comparator.

279. In conclusion, the claims based on the allegations concerning the grievance process fail. In our judgment, the process was conducted fairly and reasonably and the outcomes reached were justified. The process and outcomes were not in any way influenced by the fact that the Claimant was disabled or anything arising from her disability.

Failure to process the Claimant's sensitive date – Allegations 4(d) and 12(d)

280. The final allegation of direct disability discrimination and disability-related harassment is found in the list of issues at 4(d) and 12(d). During the course of the hearing, we clarified that within this allegation, which is put broadly in the list of issues, the Claimant wished to include a number of sub allegations. There were that:

(i) R1 did not record her fit note dated 5 February 2018 on its system
(ii) R1 did not contact her GP despite her having provided a consent form permitting them to do so
(iii) R1 did not make an OH referral for her

281. Our factual finding was that R1 did process the Claimant's fit note dated 5 February 2018. The fact that the fit note was not referenced on print out the Claimant made on the date she resigned does not prove the Claimant's case.

282. R1 had not contacted the Claimant's GP or made an OH referral for her prior to her resignation. Mr Harrer indicated, however, in the outcome to the grievance appeal that an OH referral would be made. Our factual finding was that the Claimant had not provided the signed consent form to R1 that would have enabled them to progress contacting her GP or the OH referral. The claims based on these allegations therefore failed on their facts.

Indirect Disability Discrimination – Allegations 8 - 11

283. We next considered the Claimant's claims for indirect disability discrimination.

284. The first of these claims was essentially a repeat of the allegation that R1 had failed to process the Claimant's sick note of 5 February 2018, but argued as a claim of indirect discrimination with the PCP being that R1 had

a practice of not processing fit notes (8a). We found that this was not correct on the facts and therefore this claim failed.

285. The second claim concerned R1's policy regarding compassionate leave. The PCP argued by the Claimant was expressed in the list of issues as "Not allowing staff to take compassionate leave". R1 had a policy on Bereavement Leave and Other Time Off and so on the face of it, the PCP was not correct on the facts.

286. During the course of the hearing, however, it became evident that what the Claimant was referring to in connection with this claim was the occasion when R1 refused to let the Claimant take paid leave pending the outcome of her grievance appeal. The Claimant asked if she could do this due to the stress of dealing with her grievance appeal. R1 refused saying if the Claimant was unwell, she should take sick leave. R1's refusal suggested that paid leave would not be granted for any of its employees in the same circumstances. This leads us to conclude that it was factually correct that the Respondent had a PCP of not allowing paid leave to employees suffering from stress as a result of grievance processes as an alternative to sick leave.

287. The Claimant was put at a disadvantage as a result of the application of this PCP because it meant that she had to take sick leave with the result that her pay dropped. She did not, however, present any evidence that the PCP put or would put disabled employees to this disadvantage when compared with non-disabled employees. Grievance processes are stressful for all employees who go through them. Without supporting evidence, we do not consider we can safely assume that employees with mental health conditions are more likely to need paid time off when compared to non-disabled employees.

288. In any event, even if we are wrong about the issue of disadvantage, we consider that R1 would be in a strong position to objectively justify the practice of refusing paid leave to someone who is unwell and entitled to be absent on sick leave.

Failure to make reasonable adjustments – Allegations 17 - 20

289. We next turned to the Claimant's claims that R1 failed in its duty to her to make reasonable adjustments for her in response to two PCPs.

290. The second of these PCPS (17 b) was the same PCP as argued for indirect disability discrimination, namely an alleged failure to process sensitive personal data. Our factual finding was that R1 did not have such a PCP and therefore this claim failed on its facts.

291. The second PCP argued to exist by the Claimant was expressed in the list of issues to be "*Having Ian Greaves as her line manager and not Joy Lamina.*" This was very specific and not, in our judgment, a correct PCP although we could see why the Claimant was articulating it in this way as the difficult she had was caused, in her mind, by the Respondent's refusal to change her line manager. We therefore considered that a better PCP

would be something along the lines of assigning an employee a specific line manager and refusing to change that line manager in the event of an unproven allegation of bullying and harassment/discrimination.

292. Even with such a broader PCP in place, we consider the Claimant's claim fails because she has not provided any evidence that the PCP placed her at a substantial disadvantage in comparison to a person who was not disabled because of her disability. We envisage many employees unhappy with the conduct of a line manager may ask for a change and be refused. We do not think that because an employee has an underlying mental health condition, a refusal is likely to carry greater disadvantage. It seems more likely that the same degree of perceived or real disadvantage would apply to all employees in this situation.

293. Even if we are wrong about this, and the Claimant had produced evidence to show that her mental health condition meant she was more vulnerable in such a situation, in our judgment her claim would also fail because she has not shown the adjustment she was seeking, namely a change in line management to Joy Lamina, was reasonable in all the circumstances.

294. It does appear that there were no practical barriers to putting the adjustment in place in the sense that it would have been easy enough to confirm the temporary change to Joy Lamina as permanent. This does not, however, make the adjustment reasonable.

295. In our judgment, R1 would have needed to balance the duty it owed the Claimant with the duty it owed to Mr Greaves and the danger of creating a difficult precedent for the future. In the absence of a finding that he was guilty of misconduct towards her, removing him as her line manager would be very undermining. It is unlikely that R1 would have been comfortable in setting the precedent that it would change line management arrangements where someone has taken a dislike to their line manager.

296. We note that the list of issues mentions the absence of a risk assessment as substantial disadvantage arising from the PCPs. This argument seems to be misconceived. In addition, in her correspondence to R1 at the time, she asked several times for a referral to OH as a reasonable adjustment. For the sake of completeness, we record her that case law has confirmed undertaking a risk assessment and referring an employee to OH are not adjustments in their own right, but routes to obtaining information about what is causing an employee disadvantage and what adjustments might be helpful.

297. In summary, we find the Claimant's reasonable adjustment claims to be largely misconceived, but even after we have tried to make sense of them by adapting them, the claims do not succeed.

Victimisation - Allegations 27 – 34

298. The final set of claims we considered were the Claimant's victimisation claims. Although split in the list of issues into pre and post termination claims, this distinction is superficial. The condition in section 108(1) of the

Equality Act 2010 is met in relation to the claimed post-termination detriments.

299. We first considered the question of whether the Claimant did any protected acts and, if so when.

300. Her first protected act was said to be her grievance letter sent to the Respondent on 3 January 2022. In the facts section, we noted that although the Claimant accused Mr Greaves of bullying, harassing, discriminating against her and victimising her and made explicit reference to the Equality Act 2010, she did not expressly say such conduct was related to any protected characteristic or a previous complaint of discrimination. She did refer to herself as being disabled under the Equality Act 2010, however. We think the respondents who dealt with the grievance and appeal understood the Claimant to be raising concerns to do with her disability. Our finding is that the grievance constitutes a protected act.

301. There were also a number of subsequent protected acts. Although not pleaded, the Claimant referred several times to her rights under the Equality Act 2010 in correspondence with R1. She also made express reference to initiating the Acas early conciliation process in her grievance appeal letter and submitted claims on 11 March 2018 and 24 May 2018.

302. The Claimant made four allegations of victimisation (29a, 29b, 29c and 33a). There is an overlap between 29c and 33c. We will deal with the allegation of wrongful dismissal below.

303. We have already rejected the Claimant's arguments that the conduct of the appeal hearing was anything other than fair and reasonable to her with a justified outcome. For the purposes of her victimisation claim, we have, however, considered whether the fact that the Claimant had done a protected act had any influence on the way Mr Harrer approached the appeal. Our conclusion is that it did not. This claim therefore fails.

304. Following her resignation, R1 withheld the Claimant's holiday pay. It had told her she would receive her outstanding holiday pay on 1 May 2018, but did not pay this. R1 also accused the Claimant of not having returned the office keys she had in her possession when she had in fact returned them. The facts set out on allegations in 29(c) and 33(a) therefore did occur. We have therefore considered why the R1 did this.

305. We have concluded that the reason why R1 withheld the Claimant's holiday pay and alleged she had not returned the keys was not because the Claimant had done a protected act. Our factual findings were that Ms Palmer genuinely, albeit wrongly, believed that the Claimant had not returned her keys and that she had a right to withhold the Claimant's holiday pay as a result. She was not influenced by the fact that the Claimant had brought a grievance or was pursuing litigation against R1. The claim therefore failed.

Constructive Discriminatory / Wrongful Dismissal (Allegations 12e, 29a and 35 – 37)

306. The final matter that we considered was whether the Claimant was constructively dismissed. The Claimant was pursuing three claims in connection with her resignation, with those claims being:

(a) A claim that her resignation should be construed as a dismissal and that such dismissal was discriminatory because the matters that led to her resignation amounted to less favourable treatment because of something arising from her disability (12(e))

(b) A claim that she was wrongfully dismissed because she did a protected act. We understand this to be claim that her resignation should be construed as a dismissal and that such dismissal constituted victimisation because the matters that led to her resignation amounted to victimisation (29(a))

(c) A claim for notice pay (35 – 37).

307. We have found that the Claimant was not discriminated against because of something arising from her disability . We also found that she was not victimised because of any protected acts. It follows that her claim that she was entitled to terminate her contract of employment because of acts of discrimination and/or victimisation (applying the legal test found in section 39(7) of the Equality Act 2010) must fail.

308. We finally considered the Claimant's claim for wrongful dismissal. Having rejected all the Claimant's claims of discrimination, harassment and victimisation, we considered whether there was any other conduct by any of the relevant respondents that amounted to a breach of the implied term of trust and confidence in her contract. In our judgment, there was not. Specifically, we do not consider that the following conduct amounted to a breach of trust and confidence when considered in isolation or cumulatively:

- The conduct of Mr Greaves at any point in his interactions with her

- Any aspect of the grievance process including Mr Corsinie's findings and proposal for repairing the relationship and Mr Harrer's approach to the appeal

- The decision not to agree to change her line manager pending trying to see for a two month period if the relationship could be repaired

- The Respondent's failure to contact the Claimant's GP and the delay in referring her to OH until after the appeal outcome had been delivered

309. Absent any fundamental breach of contract by R1, the Claimant's resignation without notice was itself in breach of the terms of her contract of employment and her resignation was not a constructive dismissal.

310. Having reached this decision, it was not strictly necessary for us to consider whether the Claimant resigned in response to the conduct of the relevant respondents or as a result of her new job offer. However, for the sake of completeness, we record that, in our judgment, a cause of her resignation was the conduct of the relevant respondents and in particular the decision not to change her line manager. She did not leave solely because she had been offered a new position However her claim for notice pay fails regardless of this finding.

Time and Limitation Issues

311. As none of the Claimant's claims have succeeded it has not been necessary to analyse in any detail whether they were submitted in time or not. For the sake of completeness, however, we record that we would have granted an extension of time to her on a just and equitable basis if one was needed.

Employment Judge E Burns
19 January 2023

Sent to the parties on:

19/01/2023

For the Tribunals Office

Appendix – Issues

Direct Disability Discrimination

1. What is the alleged condition the Claimant relies upon?

   (a) Depression

2. If found that the Claimant does suffer from depression does this fall within the meaning of a disability found in the Equality Act 2010?

3. Did the Respondent have knowledge, or have been reasonably expected to know, of the Claimant's depression?

4. What are the alleged act(s)/omissions which the Claimant asserts amounted to less favourable treatment and did the alleged act(s)/omission(s) occur?

   a. Bullying and harassment by R2
   b. Conduct of the review meeting
   c. Conduct of the grievance process
   d. Failure to process her sensitive personal data.

5. Are any of the acts or omissions established to have occurred out of time? If so, are the acts or omissions part of a series of acts and if so, is the last in the series in time? If not, is it just and equitable to extend time?

6. Who is the comparator relied upon - actual or hypothetical - and what are the material circumstances of that comparator?

   a. Nathasha Jones
   b. Hypothetical comparator

7. By reference to the alleged act(s)/ omission(s) and the identified comparator, was the Claimant subject to less favourable treatment because of her alleged disability?

Indirect Disability Discrimination

8. What are the provision(s), criterion or practice(s) ('PCP') that The Respondent is alleged to have applied equally to both disabled and non-disabled employees?

   a. Failure to process sensitive personal data (sick notes)
   b. Not allowing staff to take compassionate leave

9. Does the PCP put or would put disabled employees at a particular disadvantage?

10. If so, did the PCP put or would put the Claimant at that disadvantage?

11. If so, can the Respondent show it was a proportionate means of achieving a legitimate aim?

Discrimination arising from disability

12. The allegation of unfavourable treatment as “something arising in consequence of the Claimant's disability" falling within section 39 Equality Act is:

    a. Bullying and harassment by R2
    b. Conduct of the review meeting
    c. Conduct of the grievance process
    d. Failure to process her sensitive personal data
    e. Breach of trust and confidence leading to resignation

13. Does the Claimant prove that the respondent treated the Claimant as set out above?

14. Did the respondent treat the Claimant as aforesaid because of the “something arising" in consequence of the disability?

15. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

16. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

Failure to make reasonable adjustments

17. What are the provision(s), criterion or practice(s) (‘PCP’) that it is alleged placed the Claimant at a substantial disadvantage in comparison to a person who was not disable and what is the date that each of these PCPs are alleged to have been applied?

    a. Having Ian Greaves as her line manager and not Joy Lamina
    b. Failure to process sensitive personal data (sick notes)

18. Was the Respondent under a duty in respect of any PCP to make reasonable adjustments for the Claimant, in that did any PCP place the Claimant at a substantial disadvantage in comparison to persons who were not disabled? The substantial disadvantage relied on by the Claimant is:

    a. Having R2 as her manager
    b. The respondents not actioning a risk assessment

19. If so, did the Respondent take such steps as it was reasonable (taking into account its knowledge of the Claimant’s alleged disability) to have to take to avoid that disadvantage to the Claimant?

20. If any omission is established to have occurred is the Claimant out of time? If so, is the omission part of a series of acts and if so is the last in the series in time? If not, is it just and equitable to extend time?

Harassment relating to disability

21. What are each of the alleged acts of unwanted conduct which the Claimant alleges amount to harassment related to her disability:

    a. Bullying and harassment by R2

22. Are any of the act(s) or omission(s) established to have occurred out of time? If so, is the act or omission part of a series of acts and if so, is the last in the series in time? If not, is it just and equitable to extend time?

23. Did the acts/omissions occur and in respect of each act/omission established to have occurred, were the acts done in the course of employment?

24. If so, did the acts amount to conduct that were unwanted?

25. If so, by reference to the criteria in s 26(4) EA 2010, did the conduct have the purpose or effect of:-

    a. violating the Claimant's dignity; or
    b. creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for the Claimant?

26. If so, was the established conduct committed by the Respondent related to the Claimant's disability relied upon above?

Victimisation

27. What is the protected act(s) that the Claimant relies upon?

    a. Raising the grievance

28. Were these acts complaints that fall within the criteria of section 27(2)(a-d) of the Equality Act 2010?

29. If so, because of either one or both of the alleged protected acts, did the Respondent subject the Claimant to the detriments of:

    a. Wrongful dismissal (breach of trust and confidence)
    b. Conduct of the appeal hearing
    c. Withholding holiday pay

30. Are the detriments established to have occurred out of time? If so, is the act or omission part of a series of acts and if so, is the last in the series in time? If not, is it just and equitable to extend time?

Post Termination Victimisation.

31. What is the protected act(s) that the Claimant relies upon?

    a. Employment tribunal claims

32. Were these acts complaints that fall within the criteria of section 108(1) -(2) of the Equality Act 2010?

33. If so, because of either one or both of the alleged protected acts, did the Respondent subject the Claimant to the detriments of:

    a. Wrongly alleging she had failed to return keys and withholding holiday pay

34. Are the detriments established to have occurred out of time? If so, is the act or omission part of a series of acts and if so, is the last in the series in time? If not, is it just and equitable to extend time?

Wrongful dismissal

35. Was the Claimant wrongfully dismissed?

36. If so, is she entitled to notice pay?

37. If so, how much notice pay is she entitled to?