



EMPLOYMENT TRIBUNALS

Claimant: Ms M Shoulder

Respondent: Dignity Pet Crematorium Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Southampton

On: 16 to 19 January 2023

Before: Employment Judge Gray
AND Members Ms A Sinclair and Mr L Wakeman

Appearances

For the Claimant: Mr Leonhardt (Counsel)
For the Respondent: Mr Lomas (Tribunal Advocate)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

The following complaints, as recorded in the agreed list of issues, are dismissed on withdrawal:

- Direct sex discrimination by asking the Claimant to sign a confidentiality agreement (issue 2.1.1);
- Discrimination arising from disability by placing the Claimant on furlough (issue 5.1);
- Reasonable adjustments, PCP 3: communicating with employees by written correspondence (issue 6.2.2); and
- Victimisation, failing to appoint an independent appeal panel or decision-maker (issue 7.2.1).

The remaining complaints of direct sex discrimination, harassment, direct disability discrimination, discrimination arising from disability, failure in the duty to make reasonable adjustments and victimisation, all fail and are dismissed.

REASONS

1. By a claim form presented on 13 January 2021 the Claimant complains of discrimination on the grounds of disability and sex, and of victimisation.
2. As is recorded as general background in the case management summary of Employment Judge Roper from a case management hearing before him on the 8 December 2021, the Respondent is a private limited company which specialises in pet cremation services, and the Claimant was employed by the Respondent as a Driver from 16 May 2019 until 13 September 2020. The Claimant asserts that she has suffered discrimination by reason of both sex and disability. The Respondent asserts that the Claimant was dismissed for misconduct following a road traffic accident and what it says were dishonest replies by the Claimant during the subsequent investigation.
3. Further, it records that the Claimant had previously suffered from cancer and is therefore a disabled person by reason of paragraph 6(1) of Part 1 of Schedule 1 of the Equality Act 2010. The Claimant also asserts that she is disabled by reason of dyslexia, and the Respondent has conceded that the Claimant was a disabled person at all material times by reason of this impairment.
4. This claim had been listed for four days to determine matters of liability. The timetable for the hearing had been agreed at the case management hearing and was broadly met with evidence and submissions concluding at just after 3:15pm on day 3. The parties both indicated they would want written reasons, so it was therefore proportionate to reserve our decision and release the parties at the conclusion of day 3. This then left the remaining time for deliberations.
5. For reference at this hearing, we were presented with the following:
 - a. An agreed hearing bundle consisting of 335 pages. The Claimant applied at the start of evidence to add an email dated 15 January 2023 with the subject of "Statement" which appeared to be a witness statement from a Ms Morgan. The Respondent objected. After hearing submissions from the parties on the matter it was determined to refuse the inclusion of the document as it was a document produced as a witness statement for this hearing, the day before the hearing was due to commence, that had not been exchanged and the author of which was not attending.
 - b. Five witness statements in support of the Respondent from:
 - i. Kevin Spurgeon (KS) the owner and director of the Respondent.
 - ii. Annie Moynihan (AM) Office Manager (at the time).
 - iii. Tammy Highfield (TH) Procurement Administrator (at the time).
 - iv. Emma Dobell (ED) Client Services Advisor.

- v. Zara Skinmore (ZS) Chief Operating Officer.
 - c. The Claimant's witness statement and witness statements from three supporting witnesses:
 - i. Wendy Bishop (WB) a Client Services Advisor for the Respondent (who had two statements, one produced for the Respondent and then one produced for the Claimant).
 - ii. Stephen Bowling (SB) a Driver at the Respondent.
 - iii. Mike Pritchard (MP) a retired Police Officer, who did not attend the hearing and whose evidence was submitted as hearsay only.
 - d. An agreed chronology. This had been produced by the Respondent and was agreed by the Claimant following the completion of our reading, subject to two qualifications; (1) to make it clear there was also a meeting on the 6 August 2020 and (2) the Claimant could not recall the exact date she wrote her appeal statement.
 - e. CCTV footage of approximately 3 minutes in duration showing the incident with the car on the 6 August 2020 (this was viewed during the cross examination of the Claimant).
6. The issues as to liability were agreed as follows based on those set out by Employment Judge Roper in his case management summary, discussion with the parties at the start of this hearing, and following an amendment application by the Claimant (with clarifications arising from the discussions and amendment highlighted in ***bold italics***):

1. Time limits

1.1 The claim form was presented on 13 January 2021. The Claimant commenced the Early Conciliation process with ACAS on 15 November 2020 (Day A). The Early Conciliation Certificate was issued on 15 December 2020 (Day B). Accordingly, any act or omission which took place before 16 August 2020 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Direct Sex Discrimination (s 13 Equality Act 2010)

2.1 Did the Respondent do the following things:

2.1.1 on 11 November 2019 the Claimant was asked to sign a confidentiality agreement. The Claimant was the only driver who was required to sign a confidentiality agreement of this kind. No male driver was requested to sign a confidentiality agreement; and

2.1.2 on or about March 2020 the Claimant was the only female driver and was the only employee who was furloughed as a result of the covid-19 pandemic. None of her male colleagues were furloughed. The Claimant suffered a loss of earnings as a consequence. Instead of allowing the Claimant to continue working, the Respondent recruited a new male member of staff to undertake her role; and

2.1.3 on 10 August 2020 the Claimant was suspended from her employment following the incident relating to her car. No male colleague had been suspended for a similar incident; and

2.1.4 the Claimant was dismissed on 7 September 2020. The Claimant contends that a male colleague in the same circumstances would not have been dismissed. On the same day, a male colleague named Paul was involved in a car accident with the same bin, but he was not disciplined in any way; and

2.1.5 the Claimant was denied the right of an appeal with independent people. A male colleague in the same circumstances would not be treated in the same way.

2.2 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated, known as the Claimant's comparator. There must be no material difference

between the circumstances of this comparator and those of the Claimant. The comparator can be an actual person, or if there is no actual comparator then someone hypothetically. That is to say a hypothetical comparator whom the Claimant says would not have been treated in the (less favourable) way in which the Claimant was treated. The Claimant relies on an actual comparator namely her colleague Paul and/or hypothetical male comparators in the same circumstances.

2.3 If the Claimant did suffer less favourable treatment above, was this because of sex?

3. Harassment Related to Sex (s 26 Equality Act 2010)

3.1 Did the Respondent do the following things:

3.1.1 during October 2019 the Claimant was in the office where Kevin Spurgeon dropped his trousers to his ankles to show her his pink boxers. The Claimant was with Paula Bryant (Senior Manager) at the time. The Claimant told Kevin Spurgeon that she did not appreciate his behaviour; and

3.1.2 in the summer of 2020, there was a second incident where Kevin Spurgeon dropped his trousers in front of the Claimant in the garage. The Claimant asked Kevin Spurgeon what he was doing to which he responded: "you're only jealous". This time Kevin Spurgeon claimed to be showing his colleagues his groin injury; and

3.1.3 on another date (details of which will be provided by the claimant) Kevin Spurgeon was in the staff kitchen on his mobile laptop, watching videos on Facebook. The Claimant walked into the kitchen and Kevin Spurgeon proceeded to show her paedophile vigilante videos which was highly inappropriate and caused an uncomfortable working environment for her; and

3.1.4 the Claimant contends that Mr Spurgeon only behaved in this way as she was female, and he believed he could engage in such unwanted conduct towards her on the grounds of her sex [***This was confirmed as being the explanation for allegation 3.1.3 rather than a discrete allegation***]; and

3.1.5 sexual innuendo which occurred on numerous occasions (and the Claimant has been ordered to provide further information in connection with these allegations above).

3.2 If so, was that unwanted conduct?

3.3 Did it relate to the Claimant's protected characteristic, namely her sex?

3.4 Alternatively was it of a sexual nature?

3.5 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.6 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

3.7 Was the unwanted conduct of a sexual nature or related to **gender reassignment** or sex?

3.8 Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.9 Did the Respondent treat the claimant less favourably because the Claimant rejected or submitted to the conduct?

4. Direct Disability Discrimination (s 13 Equality Act 2010)

4.1 The Claimant relies upon her previous diagnosis of cancer and her dyslexia.

4.2 Did the Respondent do the following things:

4.2.1 placing the Claimant on furlough because her cancer was considered to be an underlying risk factor; and

4.2.2 dismissing the Claimant because of her cancer and/or her dyslexia.

4.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated, known as the Claimant's comparator. There must be no material difference between the circumstances of this comparator and those of the Claimant. The comparator can be an actual person, or if there is no actual comparator then someone hypothetically. That is to say a hypothetical comparator whom the Claimant says would not have been treated in the (less favourable) way in which the Claimant was treated. The Claimant relies on hypothetical comparators.

4.4 If the Claimant did suffer less favourable treatment above, was this because of disability?

5. Discrimination Arising from Disability (s 15 Equality Act 2010)

5.1 Did the Respondent treat the Claimant unfavourably by placing her on furlough?

5.2 Did the following things arise in consequence of the Claimant's disability of cancer? The Claimant's case is that her previous sick leave because of her cancer arose from that disability.

5.3 Was the unfavourable treatment because of this previous sick leave which is said to have arisen from the Claimant's disability?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent will set out any defence of justification in full in its Amended Response [**see page 71 of the agreed bundle**].

5.5 The Tribunal will decide in particular:

5.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 Could something less discriminatory have been done instead;

5.5.3 How should the needs of the claimant and the respondent be balanced?

By way of permitted amendment, the Claimant also complains that because of a cancer scare in July 2020 the Claimant had time off for stress and anxiety which arose from her disability (the cancer) and that her dismissal was unfavourable treatment because of that. The Respondent asserts the reason for dismissal was misconduct so does not assert a legitimate aim defence.

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

6.1 This claim relates to the disability of dyslexia only.

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

6.2.1 PCP 2: requiring written statements to be provided immediately following an incident; and

6.2.2 PCP 3: communicating with employees by written correspondence; and

6.2.3 PCP 4: conducting disciplinary hearings in a short timescale.

6.3 Did PCPs 2, 3 and 4 put persons who also had dyslexia, at a particular disadvantage when compared with persons with whom the Claimant did not share that characteristic, in that the disability of dyslexia gives rise to communication problems.

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

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

6.5.1 allowing her additional time to write a statement about the incident in question; and

6.5.2 allowing the Claimant extra time to prepare for the disciplinary meeting; and

6.5.3 seeking or considering alternative means of conducting the disciplinary process to avoid lengthy written documents

6.6 Was it reasonable for the Respondent to have to take those steps and when?

6.7 Did the Respondent fail to take those steps?

7. Victimisation (s 27 Equality Act 2010)

7.1 During the appeal process in her typed appeal submissions the Claimant complained about discriminatory behaviour by the Respondent. The Respondent concedes that this was a protected act.

7.2 Did the Respondent do the following things:

7.2.1 failed to appoint an independent appeal panel or decision-maker; and

7.2.2 failing to deal with the appeal with sufficient vigour; and

7.2.3 refusing the Claimant's appeal

7.3 By doing so, did the Respondent subject the Claimant to detriment?

7.4 If so, was it because the Claimant had done the protected acts?

7. By way of summary about the Claimant's amendment application; initially the Claimant sought to add a new complaint of arising from disability about correspondence received on the 30 July 2020. However, after hearing submissions this was not pursued by the Claimant. An amendment to include the further 'arising from complaint' as set out in the issues detailed above was permitted for the reasons given orally at the time.
8. At the start of the Respondent's oral closing submissions the Claimant withdrew the following complaints:
 - a. Direct sex discrimination by asking the Claimant to sign a confidentiality agreement (issue 2.1.1);
 - b. Discrimination arising from disability by placing the Claimant on furlough (issue 5.1);
 - c. Reasonable adjustments, PCP 3: communicating with employees by written correspondence (issue 6.2.2); and
 - d. Victimisation, failing to appoint an independent appeal panel or decision-maker (issue 7.2.1).

THE FACTS

9. We found the following facts proven on the balance of probabilities after considering the whole of the presented evidence, both oral and documentary, and after considering and listening to the factual and legal oral submissions made by and on behalf of the respective parties.
10. The Respondent is a private limited company which specialises in pet cremation services, and the Claimant was employed by the Respondent as a Driver from 16 May 2019 until 13 September 2020.
11. The Claimant asserts that she has suffered discrimination by reason of both sex and disability, and that she was subject to victimisation.
12. The Respondent asserts that the Claimant was dismissed for misconduct following a road traffic accident and what it says were dishonest replies by the Claimant during the subsequent investigation.
13. The claim form was presented on 13 January 2021.
14. The Claimant commenced the Early Conciliation process with ACAS on 15 November 2020 (Day A). The Early Conciliation Certificate was issued on 15 December 2020 (Day B).

15. Accordingly, any act or omission which took place before 16 August 2020 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.
16. Therefore, there is a need to determine time limit jurisdiction in this claim.
17. We note that although the list of issues on this matter refer to the Tribunal needing to consider both (1) a conduct extending over a period and (2) whether is it just and equitable in all the circumstances to extend time, the Claimant has not presented any evidence in respect of the latter, i.e., why it was not possible for her to submit her claim form before she did.
18. The Claimant's disability status is not in dispute. The Claimant had previously suffered from cancer and is therefore a disabled person by reason of paragraph 6(1) of Part 1 of Schedule 1 of the Equality Act 2010. The Claimant also asserts that she is disabled by reason of dyslexia, and the Respondent has conceded that the Claimant was a disabled person at all material times by reason of this impairment.
19. The question of knowledge of disability and substantial disadvantage remains in dispute.
20. On the 16 May 2019 the Claimant commenced employment as a Customer Service Driver (Contract of Employment pages 83 to 98).
21. It is the on the 18 October 2019 that the first allegation, being one of harassment arises chronologically. This is set out in the list of issues at 3.1.1 as ... "during October 2019 the Claimant was in the office where Kevin Spurgeon dropped his trousers to his ankles to show her his pink boxers. The Claimant was with Paula Bryant (Senior Manager) at the time. The Claimant told Kevin Spurgeon that she did not appreciate his behaviour;".
22. There is a factual dispute about this matter and no contemporaneous documents to assist us.
23. Therefore, we have considered carefully what the witnesses have told us about this matter.
24. The Claimant says (at paragraph 13 of her statement) ... "... At the end of a morning briefing meeting in the office, I was standing a few feet away from Kevin. Kevin was asked why he was not wearing anything pink. In response, he laughed and without warning, pulled his trousers down, as the Respondent admits (page 69 of the bundle). Kevin was wearing pink underwear and said, "I am wearing pink""

25. The Claimant was referred to page 69 in cross examination and that it confirms that the allegation is actually denied. We can see this is correct when looking at the document.
26. KS says at paragraph 25 of his statement ... "... A comment was made that I was not wearing pink. As a result of this I pulled the boxer shorts I was wearing above the waist band of my trousers I was wearing to show a pink stripe on my boxer shorts to the person who had made the comment so I could show that I was indeed wearing pink. I did not drop my trousers as is being stated by the Claimant.". KS maintained this asserted factual position in cross examination, also explaining that he had pink socks on which he also showed by lifting up the bottom of his trouser leg.
27. TH says at paragraph 4 of her statement ... "... My recollection was that KS was asked why he was not wearing pink. However, he did not drop his trousers as is being suggested by the Claimant. What KS did do is pull part of his boxer shorts above his trouser line that showed that part of the colour of his shorts was pink.".
28. We accept the evidence of the Respondent on this matter which is consistent. The Claimant's account differs between the allegation as agreed in the list of issues and her witness statement, referring in the former to KS dropping his trousers to his ankles and in the latter to him pulling them down. The Claimant has not proven on the balance of probability the conduct she alleges.
29. From the agreed chronology there is then the third allegation of harassment (issue 3.1.3) which is said to have occurred in the Autumn of 2019. It is alleged that ... "... Kevin Spurgeon was in the staff kitchen on his mobile laptop, watching videos on Facebook. The Claimant walked into the kitchen and Kevin Spurgeon proceeded to show her paedophile vigilante videos which was highly inappropriate and caused an uncomfortable working environment for her;".
30. The Claimant provided no evidence about this matter in her witness statement although she said in cross examination that she still relies upon it. When asked in cross examination what she presents in support, the Claimant confirmed that the video would not be shown to a male. This proposition was not put to KS in cross examination.
31. KS says at paragraph 30 of his statement ... "I was in the staff room on a break, and I had my Facebook page open on my iPad scrolling through different material. I came across a posting which showed a group confronting someone who was suspected of being a paedophile. I remember having a conversation with the Claimant about how sad such things were going on, for which she agreed, and we engaged in a brief conversation. I did not purposely show the clip to the Claimant as she is suggesting, and she raised no objection to the content of the piece at the time or since.".

32. We accept the evidence of the Respondent on this matter. The Claimant has not proven on the balance of probability the conduct she alleges.
33. On the 11 November 2019 a Confidentiality Letter Agreement is completed (pages 125 to 126). Chronologically this is the first allegation of direct sex discrimination (issue 2.1.1) ... “on 11 November 2019 the Claimant was asked to sign a confidentiality agreement. The Claimant was the only driver who was required to sign a confidentiality agreement of this kind. No male driver was requested to sign a confidentiality agreement;”.
34. The Claimant provided no evidence about this matter in her witness statement although she said in cross examination that she still relies upon it. When asked in cross examination what she presents in support the Claimant confirmed that she believed she was required to sign it because she is a woman.
35. ZS says in paragraphs 3 and 4 of her statement ... “3. We discovered that the Claimant’s nephew was running an equine crematorium which caused a conflict of interest. I was informed of this by Paula Bryan, the former Managing Director of the Respondent. Paula emailed me about this on 5th November 2019 – please see page 124 of the bundle. ... 4. The request for the Claimant to sign a confidentiality agreement was due solely to the fact that a relative of hers was in competition with the Respondent. Such a request to sign a confidentiality agreement would have requested of any other member of staff, male or female, who we had found out had a connection to a rival business. This had nothing whatsoever to do with her being female and was due solely in protecting the Respondent, so no confidential information was disclosed.”.
36. We accept what ZS says about this matter. We also note that the Claimant withdrew this allegation at the start of oral closing submissions.
37. From the agreed chronology we then get to the second allegation of harassment, now said to have occurred in February 2020. This is issue 3.1.2 that ... “... there was a second incident where Kevin Spurgeon dropped his trousers in front of the Claimant in the garage. The Claimant asked Kevin Spurgeon what he was doing to which he responded: “you’re only jealous”. This time Kevin Spurgeon claimed to be showing his colleagues his groin injury;”.
38. There is a factual dispute about this matter and no contemporaneous documents to assist us.
39. Therefore, we have considered carefully what the witnesses have told us about this matter.
40. The Claimant says (at paragraph 14 of her statement) ... “One morning in February 2020, I was entering the garage to start preparing my vehicle for the

day. Emma Dobell and Wendy Bishop were already in the garage as they were taking paw prints from deceased pets. Kevin was also in the garage. I noticed that Kevin had pulled his trousers down below his knees and was trying to show his Ms Dobell and Ms Bishop a mark on his inner thigh. As Ms Dobell and Ms Bishop were both visibly uncomfortable, and I was aware that Ms Bishop had only recently started working for the Respondent, I felt that I had to intervene. I said to Kevin "for God's sake Kevin". His response was "it's only because you're jealous". This is admitted by the Respondent (page 69 of the bundle). Kevin's suggestion that I was jealous that he was harassing my colleagues was upsetting and inappropriate. I don't believe he would have made such a comment to a male colleague. This made me feel very uncomfortable. I walked away from Kevin after he made this comment."

41. What the relevant part of the amended response says (paragraph 25 at page 69) is ... "... The Claimant walked past and said something along the lines that ED would not be interested in that (due to ED's sexual orientation) to which the Claimant responded to the Claimant "your just jealous" to diffuse the situation.". It appears to have been understood by the Claimant that this was credited to KS saying it rather than the Claimant as it states.
42. However, what KS says about the matter in his witness statement (at paragraph 28) is ... "I agree that this incident took place in the garage, but I was not wearing jogging bottoms. I was wearing shorts as I normally do to the gym. I therefore did not have jogging bottoms around my ankles. I was showing Emma Dobell a bruise that I sustained in kickboxing as she was interested in the sport. The Claimant did not say to me "for God's sake Kevin" or that I replied, "oh its only because you're jealous".
43. In cross examination KS denied that he had said anything to the Claimant.
44. Considering then the evidence of the other witnesses about this matter. WB presented the Employment Tribunal with two witness statements and confirmed that both were true to the best of her knowledge and belief. The statement she provided for the Respondent says (at paragraph 3) ... "... I can't recall whether the Claimant was wearing jogging bottoms, or he was in his shorts. However, I do recall Kevin showing some bruising he sustained to his leg in kick boxing.". Then at paragraph 5 ... "With regards to the words that the Claimant states were used, I don't recall the Claimant making the comments she states she used, or the response attributed to Kevin."
45. In her statement provided for the Claimant WB says (at paragraph 3) ... "Kevin Spurgeon entered the garage and approached the paw printing table where Emma and I were standing. Michelle Shoulder was also in the garage at this time. Without warning, Mr Spurgeon pulled his trousers down to his knees. Mr Spurgeon said that he wanted to show us bruises which had received from a sport. This made me and my colleagues feel quite uncomfortable, as none of

us had asked Mr Spurgeon to pull his trousers down and there was no prior warning of what he was going to do.”.

46. WB confirmed in cross examination that she could not actually recall if it was jogging bottoms or shorts pulled down to his knees, but she remembered KS was still wearing gym shorts. She acknowledged from her evidence that this could mean KS had pulled shorts down to his knees to reveal another pair of shorts.
47. WB also confirmed in cross examination that she did not recall any words being said after KS did what she says. WB did not recall any of the conversation as the Claimant asserts and accepted that she would have been aware of it as she was there, but she did not recall any conversation being had.
48. ED says in her witness statement at paragraphs 3 to 6 “3. I was present at the incident in question. I was at the paw print station and the Claimant was in the bedding room making beds to put into the hearse. ... 4. KS was in shorts that day not jogging bottoms but in shorts. From memory, KS showed me a bruise he sustained in kickboxing at the gym after I asked him why he was walking so badly. ... 5. I do not recall any verbal communication between the Claimant and Kevin. ... 6. I did not observe any offence being taken by the Claimant concerning KS being in shorts.”.
49. On the balance of probability, we accept the accounts of KS and ED, they are consistent and also consistent in the main with what WB is clear she can recall, which is she did not recall any conversation being had as the Claimant asserts.
50. We accept the evidence of the Respondent on this matter. The Claimant has not proven on the balance of probability the conduct she alleges.
51. The Claimant also complains as set out at issue 3.1.5 about ... “sexual innuendo which occurred on numerous occasions (and the Claimant has been ordered to provide further information in connection with these allegations above).”.
52. The further information about this is set out by the Claimant in a further information document dated 28 January 2022 at pages 65 and 66 of the bundle. The Claimant does not provide any specifics in that document by setting out what was said and when. She says in the document that there are too many to mention.
53. There were also no details in the Claimant’s written witness statement. It was by way of extensive supplemental questioning that the Claimant introduced some oral evidence about her colleague Kerry making complaints to her about KS’s conduct, asking Kerry for a massage and suggesting they go somewhere quiet. We note that this was what the Claimant says Kerry told her and Kerry

did not attend to provide her own account. KS denied the Claimant's account when asked about it in cross examination.

54. It was not until the Claimant was being cross examined that she provided an example of sexual innuendo when she referred to KS making a reference to his nuts, when referencing some fruit and nuts he had brought into the workplace.
55. It is very unhelpful for all parties for the specifics of such an allegation to not be articulated until cross examination, particularly where a party benefits from legal representation and has been asked to provide that type of further information a year ago. The Claimant explained in her oral evidence that she had only recalled this example a few days before this hearing, because of how her short-term memory is affected by her dyslexia. No medical evidence was presented to us to support what the Claimant says about this.
56. KS denied he would have intentionally made any such innuendo. No other witness at this hearing provided any evidence to suggest such a thing happened either.
57. We therefore accept what KS says and find that the Claimant has not proven on the balance of probability the conduct she alleges.
58. Chronologically it is then on the 23 March 2020 that the Claimant is furloughed, and we were referred to pages 132, 135 and 140 of the bundle, both in the agreed chronology and during the course of oral evidence.
59. This is the second allegation of direct sex discrimination (issue 2.1.2) ... "... on or about March 2020 the Claimant was the only female driver and was the only employee who was furloughed as a result of the covid-19 pandemic. None of her male colleagues were furloughed. The Claimant suffered a loss of earnings as a consequence. Instead of allowing the Claimant to continue working, the Respondent recruited a new male member of staff to undertake her role;".
60. About this the Claimant accepted in cross examination that she was not claiming that she was the only employee who was furloughed, but instead the only driver furloughed, being female.
61. This matter is also asserted as an act of direct disability discrimination (issue 4.2.1) ... "... placing the Claimant on furlough because her cancer was considered to be an underlying risk factor;".
62. It was also asserted as a 'discrimination arising' from complaint until its withdrawal at the start of oral closing submissions.
63. We can understand why the decision to withdraw this complaint was made by the Claimant. The complaint was made on the basis that the alleged

unfavourable treatment of placing the Claimant on furlough was because of previous sick leave that arose because of her cancer.

64. In cross examination the Claimant confirmed that the sick leave she says arises from her cancer is that in July 2020. The Claimant accepted that the sickness prior to that (which is because of a chest infection for a period of 24 days absence from 30 December 2019 to 15 January 2020 and a poorly dog (1 day on the 20 March 2020) (page 114)) was not arising from her cancer. The Claimant accepted therefore that a decision to furlough her in March 2020 was not because of cancer related absence.
65. The Claimant addresses the furlough matter in paragraphs 17 to 25 of her witness statement. In particular in paragraph 17 ... "... At the end of March 2020, I was told by Paula Bryan that I was being placed on furlough due to the Covid-19 pandemic. I received a letter on 30 March 2020 which confirmed I was to be placed on furlough (page 135 of the bundle). I was not consulted with regarding my selection for furlough, nor was I told at the time that the reason was because the company considered me to be more vulnerable to Covid-19. The reason given to me at the time was that there was the business was quieter due to Covid-19 and the Respondent did not need as many drivers. I have since come to learn that this was not true and in fact the Respondent needed to recruit additional drivers."
66. Paula Bryan did not attend to give evidence as to her reasons for what she did. AM addresses the matter in paragraph 5 of her witness statement ... "... My understanding was that the decision taken to furlough the Claimant and others was based on the reasoning that anyone considered to be at risk should be furloughed. The Claimant had 24-days off in December 2019 and January 2020 for a chest infection and this was the basis for furloughing the Claimant. I was not aware at the time of the Claimant's furlough that she had cancer. I was not aware of this until July 2020 (see below) when I conducted a return-to-work meeting. I therefore dispute the allegation being made that the Claimant was placed on furlough because her cancer was an underlying risk fact - see 4.2.1 of the list of issues."
67. We are of course concerned here with why Paula Bryan decided what she did, as it is asserted by the Respondent that it was her decision, albeit KS confirmed in his oral evidence that he agreed with who Paula had selected.
68. AM in her oral evidence explained that she had met with Paula after the decision was made and had been given the document at page 132 which shows those on furlough and the current position with them. AM explained that she understood Paula's decision was based on vulnerability. Those on the list are all females.
69. Considering the other documents contemporaneous to the matter.

70. They are the letter dated 30 March 2020 to the Claimant which confirms her being furloughed and makes no reference to her “vulnerability”.
71. The letter to the Claimant is the same format as those to the others furloughed, as at pages 133 to 139.
72. There is then the email in reply from the Claimant to AM dated 31 March 2020 (page 140) that says she is in agreement with going on furlough.
73. In her witness statement (at paragraph 19) the Claimant describes ... “As a result of being placed on furlough, I only received 80% of my pay which meant I suffered from a significant loss of income.”. This was not raised at the time as being an issue for the Claimant.
74. There is a note of a call between the Claimant and AM on the 16 April 2020 (page 142). It notes the Claimant feeling she was not being communicated with, but not that she thought she shouldn't be furloughed.
75. There is then a note of a call between the Claimant and AM on the 24 April 2020 (page 145). It notes the Claimant is still unwell and didn't feel able to return at that point. The Claimant does not express that she should not have been furloughed.
76. There is then a note of a meeting on the 29 April 2020 between the Claimant and AM (page 146) in which it records that the Claimant asked why Jamie had been driving and why Darren had picked up extra hours and why she wasn't asked to come back earlier even if it was only part time. AM then explains that staff are furloughed for a minimum of three weeks. AM explained that the business is monitored fortnightly to see how the numbers were looking and some days had been busier than others meaning they had more returns of ashes and therefore had to redeploy Jamie to drive as a backup on the busier days, The Claimant is recorded as agreeing that made sense and could understand why that was.
77. This was put to the Claimant in cross examination if she accepted that, and she confirmed that she did and she understood the workings of that.
78. What we have before us therefore is an explanation by the Respondent for what it did being because of the Claimant's vulnerability because of the chest infection absence. The Claimant accepts that the chest infection absence is not caused by her cancer. The Claimant has not presented evidence in her witness statement, or the documents referred to this Tribunal, that Paula directly knew of the Claimant's previous cancer. The Claimant accepts the business rationale for the use of temporary driving assistance while she was on furlough.

79. Considering a hypothetical comparator, being a male driver, with chest infection absence. We have not been presented evidence to infer that they would be treated more favourably than the Claimant and not be furloughed.
80. We would also observe that there is a question here as to whether what happened to the Claimant (i.e., being furloughed) was less favourable treatment. We recognise that there is a reduction in earnings to 80%, but someone with 24 days absence for a chest infection could argue that not being furloughed at the start of the COVID pandemic when it is possible to do so, is less favourable treatment. The Claimant does not articulate at the time that being furloughed was less favourable treatment.
81. On the 29 April 2020 the Claimant returned from furlough.
82. As the Claimant then explains in her witness statement (paragraphs 26 to 30) unfortunately she has a cancer scare and this leads to her having absence for stress and anxiety. There is a meeting about this between the Claimant and AM on the 30 July 2020 (page 163) and then a letter confirming the position of the same date (page 165). There can be no dispute that at this stage the Respondent is aware of the Claimant's previous cancer and this absence arises ... "due to the stress of having to await her results after previously suffering from cancer" (page 163). The letter states that ... "... the company now expect to see an immediate and sustained improvement in your attendance levels... Please be aware that if no improvements are made, the disciplinary procedure may be invoked and appropriate disciplinary action may be taken".
83. It is then on the 6 August 2020 that there is an incident involving the Claimant and damage to a company vehicle. A record of a meeting about the incident and the Claimant's account is at pages 167 to 168 of the bundle. It is signed by the Claimant on the 7 August 2020 (page 167) and the Claimant confirmed in her oral evidence that she agreed with what it said as recorded at that time. It refers a number of times to the Claimant saying she did what she did because the car behind her was so close.
84. We were shown the CCTV footage of the incident and it is not in dispute that after the Claimant turns into the gates and hits the bin, there is a period of 14 seconds elapsing before two cyclists go past and it is 16 seconds before a car passes. We could see that the car does not appear to be passing at a high speed.
85. A meeting takes place between the Claimant and AM on the 7 August 2020. There are notes from that meeting at page 171. They record the Claimant being shown the CCTV footage and confirming that she stands by her decision and statement.

86. Chronologically there is then the third allegation of direct discrimination on the grounds of sex, (issue 2.1.3) being ... "... on 10 August 2020 the Claimant was suspended from her employment following the incident relating to her car. No male colleague had been suspended for a similar incident;"
87. The Claimant refers to this in paragraph 37 of her witness statement ... "I was suspended on 10 August 2020 because of the accident. This is evidenced in the disciplinary hearing notes (page 179 of the bundle)."
88. The Respondent denies it suspended the Claimant and AM addresses this in her witness statement at paragraph 34 and maintained this in cross examination.
89. The reference the Claimant makes to page 179 was drawn to our attention as being also recorded at page 182 in the notes of the disciplinary meeting. They record ... "Michelle said she was mortified when handed the letter of suspension. Michelle asked why Paul hasn't been suspended after hitting the car twice. Annie said she cant talk about other actions of staff members".
90. AM was taken to this in cross examination and explained that there can be misunderstanding in such meetings and maintained that the Claimant was not suspended.
91. The Claimant in cross examination said she believed that she was given a suspension letter but no longer had it.
92. It is for the Claimant to prove on the balance of probability that she was suspended on the 10 August as she alleges. We do not find that she has discharged this burden. We find that at most there was a misunderstanding by the Claimant.
93. There is a letter to the Claimant dated 26 August 2020 inviting her to a disciplinary hearing on the 28 August 2020 (page 173). In short it confirms two issues, being causing unnecessary and severe damage to the car and then providing misleading and incorrect information about it.
94. At the Claimant's request that meeting is then rescheduled to the later date of 1 September 2020 (pages 174 to 176).
95. On the 1 September 2020 the Disciplinary Hearing takes place (pages 181 to 183). It is not in dispute that ZS was also in attendance. It is stated by the Respondent that her role was as note taker only. As AM states (paragraph 43) ... "... Although Zara Skinmore was present at the disciplinary hearing, she only took the notes of the hearing. Zara had no involvement in the decision-making process which was mine alone."

96. Then by letter of dismissal dated 7 September 2020 the Claimant is dismissed with notice (pages 184 to 186). The reason is articulated in detail on page 185. It relates to the damage and the misleading information.
97. AM also states in her statement at paragraph 45 ... "Having listened to her account of the accident, that the person behind her would have driven into the back of her car if she did not pull into the premises at the time she did, I came to the conclusion this was a false account of what occurred on the day after viewing the CCTV footage."
98. The letter of dismissal offers a right of appeal and that it should be done by writing to KS (page 185).
99. The Claimant submits an appeal to AM by letter dated 10 September 2020 (page 188 to 189). It notes the Claimant has contacted ACAS and that she has an expert witness if matters go to the Employment Tribunal. It also says ... "I think it is unjust that the driver that had the same incident, half an hour before was not suspended and appears that not investigation or disciplinary has taken place ... This feeling is not allayed at all when you tell me that I have to appeal to Kevin Sturgeon the Business Owner, who would not appear to be impartial". It ends with ... "Furthermore, I was not afforded any reasonable allowance under the 'Disability Discrimination Act 1995' during the entire disciplinary process.". The appeal does not state that the Claimant considers her dismissal to be because of her sex, cancer or recent absence.
100. By letter dated 11 September 2020 ZS invites the Claimant to an appeal hearing on the 17 September 2020 with AM attending to record the minutes (page 190).
101. By letter dated 17 September 2020 ZS writes to confirm that following the Claimant's request for additional time to prepare, the appeal will be moved to the 2 October 2020 (page 201). It is then moved again to the 19 October 2020 as can be seen by the letter dated 10 October 2020 (page 214).
102. The Claimant's email correspondence that makes the request to move the appeal refers to her dyslexia and needing more time. Over the course of several emails (pages 204 to 213) it is agreed that the appeal hearing will take place on the 19 October 2020, which was also agreed at that later time to reflect the availability of the Claimant's colleague SB and the availability of ZS and AM.
103. By email dated 15 October 2020 (page 215) the Claimant lists several areas of challenge referring to amongst others, Disability and Discrimination Act, Victimisation and Sexual Discrimination.

104. In this claim the Claimant asserts that the Respondent had the following PCPs (as still pursued):
- a. requiring written statements to be provided immediately following an incident; and
 - b. conducting disciplinary hearings in a short timescale.
105. The evidence the Claimant presents about these PCPs is very limited. In paragraph 42 of her statement, she says that in her appeal she indicated the Respondent had not made any adjustments in respect of her dyslexia.
106. It is the Respondent's case that they did not have the asserted PCPs nor that they had knowledge of the substantial disadvantage.
107. We do not find that the Claimant has proven on the balance of probability that either PCP was applied to her or generally.
108. The Claimant approved the notes of her account produced on the 6 August 2020 and agreed on the 7 August 2020. She confirmed that she agreed with the content at the time. The Claimant has not asserted it is an inaccurate account, nor that it would have been different but for the alleged PCPs.
109. Further, the timescale does not appear to be short. Requests for more time were agreed with the Claimant.
110. As matters are conducted with the Claimant's agreement the Claimant has not shown a substantial disadvantage nor proven that the Respondent was aware of any such disadvantage.
111. The Claimant presents an appeal statement at the start of the appeal hearing (pages 216 to 222). This document raises sexual discrimination complaints referring to the decision to furlough, KS dropping his trousers on more than one occasion, and showing of inappropriate material being the paedophile vigilante clips (page 219). As to disability it refers to a lack of training; her cancer and that there were no allowances during the informal meeting on the 6th or follow up meeting on the 7th. It also under a heading of victimisation asserts that she has been treated differently to PF who was not suspended. It is accepted that this constitutes a protected act.
112. In the appeal minutes it is also noted (at page 223) (as was drawn to our particular attention in the Claimant's closing oral submissions) that the Claimant felt ... "the previous male driver to hit the bin was not suspended or sacked and feels this was because she is the only female driver who stood up to the owners sexual remarks and actions on more than one occasion which Michelle felt contributed to her being suspended".

113. We have considered the whole of the notes of the appeal hearing which are at pages 223 to 226. From that it is apparent that ZS is seeking information and clarification from the Claimant about what she is alleging. In response to the above quoted extract ZS asked the Claimant what she means by sexual remarks and actions on more than one occasion as she was unaware of it. What follows from the Claimant is unfortunately a lack of any further specifics. The Claimant refers to having to check her diary but does not provide any more specifics and did not produce her diary to the Respondent or this hearing.
114. The appeal outcome is communicated by letter dated 12 November 2020 as can be seen at pages 235 to 238. The appeal outcome does appear to address all the matters that the Claimant raises.
115. As to the Claimant's comparator PF. AM says at paragraph 53 of her statement ... "The work colleague referred to (PF) was in his probation and I conducted a probationary review meeting with him on 4th September 2020. I had concerns about PF's standard of driving and failing to report an accident which caused damage to a Company vehicle. When I asked PF for an explanation, he stated that he had not realised he caught the passenger side handle of the hearse when driving through the rear gates and he failed to report this accident immediately to his manager, even though CCTV showed him assessing the damage to the hearse. PF had hit the bin previously but had not caused any damage to the vehicle. However, this incident which happened shortly afterwards did cause significant damage to the hearse. I therefore took the decision to terminate his employment with effect from 6th September 2020 and gave him 1-weeks' notice which was paid in lieu."
116. The termination letter of PF is at page 187. It affords PF a right of appeal by writing to ZS.
117. The Claimant claims that the dismissal was an act of direct sex discrimination ... "2.1.4 the Claimant was dismissed on 7 September 2020. The Claimant contends that a male colleague in the same circumstances would not have been dismissed. On the same day a male colleague named Paul was involved in a car accident with the same bin, but he was not disciplined in any way;"
118. The Claimant also claims it was an act of direct disability discrimination ... "4.2.2 dismissing the Claimant because of her cancer and/or her dyslexia."
119. Also, by way of permitted amendment as a section 15 complaint that because of a cancer scare in July 2020 she had time off for stress and anxiety which arose from her disability (the cancer) and that dismissal was unfavourable treatment because of that.

120. The Claimant also claims that she was directly discriminated against on the grounds of sex in respect of the appeal ... "2.1.5 the Claimant was denied the right of an appeal with independent people. A male colleague in the same circumstances would not be treated in the same way."
121. The Respondent denies the Claimant's asserted reasons for her dismissal, maintaining that it dismissed the Claimant for the damage to the vehicle and the Claimant's misleading account about why she did what she did.
122. We accept the reason presented by the Respondent for the dismissal. The Claimant maintained the accuracy of her account as recorded on the 6 August 2020 even after viewing the CCTV footage on the 7 August 2020, which we have also had the benefit of viewing and which does show a significant time gap between the Claimant entering the driveway and a car passing. The Respondent has presented consistent evidence that the damage to the car was substantial and the car needed repair. We have seen an invoice for £600 (page 311). We accept what ZS said in her oral evidence that putting a car in for repair takes it out of action which impacts on the business.
123. We also accept the evidence as to PF and his treatment. He does not appear to be treated more favourably as he is dismissed for a similar matter to the Claimant, damage to a vehicle and not reporting it. As to the incident on the 6 August for PF, it doesn't seem any more generous than the way the Claimant was treated during her probation as we were referred to in the minutes of a meeting in the 31 October 2019 (page 307) in which it is recorded that the Claimant had by that point, two separate hits on her vehicle and got a speeding fine and a congestion charge.
124. PF was also able to appeal to ZS having been dismissed by AM.
125. The Claimant claims that the Respondent did the following things, and they were detriments against her because she had done the protected act (allegation 7.2.1 having been withdrawn):
- a. failing to deal with the appeal with sufficient vigour (which in closing submissions the parties asserted should more accurately be described as rigour); and
 - b. refusing the Claimant's appeal.
126. ZS sets out in her witness statement at paragraphs 22 to 50, her appeal considerations, and conclusions.
127. ZS was cross examined about these and maintained they were accurate, for example as to her belief the damage to the vehicle caused by the Claimant was severe (paragraph 23 of her statement), whereas the PF incident on the

same day was not significant (paragraph 25). What ZS says is consistent with the documentary evidence we have been presented (for example the invoice at page 311).

128. We can also see from the evidence presented by ZS and the appeal outcome letter (pages 236 to 239) that she has responded to the discrimination allegations raised by the Claimant.

129. We do not find that the Claimant has proven on the balance of probability that there was a failure to deal with the appeal with sufficient rigour (or vigour). We find that ZS acted on all the information the Claimant had given her. The notes of the appeal show engagement and enquiry by ZS. She did follow matters up.

130. The Claimant's appeal was refused.

131. We can see from the outcome letter though that it addressed all the issues the Claimant had raised. We would note that there continued to be a lack of information and evidence on some of the complaints the Claimant makes in her witness statement for this hearing and at this hearing, until for example the specifics of a sexual innuendo were articulated for the first time when the Claimant was cross examined. We accept that ZS's appeal outcome was in response to the information she had.

THE LAW

132. This is a claim alleging discrimination on the grounds of protected characteristics under the provisions of the Equality Act 2010 ("the EqA").

133. The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges direct sex discrimination, harassment, direct disability discrimination, discrimination arising from disability, failure in the duty to make reasonable adjustments and victimisation.

134. The protected characteristics relied upon are disability and sex, as set out in sections 4, 6 and 11 of the EqA.

Disability

135. As set out in **section 6 and schedule 1 of the Equality Act 2010** a person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or

trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person.

136. It is not in dispute in this claim that the Claimant is a disabled person at times material to the matters complained about.

Direct discrimination – section 13 Equality Act 2010

137. For a claim for direct discrimination, under section 13(1) of the EqA 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.

138. Direct discrimination claims require a comparison as between the treatment of different individuals i.e., individuals who do not share the protected characteristic in issue. In doing so there must be no material difference between the circumstances relating to each individual (section 23 EqA). The Tribunal therefore must compare 'like with like'.

139. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

140. In respect of the burden of proof, there is a two-stage process for analysing the complaint. At the first stage, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. At the second stage, if the Claimant is able to raise a prima facie case of discrimination following an assessment of all the evidence, the burden shifts to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons (**Igen -v- Wong [2005] EWCA Civ 142** as affirmed in **Ayodele -v- CityLink Ltd [2018] ICR 748**).

141. We also note the recent decision of **Efobi v Royal Mail Group Ltd (2021) ICR 1263** which confirmed that the reverse burden of proof remains good law under the EqA.

142. Considering **Madarassy v Nomura International Plc [2007] ICR 867**, Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination".

143. The burden of proof does not shift to the Respondent simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that the Respondent had committed an unlawful act of discrimination (*Madarassy*). “Could conclude” must mean that “a reasonable Tribunal could properly conclude” from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.
144. In *Igen* the Court of Appeal cautioned tribunals ‘against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground’ but made it clear that a finding of ‘unexplained unreasonable conduct’ is a primary fact from which an inference can properly be drawn to shift the burden.

Harassment – section 26 Equality Act 2010

145. Section 26 of the Equality Act states:

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

Discrimination arising from disability (Section 15 Equality Act 2010)

146. Section 15 of the Equality Act states:

15 Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if—**

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

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

147. We remind ourselves that the correct approach to the operation of section 15 was set out at paragraph 31 by Simler P in the case of *Pnaiser v NHS England [2016] IRLR 170*. In essence, as summarised by Harvey at Q [1468], the position is:

(1) Was there unfavourable treatment and by whom?

(2) What caused the impugned treatment, or what was the reason for it?

(3) Motive is irrelevant.

(4) Was the cause/reason 'something' arising in consequence of the claimant's disability?

(5) The more links in the chain of causation, the harder it will be to establish the necessary connection.

(6) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(7) The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.

(8) It does not matter in which order these matters are considered by the tribunal.

148. At paragraph 31(b) of *Pnaiser*, Simler P emphasised the focus of the analysis to be on the state of mind of the alleged discriminator as to the underlying reason for the allegedly unfavourable treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but it must have at least a significant (or more than trivial) influence on the mind of the person alleged to have caused the unfavourable treatment.

149. In terms of knowledge, there need only be actual or constructive knowledge as to the disabilities themselves, not to the causal link between the disability and its consequent effects which led to the unfavourable treatment.

Reasonable adjustments

150. Section 20 of the Equality Act states:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

151. **Paragraph 20(1) of Schedule 8 to the EqA** provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid — **paragraph 20(1)(b)**.

152. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e., what the employer ought reasonably to have known). In view of this, the EAT has said that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

- a. first, did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?
- b. if not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially? **Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT.**

153. It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

154. There is guidance in the case authority of **Environment Agency v Rowan [2008] IRLR 20, [2008] ICR 218** as to what needs to be found in such claims, namely that in order to make a finding of failure to make reasonable adjustments there must be identification of:

- a. the provision, criteria or practice applied by or on behalf of an employer;
or
- b. the physical feature of premises occupied by the employer;
- c. the identity of non-disabled comparators (where appropriate); and

- d. the nature and extent of the substantial disadvantage suffered by the claimant.

Victimisation – section 27 Equality Act 2010

155. Section 27 Equality Act 2010:

(1) 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.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Time limits

156. Section 120 of the EqA 2010 confers jurisdiction on claims to employment tribunals, and section 123(1) provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.

157. Section 123(3)(a) of the EqA 2010 provides for conduct that extends over a period to be treated as being done at the end of that period.

158. Section 123(3)(b) of the EqA 2010, failure to do something, is to be treated as occurring when the person in question decided upon it. Where there is no evidence to the contrary, s.123(4) of the EqA 2010 provides a default means by which the date of the ‘decision’ can be identified, either when there is an inconsistent act or alternatively the expiry of the period in which the employer might reasonably have been expected to do it.

159. An ongoing situation or continuing state of affairs amounting to discrimination was considered in *Hendricks v Metropolitan Police Commissioner [2003] IRLR 96*.
160. The Employment Tribunal has jurisdiction to extend time on a just and equitable basis. The discretion to extend time is very wide, see, *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraphs 18 to 19, although factors that will almost always be relevant to consider in this context are (a) the length of, and reasons for the delay and (b) whether the delay has prejudiced the Respondent.
161. Claimant's Counsel submitted that whilst there is no direct evidence as to why the Claimant did not commence ACAS early conciliation and/or present her claim earlier, that is not a prerequisite. Whilst that is a factor to consider in favour of the Respondent, it does not obviate the need to consider the balance of prejudice and the exercise of discretion.

THE DECISION

162. Starting with the alleged acts of less favourable treatment on the grounds of sex. Did they happen and were they acts of less favourable treatment?
- a. On or about March 2020 the Claimant was the only female driver who was furloughed as a result of the covid-19 pandemic. None of her male colleagues were furloughed. We find that this did happen and accept that for the Claimant it was less favourable treatment as she suffered a loss of pay as referred to in paragraph 19 of her witness statement.
 - b. On 10 August 2020 the Claimant was suspended from her employment following the incident relating to her car. We do not find this did happen as the Claimant alleges. It is for the Claimant to prove on the balance of probability that she was suspended on the 10 August as she alleges. We do not find that she has discharged this burden. We find that at most there was a misunderstanding by the Claimant.
 - c. The Claimant was dismissed on 7 September 2020. It is not in dispute that the Claimant was dismissed, and a dismissal would be less favourable treatment.
 - d. The Claimant was denied the right of an appeal with independent people. We do not find the Claimant has proven this allegation on the balance of probability. The concern expressed by the Claimant at the time of the appeal is to KS hearing it. He did not do so, ZS did.
163. Then in respect of disability:
- a. Placing the Claimant on furlough because her cancer was considered to be an underlying risk factor. We find that the Claimant was placed on

furlough and accept that for the Claimant it was less favourable treatment as she suffered a loss of pay, we need to consider though, whether it was because her cancer was considered to be an underlying risk factor as also alleged.

- b. Dismissing the Claimant because of her cancer and/or her dyslexia. It is not in dispute that the Claimant was dismissed, and a dismissal would be less favourable treatment. It is in dispute that the reason was her cancer and/or her dyslexia.

164. In respect of those acts we have found proven to have happened as the Claimant alleges, we then need to decide whether the Claimant was treated worse than someone else was treated, known as the Claimant's comparator.

165. There must be no material difference between the circumstances of this comparator and those of the Claimant. For her complaints of direct sex discrimination, the Claimant relies on an actual comparator namely her colleague PF and/or a hypothetical male in the same circumstances. For her complaints of direct disability discrimination, the Claimant relies on a hypothetical comparator without her disability.

166. In respect of the furlough allegation, we have been presented evidence by the Respondent for what it did being because of the Claimant's vulnerability because of the chest infection absence. The Claimant accepts that the chest infection absence is not caused by her cancer. The Claimant has not presented evidence in her witness statement or documentation that Paula (the decision maker) directly knew of her previous cancer at the time of her decision. The Claimant accepts the business rationale for the use of temporary driving assistance while she was on furlough.

167. Considering a hypothetical comparator, being a male driver, with chest infection absence. We have not been presented evidence to infer that they would be treated more favourably than the Claimant and not be furloughed.

168. We would also observe that there is a question here as to whether what happened to the Claimant (i.e., being furloughed) was less favourable treatment. We recognise that there is a reduction in earnings to 80%, but someone with 24 days absence for a chest infection could argue that not being furloughed at the start of the COVID pandemic when it is possible to do so, is less favourable treatment. The Claimant does not articulate at the time that being furloughed was less favourable treatment.

169. We accept the reason presented by the Respondent for the dismissal. The Claimant maintained the accuracy of her account as recorded on the 6 August 2020 even after viewing the CCTV footage on the 7 August 2020, which we have also had the benefit of viewing and which does show a significant time

gap between the Claimant entering the driveway and a car passing. The Respondent has presented consistent evidence that the damage to the car was substantial and the car needed repair. We have seen an invoice for £600 (page 311). We accept what ZS said in her oral evidence that putting a car in for repair takes it out of action which impacts on the business.

170. We also accept the evidence as to PF and his treatment. He does not appear to be treated more favourably as he is dismissed for a similar matter to the Claimant, damage to a vehicle and not reporting it. As to the incident on the 6 August for PF, it doesn't seem any more generous than the way the Claimant was treated during her probation as we were referred to in the minutes of a meeting on the 31 October 2019 (page 307) in which it is recorded that the Claimant had by that point, two separate hits on her vehicle and got a speeding fine and a congestion charge.

171. PF was also invited to appeal to ZS having been dismissed by AM.

172. For all these reasons we find that the Claimant has not demonstrated a difference in status or treatment based on sex or disability. The Claimant has not raised a prima facie case of discrimination following an assessment of all the evidence, so the burden does not shift to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons. We also accept the evidence of AM and ZS about their reasons for the Respondent doing what they did in relation to the Claimant.

173. Then to consider the complaints of harassment. Did the things the Claimant alleges happen?

174. Considering each in turn:

- a. During October 2019 the Claimant was in the office where Kevin Spurgeon dropped his trousers to his ankles to show her his pink boxers. The Claimant was with Paula Bryant (Senior Manager) at the time. The Claimant told Kevin Spurgeon that she did not appreciate his behaviour; We accept the evidence of the Respondent on this matter as detailed in our findings of fact. The Claimant has not proven on the balance of probability the conduct she alleges.
- b. In the summer of 2020, there was a second incident where Kevin Spurgeon dropped his trousers in front of the Claimant in the garage. The Claimant asked Kevin Spurgeon what he was doing to which he responded: "you're only jealous". This time Kevin Spurgeon claimed to be showing his colleagues his groin injury; We accept the evidence of the Respondent on this matter as detailed in our findings of fact. The

Claimant has not proven on the balance of probability the conduct she alleges.

c. On another date (details of which will be provided by the Claimant) Kevin Spurgeon was in the staff kitchen on his mobile laptop, watching videos on Facebook. The Claimant walked into the kitchen and Kevin Spurgeon proceeded to show her paedophile vigilante videos which was highly inappropriate and caused an uncomfortable working environment for her [the Claimant contends that Mr Spurgeon only behaved in this way as she was female, and he believed he could engage in such unwanted conduct towards her on the grounds of her sex]. The Claimant provided no evidence about this matter in her witness statement although she said in cross examination that she still relies upon it. When asked in cross examination what she presents in support, the Claimant confirmed that the video would not be shown to a male. This proposition was not put to KS in cross examination. We accept the evidence of the Respondent on this matter as detailed in our findings of fact. The Claimant has not proven on the balance of probability the conduct she alleges.

d. Sexual innuendo which occurred on numerous occasions (and the Claimant was ordered to provide further information in connection with these allegations). Unfortunately, the Claimant did not provide such specifics only articulating one example when she was under cross examination. It is very unhelpful for all parties for the specifics of such an allegation to not be articulated until cross examination, particularly where a party benefits from legal representation and has been asked to provide that type of further information a year ago. The Claimant explained in her oral evidence that she had only recalled the example she gave a few days before this hearing, because of how her short-term memory is affected by her dyslexia. No medical evidence was presented to us to support what the Claimant says about this. KS denied he would have intentionally made any such innuendo. No other witness at this hearing provided any evidence to suggest such a thing happened either. We therefore accept what KS says and find that the Claimant has not proven on the balance of probability the conduct she alleges.

175. As the Claimant has not proven on the balance of probability that the things she alleged did happen, we do not find there was such unwanted conduct as she asserts. We therefore do not need to go on and consider the other aspects of these complaints.

176. As to the complaint of discrimination arising from disability (section 15 of the Equality Act 2010). By way of amendment and withdrawal this complaint is that because of a cancer scare in July 2020 the Claimant had time off for stress and anxiety which arose from her disability (the cancer) and that dismissal was unfavourable treatment because of that.

177. It is not in dispute that the Claimant was dismissed, and a dismissal would be unfavourable treatment.
178. We then need to consider whether the following thing arose in consequence of the Claimant's disability of cancer? The Claimant's case is that time off for stress and anxiety because of a cancer scare that was heightened because of her previous cancer, arose from that disability. This does not seem to be in dispute between the parties and we accept this to be the case.
179. Then to consider whether the dismissal was because of this time off for stress and anxiety which is said to have arisen from the Claimant's disability? As already noted, the Respondent does not rely on a proportionate means of achieving a legitimate aim, asserting the reason for dismissal was the Claimant's conduct. As we have detailed above, we accept the reason presented by the Respondent for the dismissal. The Claimant maintained the accuracy of her account as recorded on the 6 August 2020 even after viewing the CCTV footage on the 7 August 2020, which we have also had the benefit of viewing and which does show a significant time gap between the Claimant entering the driveway and a car passing. The Respondent has presented consistent evidence that the damage to the car was substantial and the car needed repair. We have seen an invoice for £600 (page 311). We accept what ZS said in her oral evidence that putting a car in for repair takes it out of action which impacts on the business.
180. Considering then the alleged failure in the duty to make reasonable adjustments. In this claim the Claimant asserts that the Respondent had the following PCPs (as still pursued):
- a. requiring written statements to be provided immediately following an incident; and
 - b. conducting disciplinary hearings in a short timescale.
181. The evidence the Claimant presents about these PCPs is very limited. In paragraph 42 of her statement, she says that in her appeal she indicated the Respondent had not made any adjustments in respect of her dyslexia.
182. It is the Respondent's case that they did not have the asserted PCPs nor that they had knowledge of the substantial disadvantage.
183. We do not find that the Claimant has proven on the balance of probability that either PCP was applied. The Claimant approved the notes of her account produced on the 6 August 2020 and agreed on the 7 August 2020. She confirmed that she agreed with the content at the time. The Claimant has not asserted it is an inaccurate account, nor that it would have been different but

for the alleged PCPs. Further, the timescale does not appear to be short. Requests for more time were agreed with the Claimant. As matters are conducted with the Claimant's agreement the Claimant has not shown a substantial disadvantage nor proven that the Respondent was aware of any such disadvantage.

184. As is understood from relevant case law it is for the Claimant to prove on the balance of probability that, for a failure in the duty to make reasonable adjustments, the asserted provision, criteria or practice was applied by or on behalf of an employer.

185. We do not find that the Claimant has proven on the balance of probability that the asserted PCPs existed or were applied to her or generally.

186. As to the complaint of victimisation. The agreed issues in this claim record that during the appeal process, in the Claimant's typed appeal submissions, the Claimant complained about discriminatory behaviour by the Respondent. The Respondent concedes that this was a protected act. We agree.

187. So, to consider, did the Respondent do the following things (as still pursued)?

a. failing to deal with the appeal with sufficient rigour (rather than vigour as set out in the agreed issues as the parties confirmed in their closing submissions that this is what they thought was the issue); and

b. refusing the Claimant's appeal.

188. We do not find that the Claimant has proven on the balance of probability that there was a failure to deal with the appeal with sufficient rigour (or vigour). We find that ZS acted on all the information the Claimant had given her. The notes of the appeal show engagement and enquiry by ZS. She did follow matters up.

189. The Claimant's appeal was refused.

190. We can see from the outcome letter though that it addressed all the issues the Claimant had raised. We would note that there continued to be a lack of information and evidence on some of the complaints the Claimant makes in her witness statement for this hearing and at this hearing, until for example the specifics of a sexual innuendo were articulated for the first time when the Claimant was cross examined. We accept that ZS's appeal outcome was in response to the information she had.

191. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude that the Respondent has committed an act of discrimination, in the absence of an adequate explanation. The first stage of the burden of proof exercise will usually depend on what inferences it is proper to draw from the primary facts found. From these primary facts we are satisfied that the Respondent and in particular ZS has acted for a particular reason, being her conclusions on the appeal matters based on the evidence presented to her by the Claimant and her subsequent enquires. We do not find facts to infer discrimination.
192. As a consequence of these findings, we do not need to go on and consider the time limit jurisdictional matters.
193. The unanimous judgment of the Tribunal is therefore, that the remaining complaints of direct sex discrimination, harassment, direct disability discrimination, discrimination arising from disability, failure in the duty to make reasonable adjustments and victimisation, all fail and are dismissed.

Employment Judge Gray
Date: 26 January 2023

Judgment sent to Parties: 08 February 2023

FOR THE TRIBUNAL OFFICE