EMPLOYMENT TRIBUNALS

Claimant: Ms Navabaksh

Respondent: Ben Adams Architects Limited

Heard at: London South (Croydon) via CVP

On: **14, 15 and 16 November 2022 and in Chambers 6 and 7 March 2023**

Before: Employment Judge Khalil (sitting with members)
Ms Clewlow
Mr Townsend

Appearances

For the claimant: Mr Magennis, Counsel
For the respondent: Ms Evans-Jarvis, Lead Litigation Consultant, Peninsula

RESERVED JUDGMENT

Unanimous Decision

- The claimant was a disabled person within the meaning of S. 6 of the Equality Act 2010 with effect from 26 February 2020.

- The claimant's claims for Direct Disability Discrimination (S.13 Equality Act 2010), Harassment (Disability) (S.26 Equality Act 2010) and Victimisation (S.27 Equality Act 2010) are not well founded and fail.

- The claimant's claims for Direct Race Discrimination (S.13 Equality Act 2010) and Harassment (Race) (S.26 Equality Act 2010) are not well founded and fail.

- The claimant's claim for Unauthorised Deductions contrary to S.13/23 Employment Rights Act is not well founded and fails.

- The claimant's claim for (constructive) Unfair Dismissal pursuant to S.94/95 of the Employment Rights Act 1996 is not well founded and fails.

- Both parties' applications pursuant to Rule 50 of the Employment Tribunals Regulations 2013 are not well founded and fail.

Reasons

Claims, appearances and documents

(1) This was a claim for constructive Unfair Dismissal contrary to S.94/95 of the Employment Rights Act 1996 ('ERA'), Direct Disability Discrimination, Harassment (related to disability and race), victimisation and Direct Race Discrimination contrary to S. 13, 26 and s.27 of the Equality Act 2010 ('EqA') and Unauthorised Deductions contrary to S.13/23 ERA.

(2) The claimant was represented by Mr Magennis, Counsel and the respondent by Ms Evans- Morris, Lead Litigation Consultant, Peninsula.

(3) The Tribunal was working from an agreed E-Bundle in 3 parts running to 619 pages.

(4) The Tribunal heard from the claimant and for the respondent, from Ms Alexandra Levin, HR and Office Manager, Mr Benjamin Adams, founding Director, Ms Francesca Pont, Associate Director and Mr Patrick Hammond, Associate Director. All witnesses had prepared and exchanged witness statements.

(5) At the outset of the Hearing, the claimant asked for reasonable adjustments to accommodate her anxiety. The adjustments sought were to have regular breaks. The Tribunal announced it would do so upon the claimant's indication/request. At the outset of the claimant's evidence, she in fact indicated she would prefer a structured stop or pause time which was agreed. Her evidence started at 2.20pm and she asked for a break to be scheduled for 3.15pm. This was agreed. As it happened, her Counsel asked for a break at 3.00pm to reflect the medical advice to have a break after 30 minutes. This advice was not before the Tribunal, neither had the Tribunal understood the claimant's own wish to reflect this. In any case, after a break, the subsequent evidence was paused after 30 minutes and the Tribunal directed that her evidence would continue on day 2, rather than resume after a further break. This was because the respondent said it had at least another 45 minutes, possibly an hour, of cross examination. In the light of the claimant's health, this would amount to a lot of evidence in one afternoon, which was not considered to be in the overriding interest of being fair and just. At the outset of day 2, it was agreed that the Tribunal would pause for a break after every 25 minutes of evidence (including when the respondent's witnesses were giving evidence) as an adjustment to benefit the claimant.

(6) The Tribunal also announced it did not have a list of issues. After discussion with the parties, it emerged that the respondent did not have the final list of issues either. This was subsequently sent to the Tribunal.

(7) Upon a provisional review of the list of issues, the Tribunal announced that in respect of a number of the alleged protected acts, as drafted, the Tribunal was struggling to see how these were arguable protected acts as they were unlikely, without more, to meet the definition of a protected act. Examples were given of

informing Ms Pont of her anxiety and asking to have a private conversation with her. This was important as there were a number of alleged detriments and it was not clear which was said to be because of which act and whether, chronologically, the allegation worked. The parties were asked to reflect on this and address the Tribunal on day 2.

(8) Once it had undertaken its reading, the Tribunal also raised with the parties two documents it could not locate. One of these documents was a letter of 16 March 2020 from the claimant's solicitor. Once the Tribunal was directed to it, the Tribunal realised from the header, without reading the content, that it was stated to be without prejudice. Following discussion with the parties, both parties waived privilege in respect of this document and to any related content in the bundle.

(9) Both representatives announced that they had only recently been instructed on the case. This may well have explained the Tribunal's concerns with timetabling, the claimant had not pre-warned the Tribunal at all about her need for frequent breaks, neither had the respondent informed the Tribunal it was calling four, not two, witnesses.

(10) There was also a Rule 50 application made by the claimant (the written application which the claimant said was dated 11 November 2022, was not before the Tribunal) in relation to anonymising the claimant's name from any Judgment published online. It was agreed with the parties however that this could be addressed before promulgation and the Tribunal would invite submissions first.

(11) On day 3 of the Hearing a document confirming the claimant's pay rise in April 2019 was admitted. This was not opposed by the respondent. The Tribunal had enquired about the client report sent in April 2019 which had caused Mr Adams to be critical of the claimant. Upon reviewing this document, it was not necessary to admit the document into evidence. It would require further evidence, which was likely to be disputed when the Tribunal was already extremely pressed for time. Further, this document had only been referenced for the Tribunal's clarity, but in the light of the claimant's testimony and that of Mr Adams, the Tribunal considered it had sufficient evidence to understand the issue.

(12) Also on day 3, the claimant applied to submit evidence of the claimant's level 3 qualifications which given the (disputed) evidence of Ms Pont, was admitted for rebuttal purposes.

(13) An application for specific disclosure by the applicant to have documentary records of advice sought from and given by Peninsula to individuals working for the respondent was refused. This was because it was not considered relevant and necessary for the Tribunal to determine the issue of disability, which legal question the Tribunal could determine from the claimant's impact statement, the medical evidence, testimony and documents in the Bundle, or the respondent's knowledge of anxiety, noting that the respondent did not dispute the claimant was suffering with anxiety at the material time. If the Tribunal was to find the

claimant was a disabled person by reason of anxiety at the material time, it would follow the respondent had knowledge. It was also already open to argue that by reason of anxiety, the claimant was treated less favourably or unfavourably.

(14) The parties completed the evidence by close on day 3, leaving insufficient time for submissions. The Tribunal directed that these be exchanged in writing, to include submissions on the anonymisation of the claimant's name. The respondent also intimated it intended to make such an application which it would do in 7 days which the claimant could address in her submissions too.

(15) Written submissions were subsequently received from both parties.

Relevant Findings of fact

(16) The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

(17) The findings were unanimous.

(18) Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence or submissions and considered relevant to an issue.

(19) The respondent is an architecture business.

(20) The claimant was employed as a Senior Architectural Designer from 4 June 2018. The claimant had completed her education and qualifications in Iran, with the exception of her Masters in Architecture and a part III post-graduate diploma, which she completed in the UK. She was not however accredited with the Architects Registration Board ('ARB'). Whilst that was common ground, there appeared to be dispute or confusion at the Hearing of these claims, as to whether the claimant had passed her Part III exams. Ms Pont had said in evidence, twice, she believed she had not. The claimant subsequently produced documentary evidence of her Part III qualification.

(21) The claimant initially worked for the respondent at 99 Southwark Street, London until February 2019 when she was asked to move over to Birrane House, 4 Southwark Street, London. This was because the space at 99 Southwark Street was considered overcrowded and in contrast the space at Birrane House, under-used. The claimant was given notice of change, but this was less than one months' notice stipulated in the claimant's contract, clause 12.1 (page 109).

(22) On 21 September 2018, Mr Hammond emailed Ms Pont, Mr Jewell, Senior Consultant, Head of Research and Ms Levin expressing concerns that the claimant was slightly resistant to be working as part of a team unless she was 100% in control and that she was not fitting in too well because of her prickly ego. He also recorded that the claimant did not think Ms Pont liked working with her (page 143).

(23) On 1 October 2018, Mr Hammond emailed Ms Pont, Mr Jewell and Ms Levin again about the claimant's performance to date. He said she was pleasant and supportive of the staff she was managing, but he had concerns about her attitude. These related to resistance to being secondary on a project and her desire to be in charge. He also said he had observed her being rude in some staff interactions and this also related to people she believes she 'outranks'. He mentioned her perception about Ms Pont not liking her. Mr Hammond believed this was about her wanting more responsibility and that he had explained she was still new and needed to prove herself (page 147).

(24) On or around 6 March 2019, a member of staff who had been co-working with the claimant asked Mr Hammond if she could not work with the claimant anymore. In his email, Mr Hammond recorded that although the claimant was very capable, she was also very intense and had been reluctant to his involvement too (page 149).

(25) In April 2019, the claimant was awarded a £2,000 pay rise.

(26) On 25 April 2019, Ms Popovici, another employee, in conversation with the claimant, remarked that the claimant looked young for her age. The claimant remarked back with a similar comment but adding that was because Ms Popovici was very young. The claimant said this was overheard by Mr Adams. Further, the claimant said that Mr Adams and Ms Popovici were in a relationship, with a significant age gap and this remark was taken the wrong way. The Tribunal accepted the remarks were made by both the claimant and Ms Popovici and that the comment was overheard by Mr Adams. The respondent's grievance outcome did not reach a finding on this point (page 320) and Mr Adam's witness statement did not address the matter. Ms Popovici was not called as a witness either.

(27) The claimant asserted that this incident was what started Mr Adams and Ms Popovici bullying her thereafter.

(28) The claimant's time was engaged on working on 2 projects – Voentorg (requiring regular travel to Russia) and Brettenham House ('BH') on which the claimant was supervised by an Associate, Mr Patrick Hammond.

(29) From a hierarchy, the claimant, as a Senior Architectural Designer was lower in rank than a Registered Architect and an Associate. The Tribunal understood that it was possible for claimant's salary to be higher than an Associate owing to experience. The Tribunal accepted Mr Adams' evidence in oral testimony.

(30) On 26 April 2019 the claimant sent out a report to the client on the BH project.

(31) In an email at 12.34, Mr Hammond said to the claimant:

"The priority is getting the plans out and those areas measured – we can follow up with the area schedule on Monday. It will be complex as there are two options so I'd rather not rush it"

(32) In an email at 15.04 to Mr Hamond, the claimant said the area schedules would follow the following week (page 603), this week she would just send the updated report with plans. She asked if he was happy with that. In response at 15.08, Mr Hammond Said this was enough to keep people quiet, adding the claimant had been 'bang on'.

(33) The Tribunal understood the area schedules to be the detailed plans setting out square metre cost. The area tables would mirror this information in tabular form. Area plans were separate and an informal illustration with less detail.

(34) In a further email at 17.16 on the same day, the claimant sent an email to Mr Hammond with the updated report saying she would add the area tables too, before sending it out.

(35) There was no further response that day from Mr Hammond but that evening the client raised concerns with Mr Adams about the report prompting the following email from Mr Adams to the claimant copying in Mr Hammond and Ms Pont that evening:

"Areas without totals, proposed areas, gain per floor, existing totals and sq ft are literally pointless. As I have made clear on so many occasions, an accurate, cross checked, complete and caveated area schedule is the most important part of a feasibility study for an office building. Without one our clients cannot make any viability calculations, and so the rest of the report is of no use whatsoever. Please make certain this is included on any further information issued to the client. It is embarrassing when our clients ask for this, as it is so fundamentally obvious. It is always worth delaying the report to be issued, in order to complete the table."

(36) In response the claimant said:

"*Thank you for your note. We discussed it among us to send the plans and updated report today and next week focus on area schedules. Your point is noted, we will make sure to incorporate it in all future issues. Hope you have a nice weekend"*

(37) Mr Adams responded further as follows:

"I think you need to understand how I direct projects and what I expect from senior staff. 'Your point is noted' is not a reply I expect, and nor is it acceptable. When I give direction, it is exactly that, and any challenge to this is insubordination which is a very serious issue. It is not a point for discussion it is a direction to be followed. Alex, please note this, and I genuinely hope we do

not need to return to this issue. I am certain that the employee handbook, and employment contract are clear on this point. I am disappointed by the tone and content of this exchange, which is not good enough. We have spent enough time and energy on what we require when it comes to areas, on many occasions, that I am very surprised to be addressing the issue again, with a senior member of staff."

(38) On 29 April 2019, the claimant had sought Mr Hammond's view on this email. Mr Hammond responded as follows:

"*Ouch. Ben is incredibly finicky about area tables because they are so important to clients. I did say to hold off on areas until today so we could do them properly. We must also always use the templates, the one in the report isn't great. I have told him that the circumstances you were working under for the report were difficult. It is not a pleasant email at all - I think there was a miscommunication there and he misjudged your tone. I am in this afternoon and we should look at the areas together"*

(39) It appeared to the Tribunal that Mr Adams was expecting the claimant to accept responsibility for an error and/or express an apology. Whilst Mr Adams was entitled to challenge the claimant's error of Judgment (which the Tribunal understood to be the provision of incomplete area tables and without area schedules) to characterise her response as insubordination was over the top.

(40) On 5 July 2019, Ms Levin sent the claimant an email to capture the content of a meeting that had taken place on the Friday (28 June 2019) between Ms Levin, Ms Pont and the claimant. This meeting had been arranged because of the claimant asserting mental stress, depression and anxiety in relation to the Voentorg project. (In her witness statement (paragraph 14), the claimant said Ms Pont had asked the claimant not to use the word 'anxiety' due to the 'weight 'of the word. There was some reference to this in general terms in the claimant's later email of 26 February 2020 (page 197), but no reference to this was made in the claimant's Solicitors letter of 16 March 2020. The Tribunal was not satisfied on the evidence that Ms Pont had asked the claimant to refrain from its use when it would be open to her GP, therapy consultant, OH or her Solicitor to do so. Ms Pont could hardly control or suppress its use in the workplace. The Tribunal rejected that Ms Pont had said this to the claimant.

(41) At this meeting the claimant did refer to the interaction with Mr Adams (in relation to the report sent out on the BH project) which she said had left her feeling low for weeks. She also referred to one of her trips to Moscow where she had stayed in a different hotel to normal which she said was of an unacceptable standard. She felt there was a laborious process around the booking of the trips. Ms Pont said going forward she (Ms Pont) would have responsibility for the costs which would mean the claimant did not have to consult with others. She also committed to sharing the monthly resource availability to enable the claimant to plan her time and routine accordingly. The claimant also said she had been told by Mr Hammond that Mr Adams did not want her to be client facing on the BH project and she felt that as Mr Hammond was the architect on the project she was not needed. Ms Pont explained that

she understood the team on that project had complementing skills and Mr Hammond's plan was to hand over the project to the claimant. Ms Pont explained there were client challenges on this project but that she would follow up and confirm her role on this project. The claimant also expressed a desire to be more involved in developing the sustainability agenda. At the close of the meeting, the claimant agreed that the stress and pressure she had described in her email was specifically regarding coordination of the arrangements and sign off for the Moscow trips (pages 163-164).

(42) On 16 July 2019, Ms Pont emailed Ms Levin, copying in Mr Hammond and Mr Jewell about the claimant's performance against duties. She cited five examples of not meeting deadlines and/or poor presentations. She was also considered to be insubordinate in relation to refusing to work on the BH project and refusal to follow instructions from an Associate Director and Associate. Mr Hammond agreed with Ms Pont's summary and also referred to the incident with Mr Adams (in April) and 2 other incidents in September and October (2018). Mr Jewell also agreed, adding that the claimant's seniority meant taking on responsibility for all jobs she was associated with, not cherry picking those which suited her and he didn't believe she was leading in a way that was expected (pages 166-169).

(43) In a further email of 17 July 2019, Mr Hammond referred to the claimant getting annoyed with him about 'correcting her' and then listed a series of historical issues (pages 171-172):

Historic Issues
• She was very aggressive towards Joann when she worked on Brettenham briefly last year.
• She has been aggressive towards Yuho and made her cry so I we to remove her from the Voentorg team
• She was aggressive towards Jenny when her travel arrangement weren't done to her satisfaction
• She did not want to share responsibilities with Fidel on Voentorg. Refused to treat him as an equal.
• Initial programme for Voentorg did not account for the deliverables. I had to reject it and require a new one be made and this was not received well.
• On 28th Sept I had to get involved in Voentorg because an agreed plan was changed so that she could try to get 'her' option out to the client instead of programmed work – she made the whole team stay late for this so I stopped it.
• Complained to PH in Sept 18 that Fran did not like her and she says that members of the team have told her this. I personally do not think it is likely that anyone on the team said this
• Complained that she did not want to be on Voentorg as there 'wasn't enough for her to do'
• Complained about being on Brettenham initially last year as I was going to meetings at first.
• She performed badly on a pitch for Nick and he had to work all weekend to finish it

(44) He concluded as follows:

When you list it all out it doesn't look good: she has complained about every project she has been assigned to. Has caused upset to other staff on every project. Has got into issues with Fran, Ben and now myself. And has consistently had problems with performance.

(45) On 18 July 2019, the claimant saw her GP who suggested she took some time off work. On the same day the claimant left the office as she felt she was suffering a nervous breakdown. She set out various symptoms (in paragraph 16 of her witness statement, including a rapid heartbeat and shallow breathing) culminating in her sitting in a public place having a nosebleed.

(46) The claimant emailed Ms Levin to describe how she was feeling on 18 July, referring to what she described as feeling like a nervous breakdown. She also referred to aggressive emails from Mr Hammond and gossiping amongst staff about her This email was in response to a request for a meeting about some project related issues which Ms Levin had asked about following a discussion with Mr Jewell (pages 597-598).

(47) A meeting took place between Ms Levin, Mr Jewell and the claimant on 19 July 2019. The content of the meeting was captured in an email from Ms Levin to the claimant on the same day. At this meeting, Mr Jewell suggested the claimant took the rest of the day off and to see her GP for advice on reasonable adjustments the respondent could make. Mr Jewell also suggested some distance from her projects and said he would not be prepared to send her abroad for meetings on the Voentorg project in her present health. The claimant said it was her personality clash with Mr Hammond and the gossiping which had led to this reaction. Mr Jewell referred the claimant to the complaints procedure if she felt she had been bullied but the claimant said she did not wish to do this. The claimant agreed to go home, arrange to see her GP and use the weekend to recharge. Mr Jewell suggested the claimant to get in touch early in the following week (page 173).

(48) In a further email on the same day, Ms Levin referred the claimant to the grievance procedure if she wished to make a complaint adding "I hope you feel you are able to. There is no place in the office for bullying or harassment of any kind". She also referred the claimant to the respondent's Occupational Health ('OH') policy and informed her she could have 5 therapy sessions for stress related health issues, if she wished to consider this. She reminded the claimant to keep communicating with her to find the best solution forward (page 174).

(49) In response to the first email, the claimant said her GP had referred her for therapy. She added she was happy with responsibilities and workload on Voentorg and had spoken to the client to reduce her visits from every 4 weeks to 6 weeks. She said whilst she was spending most of her time on Voentorg she questioned why she was not working with Directors like other senior architects and raised her desire to improve her skills. She resolved that she was no longer concerned about any discussion Mr Hammond or others may have had about her and she did not feel threatened (page 179).

(50) The claimant also reported concerns about working with Mr Hammond on the BH project saying that he was picking her up on things unfairly (page 178).

(51) In an email of 24 July Ms Levin asked the claimant if she had seen her GP and whether she was fit to work and if any adjustments were recommended by the GP. Also, whether the claimant wished to pursue a formal complaint against Mr Hammond. Further, any recommendation for the claimant to work from home or part time from her GP, needed to be in writing. In response, the claimant said she wished to continue working, that she had seen her GP who had said 'the breakdown was triggered by something repeatedly that appears to have been resolved so he would not worry'. The claimant confirmed she did not wish to make a formal complaint against Mr Hammond. The claimant did not request working from home or part time working, though noting she already had dispensation to work from home on Thursdays (page 177).

(52) On 29 July 2019, Ms Levin informed the claimant that she would need to have a medical certificate confirming her fitness for work, including international travel and lone working (page 176). In response, the claimant said she had seen her doctor's notes which confirmed she looked and sounded fit. She referred to the triggers with Mr Hammond and 'unbearable stress' but also said it was unlikely to occur again based on the support she had received since last Friday (page 176).

(53) Following a discussion on 31 July 2019, Ms Levin reaffirmed the need for a medical certificate and also referred to the claimant's workload, that 100% of her time was being taken up on Voentorg but if she did have spare capacity to work on BH, she would prefer to work under the direction of an Associate Director rather than an Associate (page 175).

(54) The Tribunal found that the claimant ceased working on the BH project from July 2019, owing to a combination of the claimant's working relationship with Mr Hammond, the claimant's request to be removed from this project and client concerns as expressed by Mr Adams.

(55) There was a conversation and an exchange of emails between the claimant and Ms Pont on 8 and 9 August 2019 in which it was expressed by Ms Pont and understood by the claimant, that without her doctor's note certifying her as fit to travel, her travel to Moscow would need to postponed and the meetings rearranged. The claimant also emailed on 11 August 2019, following up on a conversation on 10 August 2019 to state that she had been carrying out her day-to-day duties and felt fit and happy to travel (page 181).

(56) The claimant asserted that in October 2019, she asked to have her work, in leading the internal sustainability group included in her CV which she said was declined. She said, in parallel, there was a work group for residential and office projects, where the individuals leading those groups had that referenced on their CVs. This was stated in the claimant's subsequent grievance (page 611). There was also limited reference to this, although that was in the claimant's email of 28 November 2019 (see below). There was no reference however to who these individuals were or any further context. There was no reference to

who she asked or specifically when or the context or gist of the reply or whether/what reasons were given. There was no further elaboration in the claimant's witness statement (paragraph 21). The Tribunal accepted that this did happen, indeed the respondent's grievance outcome did not dispute this, but it was said the Marketing Manager included CVs tailored according to the audience or pitch (page 323). Owing to a lack of comparative or specific further detail, the Tribunal accepted there was no adverse or sinister motive on the part of the Marketing Manager.

(57) On 4 November 2019, the claimant had a performance appraisal with Mr Jewell and Ms Pont. In her self-appraisal, the claimant referred to the BH project and feeling undermined which had impacted on her physical and mental state. She also said she was appreciative of the support she had received since the incident (what she had described as her nervous breakdown) although had hoped it might have been resolved in a 'slightly more responsive' way. In response, it had been noted in manuscript, that senior members have the casting vote as they are more experienced and more senior. It was noted that the claimant had worked for herself and was used to having the casting vote in decisions. The claimant had also commented that "I hope my melt-down has not affected the Director's judgment on my capabilities". In response it had been noted, in manuscript "proved yourself on Voentorg, that you are resilient". It was also noted in relation to ARB accreditation, that without it, it can limit opportunities with clients and their opinion of you. The claimant also expressed her gratitude for the support on her sustainability visions for the practice (pages 185-187).

(58) In November 2019, the claimant asserted she had been demoted on the claimant's website. She said she had been moved down into the middle of the group amongst senior architects (having previously appeared in the group second from top). She said she was informed this was an error, but subsequently, she saw she had been moved down further below the senior architects, despite being on a higher salary than a number of them. The claimant raised this at the time in an email dated 28 November 2019 asking what she had done to deserve this adding that she felt she had been treated like a criminal ever since her nervous breakdown (page 601). In a subsequent email to Mr Jewell, the claimant added she had been told by Ms Carter that the website issue was because of a 'clash' she would try to sort out with the website developer. In the grievance outcome, it was accepted there was a website update underway in November/December 2019 and staff were rearranged on the website. In oral testimony, Mr Adams said the marketing team were experimenting, such as chronological arrangements and grouping roles together including looking at the hierarchy**.** However, in his conversation with the claimant on 18 December 2019 (see below) he had said to the claimant her placement on the website was correct and that her not being a fully qualified architect, presents issues. The Tribunal found that the change in the claimant's positioning on the website did have the involvement of Mr Adams.

(59) The claimant consulted her GP on 3 November 2019 about her anxiety which the claimant said she had had for about 5 months. It was noted that the claimant was crying more often, losing concentration and experiencing low

mood. Further, the claimant was not sleeping enough. The claimant did not have suicidal or self-harm thoughts (pages 495-499). Her GP also said he would chase up the claimant's outstanding Counselling referral (from July 2019).

(60) On 30 November 2019, the claimant also saw her GP who assessed her to have a depressive disorder and stress at work. He recommended counselling and/or therapy. Although the claimant had been prescribed medication, the claimant had not started this yet (pages 502-503).

(61) On 18 December 2019, the claimant had a meeting with Mr Adams. Ms Levin emailed the claimant on 20 December 2019 to reflect a conversation with Mr Adams the day before (i.e. 19 December 2019), during which Mr Adams conveyed to her what he said had been discussed. This email was at page 188.

(62) In this email, it was recorded that the claimant's position on the website was correct and the claimant not being a qualified architect 'presents issues'. Mr Adams suggested to the claimant, by reference to her experience, to 'own your title'. The claimant's work on Voentorg was praised. In relation to promotion, Mr Adams said the claimant needed to make something out of the sustainability agenda, with greater clarity and be strategic and to prove her ability to run big projects, including complicated ones and ones that are overseas. She also needed to prove she can work well with other people. In relation to BH, there was reference to the client not having confidence in the claimant.

(63) In her witness statement, paragraph 24, the claimant said Mr Adams had also referred to the claimant's nervous breakdown when discussing the claimant needing to prove she could work well with other people/in a team. This was not raised by the claimant at the time when she was sent Ms Levin's email. The claimant said because of her health, she did not have the energy to respond at the time. However, in her subsequent email of 26 February 2020 (page 197, referred to by the claimant in paragraph 24 of her witness statement), she did not mention Mr Adams referring to her nervous breakdown then either. The Tribunal found he had not made reference to her nervous breakdown at this time.

(64) The claimant also said in paragraph 25 of her witness statement that over the Christmas and New Year break, she had felt suicidal and had been unable to leave her bed. There was no evidence that she had seen her GP or other medical professional at this time. This was surprising as she had seen her GP twice in November 2019, on both occasions it had been noted that she did not have suicidal/self-harming thoughts (pages 496 and 501). For that to change, it was remarkable that no medical assistance was sought. She did not see her GP again until 19 February 2020. Whilst the Tribunal accepted that the claimant had some anxiety symptoms at this time, the Tribunal did not accept these were as described.

(65) On 25 February 2020, the claimant had a meeting with Ms Pont and Mr Adams. The minutes were recorded in an email sent on the following day (26 February 2020) which invited the claimant to comment if she considered there were any

errors. This email was at pages 191-192. It was stated that as a result of reduced workload, in particular large projects, the respondent was reviewing the claimant's position in the office. In response, the claimant referred to the possibility of a (new) project in Russia. The claimant referred to the possibility of going part time so she could carry out a PhD. The claimant also referred to some projects in Iran, but these were ruled out because of political risks.

(66) The claimant responded to this email on 26 February 2020 too, in which she did not disagree with the content of the email sent to her and mentioned that her suggestion to reduce hours could work to her benefit too, to enable her to pursue a PhD.

(67) In her witness statement, paragraph 27, the claimant said she raised her mental health at this meeting, but this was not recorded in *either* email. The Tribunal found the claimant had not raised this at that time. The claimant also referred to several promotions and pay rises in her witness statement but did not provide any further/specific details.

(68) On 26 February 2020, the claimant emailed Ms Levin setting out that she felt the company had given up on her and stopped investing in her since her nervous breakdown in July 2019. She referred to an email which she said Ms Levin had sent on Christmas eve (which was not before he Tribunal) which she had wished to respond to. She referred to the April 2019 incident, issues on the Moscow site trip and being demoted on BH. She felt treated as deadwood and had felt scared to communicate the severity of her anxiety. She referred to problems with her menstrual cycle and insomnia. She said the project she was working on still brings money to the practice. Whilst she respected her peers, she said had been treated differently. She concluded:

"Despite my concern over the fairness of the approach, I appreciate the financial concerns and would be happy to contribute to a degree as I have noted that I could use this time to do my PhD. I would really appreciate it when making decision on the terms that my current situation would be accommodated and I would like to know the reduction in working hours will not result in being treated less favourably."

(pages 197-198)

(69) There was another meeting on 26 February 2020 between the claimant, Ms Pont and Mr Adams. The content was captured in an email from Ms Pont to Ms Levin on the same day (pages 193-194). At this meeting, the claimant was informed:

- Due to several large projects being on hold, the sustainability budget needed to be curtailed
- The workload on Voentorg was reducing in intensity
- As the claimant was not a senior architect, placing her in a senior role on UK projects was proving difficult

- The claimant had not pursued ARB accreditation and clients were increasingly required to have accredited architects to lead on projects

- The respondent was unable to continue to offer her a permanent position, for which the respondent said it apologised but said it was not personal

- The claimant could be offered a role as a consultant, which could balance her wish to carry out a PhD as discussed yesterday. The claimant said she wished to discuss this now and knew how the self-employment tax process worked, as she had been self-employed before. The claimant asserted that Ms Pont did not like her which Ms Pont said she had previously refuted. Ms Pont said she did not develop friendships with staff and did not view them in terms or liking them. The claimant asserted she had anxiety which she said had been caused by the office. She requested the terms of the consultancy role in an email.

(70) In her witness statement (paragraph 31), the claimant said Mr Adams expressed that he was surprised that the claimant's lack of accreditation had not been an issue on the Voentorg project. The Tribunal accepted that this had been said, it was consistent with the general concern about the claimant's qualifications and the respondent's explanation was its attempt to reconcile the claimant's work on Voentorg. The Tribunal also accepted that Mr Adams expressed that the claimant was still 'needed' on the Voentorg project and that they would be stupid to get rid of her. The claimant had, in December 2018, been praised for her work on Voentorg by Mr Adams and unlike the BH project, there were no reported concerns involving the claimant.

(71) The email sent to Ms Levin before this meeting was not mentioned by the claimant (or Ms Pont and Mr Adams) at this meeting.

(72) The Tribunal found that at or following this meeting, there was a clear, advanced intention to terminate the claimant's permanent employment. Although the claimant suggested in oral testimony that her employment was in fact terminated, she subsequently clarified that this did not in fact happen, which would be consistent with conduct thereafter which supported an ongoing employment relationship (including the submission of medical certificates, being seen by OH and the prosecution of a grievance and her subsequent election to resign). At the time the claimant had less than 2 years' service. The respondent's evidence was that around this time there were other short serving staff (less than 2 years' service) who were also dismissed. This appeared to be accepted by the claimant (email dated 21 July 2020, page 315).

(73) The claimant asserted that she had requested to have a private meeting with Ms Pont to discuss the consequences of her health. This did not sit consistently with her email at the same time to Ms Levin, wherein she had spoken about her health issues too and asked for those matters to remain confidential as she was shy and nervous to discuss them with anyone else. The Tribunal was not satisfied that the claimant had thus asked for a private meeting with Ms Pont.

(74) The claimant was signed off until 11 March 2020 for work related stress and anxiety (page 199). The claimant had therapy on 27 February 2020 too who recorded the claimant as having stress and low mood. The claimant was also scored as follows: 24/27 (severe) on the PHQ-9 depression measure and 19/21 (severe) on the GAD-7 anxiety measure. It was also noted that the claimant had been feeling hopeless and had thoughts of not wanting to be around but that she did not have intent or plan to act on the thought. The Tribunal noted however, that in her GP appointment of 26 February 2020 (page 508), the claimant had said she was feeling suicidal.

(75) The claimant was signed off again until 31 March 2020 for work-related stress and anxiety (page 202).

(76) The claimant had not sent in her medical certificates. Ms Levin emailed the claimant on 16 March 2020 requesting that these be sent in to ensure her sick pay could be processed and to avoid disciplinary action. She also described the situation as 'totally unacceptable' (page 205). The claimant was also requested to return her laptop so this could be reallocated to another member of staff whilst the claimant was off sick and because staff were now working from home following the Covid-19 lockdown (pages 205 to 207). The claimant cooperated with Ms Levin's requests. In her email of 18 March 2020, the claimant did refer to her therapist saying she might need to be signed off for 6 months.

(77) A Solicitor's letter dated 16 March 2020 was received by the respondent in relation to the claimant (pages 591-596). This letter set out allegations of bullying and harassment in relation to Mr Adams, hotel arrangements on one of her Moscow trips and undermining in relation to working on the BH project. It was also asserted that the claimant was suffering with anxiety, reference was made to various symptoms including difficulty sleeping and the effect on her menstrual cycle. Symptoms in relation to what the claimant had described as her nervous breakdown were also stated. It was alleged that she had a qualifying disability under the Equality Act 2010. Reference was also made to aforementioned issues relating to sustainability on her CV, her position on the website, her meeting with Mr Adams on 18 December 2019 and the recent meetings on 25 and 26 February 2020 (including an allegation of victimisation). The claimant's email of 26 February 2020 was referred to as a formal grievance. The letter concluded with an offer to settle the claimant's claims in return for the claimant agreeing to the termination of her employment.

(78) On 20 March 2020, Ms Levin responded to the Solicitor's letter summarising her understanding of the issues raised and inviting the claimant to a grievance meeting on 26 March 2020, to be chaired by Ms Pont. The claimant said in her witness statement that she was not comfortable with Ms Pont presiding partly because she had made numerous comments about her accent, her level of English and the colour of her skin. For such serious allegations, it was surprising that no examples were given, or dates offered or any other context.

(79) There was an exchange of various emails between Ms Levin and the claimant's Solicitor. The claimant's Solicitor had said the claimant's primary focus was on

securing a mutually agreed departure/exit from the company but had said in the alternative, for the grievance to be dealt with by way of correspondence (page 249). On 8 April 2020 Ms Levin confirmed could be dealt with by written correspondence if that was the claimant's preference (page 273).

(80) By a fit note dated 31 March 2020, the claimant was assessed as fit for work, with adaptations, from 6 April 2020. The adaptations were to work from home and 'limiting situations exacerbating anxiety'. On her return to work, the claimant was informed she was being furloughed until 31 May 2020 (on 80% pay) (page 258). The Tribunal found that the Voentorg project was put on hold, consequent on the lockdown in Russia and upon the claimant's return to work on 6 April 2020, there was no further work required. The outstanding reports referred to in Ms Levin email (page 271) related to a period whilst the claimant was signed off. The claimant's reference to Bryan (Tsang) in her email of 7 April 2020 (page 273) was in relation to a period when she was off sick.

(81) On 30 April 2020, the claimant sent a further document in relation to her grievance, expanding on the detail. She said in her cover email she was being advised by the United Voices of the World Trade Union. She said she was seeking a fair, timely and thorough investigation of her grievance together with a settlement offer. She said she would not hesitate in pursuing the matter further via ACAS and an Employment Tribunal (pages 607-619).

(82) Her complaints involved the following issues:

- Interaction with Mr Adams in April 2019
- The Hotel change in Russia
- Her concerns were not taken seriously
- Anxiety caused by work
- Nervous breakdown – which the claimant said was caused by the stress of working extra hours, being undermined and not being treated equally
- Eventual acceptance of her request to be removed from the BH project – the claimant explained that the micromanaging by Mr Hammond and/or Mr Jewell had been at the instruction of Mr Adams. The claimant referred to Mr Adams subsequently saying that the claimant could not work as part of a team and that the client on BH had expressed dissatisfaction with the claimant, which she said was inconsistent with why she had been removed from the project
- Prevention from including sustainability on her CV
- Variation in Company structure on the website – demotion
- Unfair and contradictory position on the claimant's qualifications - which referred to the meeting on 18 December 2019 too

- Unfair and poorly structured meeting about the Company's finances and my role – 25 February 2020

- My grievance, followed by threat of termination and removal of employment rights – 26 February 2020

- Workplace Bullying and Harassment leading to personal injury, disability discrimination and threat of termination of contract

- Birrane House – despite facing humiliating treatment, I did my utmost to support others

- My positive contribution to the Company's culture

- The severity of my anxiety, depression caused by work, leading to the engagement of my lawyer

- Unfair prevention from promotion – the claimant cited examples of other employees receiving pay rises and/or promotions but did provide specific examples

(83) On 1 May 2020, the claimant had a telephone consultation with OH. The report following this consultation dated 14 May 2020 was at pages 291-295. The OH assessment was that the claimant had work-related stress, anxiety and depression, although the claimant was feeling better and her physical symptoms had improved. The OH Advisor considered that it was unlikely for the claimant to be covered by the Equality Act 2010 because the impairment was unlikely to be long term at the time of the assessment. A phased return to work was suggested after furlough and it was suggested a risk assessment might be worthwhile. It was also suggested she might require extra time or written explanation to engage in the management process. In respect of whether there was any causal link to her work or interaction with management, the OH Advisor said the claimant had stated she enjoyed her work but has raised a grievance regarding the senior management team.

(84) In her witness statement, paragraph 48, the claimant said OH had informed her that they had been confused and surprised by questions relating to whether the claim was a qualifying disabled person and if the respondent was responsible for the claimant's anxiety. Drawing on its own collective Judicial and industrial experience, the Tribunal found these were routine and proper questions to put, in fact, on the contrary, it would have been more remarkable if an OH opinion on these questions were not asked. Although the claimant's union had written to Ms Levin about omissions/inaccuracies in this report on 18 May 2020 (pages 298-299), the Tribunal was not taken to this document, neither was any witness questioned on the content and there was no evidence of acceptance (or otherwise) by OH of these alleged omissions/inaccuracies such that the Tribunal could make any further finding on those matters.

(85) The claimant's furlough was extended on 18 May 2020 until 31 August 2020. This was agreed by the claimant in writing (page 297).

(86) The claimant asserted that some furloughed employees returned to work at the end of June 2020 (page 303), but she did not provide any further details of who returned. There was no evidence before the Tribunal from either party. The claimant also asserted (paragraph 50 of the claimant's witness statement) that 'to her knowledge', the Directors had called these workers but again, did not say who had been called, or by whom, or when or the context of the calls or the basis upon which she said she knew this. No further finding could thus be made by the Tribunal.

(87) By an email dated 9 June 2020, the claimant's union advisers enquired of Ms Levin about a response to her grievance (pages 303-304) and criticised the delay. In response on 12 June 2020, Ms Levin said the investigation was underway but due to the lockdown, the fact that several staff are on furlough or working part time, and some of the witnesses no longer employed and thus more difficult to contact, as well as the length and detail of the complaint this, it was taking longer than it ordinarily would (page 302).

(88) The claimant issued Tribunal proceedings on 3 July 2020.

(89) On 8 July 2020, an email was sent from Ms Levin to Mr Goldsmith about staff on furlough (in relation to team meetings). The claimant's name did not appear. (The claimant's furlough had been extended until 31 August 2020 by a letter dated 19 May 2020 Page 297)).

(90) On 15 July 2020, the respondent announced it was proposing to make some redundancies (page 309). The Roles at risk were Architects, Part II Architectural Assistants, Senior Architectural Designer (the claimant), Marketing Assistant and Team PA. The claimant was invited to a consultation meeting to take place on 21 July 2020 (page 310). The claimant was invited to have the consultation via email if she preferred, which she agreed to. She also informed Ms Levin that she had been informed of this later than her colleagues and she felt anxious about Ms Pont conducting this given that she had already made her redundant unprofessionally without consultation. The Tribunal found this was a reference to the meeting on 26 February 2020 (page 311). In response, Ms Levin said the previous week had involved consultations with staff in a group, unlike the claimant's stand-alone role.

(91) On 21 July 2020, the claimant emailed Ms Levin expressing concern about her outstanding grievance and asserting unfairness in relation to the redundancy consultation process, cross referring to what had happened earlier in the year too. She also invited Ms Levin to communicate with her union in respect of possible settlement.

(92) On 23 July 2020, a grievance outcome was sent to the claimant. The grievance was rejected by Ms Levin.

(93) In relation to the interaction with Mr Adams in April 2019, the grievance concluded that the claimant had committed a serious error and the language used by Mr Adams was not aggressive or threatening and that it did not relate to any previous interaction with Ms Popovici. Reference to or the fact of Mr Adams having anger issues was rejected and there was no connection to the claimant's age.

(94) In relation to the claimant's arrangements in Russia, the grievance outcome concluded there was no guidance on PPE for travel to Russia, further that the claimant was covered by comprehensive insurance. In addition, the claimant had stayed at the 5-star Peter Hotel on all but one trip when the claimant was booked into a 4-star hotel because of a lack of affordable rooms.

(95) In relation to the BH project, the outcome found that the claimant had been removed from the project once the respondent had become aware of her mental health condition. Further, the outcome rejected the claimant had not been in a client facing role or had been deskilled.

(96) In relation to anxiety caused by work, the outcome found that communications from Mr Hammond had not been aggressive or malicious, the focus had been on administration of project tasks. Further, after 19 July 2019, the claimant had been encouraged to see her GP, to follow the complaints procedure regarding Mr Hammond and was removed from the BH project. The claimant had also been encouraged to provide medical certification and recommendations (from her GP) about workplace adjustments. The OH assessment in May 2020 had stated that the claimant was unlikely to be covered by the definition of disability. Accordingly, it was found the claimant had been supported and there was on-going support for the claimant's health.

(97) In relation to the claimant's nervous breakdown, the outcome cross referred to the outcome under the previous section but in addition, it was found that the structure on the BH project was not at odds with office norms with Mr Adams as Director, Mr Hammond as Associate and the claimant as the Senior Architectural Designer (the claimant's peers would have been senior architects).

(98) In relation to the removal of the claimant from the BH project, the outcome found no evidence that the claimant was micromanaged and/or that Mr Hammond or Mr Jewell had been instructed to do so. The claimant was replaced on the project by a recent graduate because the office did not have a senior member of staff to replace the claimant at the time, with Mr Hammond taking over some of the day-to-day issues. The outcome also found evidence of underperformance on BH, questions from the client regarding suitability as well as issues with the claimant's interactions with other staff.

(99) In relation to the non-inclusion of sustainability on the claimant's CV, the outcome found these were often tailored for the specific audience or project being bid for. It was found this was not evidence of bullying or harassment.

(100) In relation to the website, the outcome found there was a website update underway in November/December 2019 and staff were rearranged on the

website. However, the claimant's salary, title and job duties were not changed, thus the claimant was not demoted or treated 'like a criminal'.

(101) In relation to the claimant's qualifications and the website, the outcome found that the Marketing Manager had initially acted unilaterally but that her actions were subsequently approved by Mr Adams. Based on the claimant's performance reviews in November 2018 and 2019, there were mixed reports regarding the claimant's teamwork and that promotion matters rested with Mr Adams which he had addressed on 18 December 2019 and in respect of which the claimant did not meet the criteria.

(102) In relation to the meeting on 25 February 2020, the outcome found that the company was not at the time considering redundancies but had let go three other short serving employees (for performance). The outcome found no issue or connection in relation to Ms Popovici or that the claimant had raised any interpersonal relationship issue with her. Further, the claimant's mail to Ms Levin on 26 February 2020 had stated her desire to keep it confidential and not to discuss it with anyone, ending with a request to have regard to her circumstances in relation to future decisions about work. Further, it did not say it was a complaint or a grievance.

(103) In relation to the meeting on 26 February 2020, it was found that the claimant was given notice of termination but that there was no discriminatory reason behind this decision. Ms Levin also stated that the claimant's email to her had not been seen by her until later and had not been shared with Mr Adams or Ms Pont until after the meeting. It had also not been read as a grievance, thus the outcome rejected there had been retaliation.

(104) In relation to workplace bullying and harassment leading to personal injury, the outcome found the claimant was signed off 26 February to 6 April 2020. The outcome noted the company had offered to pay for counselling, had urged the claimant to consult with her GP, removed the claimant from a stressful project, had enquired about accommodations for the claimant's wellbeing and had suspended the claimant's termination following the claimant's disclosure of her mental health.

(105) In relation to Birrane House, the outcome found that no other staff member had lodged complaints about the move, the reason for leasing the office was overcrowding at the main site (before the staff were moved back in January 2020 due to economic circumstances) and the employee specifically cited had given a different account of her experience there. There was no evidence of any hostile behaviour at Birrane House.

(106) In relation to the severity of anxiety, depression caused by work, the outcome cross referred to its earlier findings about supporting the claimant. It was not clear why the claimant had been seeking to negotiate a termination. The claimant had been urged to lodge a grievance which the outcome found had been received on 30 April 2020 which was the subject matter of this investigation.

(107) In relation to unfair prevention from promotion, the outcome found that two employees had been promoted to Associate, both of whom had been working on large, long-term projects with large teams. Both had been furloughed, now recalled. No evidence of unprofessional behaviour on the part of Ms Pont was found.

(108) In conclusion, Ms Levin stated:

"Having reviewed all of the available evidence it is my finding that you first made the office aware of your mental health condition in July 2019. You were encouraged to take time out of the office, consult with your GP, were offered counselling sessions, were removed from a project you found distressing and were encouraged to pursue Sustainability as a focus in line with your PhD subject. Despite repeated requests for a sick note you self certified yourself well enough to return to work and did not provide the company with any requests or recommendations from your GP for accommodations that would need to be made. The company grievance procedure is freely available to view in the company's Employee Handbook and was brought your attention, you did not make a complaint against any of the senior staff including Ben Adams until April 30th 2020 and I have been unable to find any evidence that any harassment, bullying, discrimination or neglection of duty took place. I did not find evidence that your employment rights were breached."

(109) In total, Ms Levin interviewed 12 witnesses, but the notes of these were not before the Tribunal. The claimant was given a right of appeal which she exercised on 3 August 2020.

(110) The claimant's appeal document was 30 pages, at pages 330-360. A summary of the claimant's appeal was captured in points 1 to 6 of the appeal outcome report (page 417) – that the grievance outcome report had missed several key points, that it contained contradictory statements, the response was slow and inadequate, the selection for redundancy continued to follow patterns of discrimination, the respondent's conduct had caused the claimant's health to deteriorate and the claimant's health had not been treated with care, dignity and respect and the claimant's placement on furlough had continued to cause the claimant detriment.

(111) In August 2020 (paragraph 59 of the claimant's witness statement), the claimant described her symptoms as follows:

"*shortage of breath, missing menstrual cycles, insomnia, difficulties concentrating, little appetite, feeling of impending doom, sharp pain in my belly and chest, shaking, fast heartbeats and dizziness, inability to focus and concentrate, impacting my day to day activities and sometimes my ability to leave the bed. I was having, by this point, nervous breakdowns on a daily basis. In around the second week of August, for example, I burst into tears while I was cycling and had to stop by the roadside until I could stop crying, which led me to a minor accident."*

(112) This evidence was not challenged.

(113) A report was prepared on 11 September 2020 by Georgina Shepherd of Face 2 Face, the organisation appointed to conduct the claimant's appeal. The appeal outcome recommended the grievance appeal was dismissed.

(114) On 16 September 2020 the claimant resigned citing continual discrimination and harassment because of the claimant's mental health and the procedure used and the delays. The resignation letter set out the history of the claimant's issues to date (pages 436-445).

(115) On the next day (17 September 2020), the appeal outcome report was sent to the claimant (page 412).

(116) The appeal outcome recommended that the respondent look to the OH recommendations upon the claimant's return to work. Further, that the respondent should communicate with the claimant about the redundancy process and any updates in relation to this (pages 415-435).

Applicable Law

Disability – S. 6 EqA

(117) The law on the definition of "disability" is provided by S.6 EqA and further assistance is provided in Schedule 1 of the same Act.

S.6(1) of the EqA defines disability as follows:

"A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities"

(118) The above definition poses four essential 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?

(119) Under paragraph 2(1) of Schedule 1 to the EqA, the effect of an impairment is long term if it:

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

(120) Under paragraph 2 (2) of Schedule 1 to the EqA, 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 to have that effect if that effect is likely to recur.

(121) The term “substantial” is defined in S.212(1) EqA as meaning ‘more than minor or trivial’.

(122) Guidance on the definition of “disability” is also contained in a document produced by the Office for Disability Issues in May 2011 called “Guidance on matters to be taken into account in determining questions relating to the definition of disability” (‘the Guidance’).

Discrimination - S.13, S.26 & S.27 EqA (Disability & Race)

(123) The direct discrimination, harassment and victimisation provisions of the EqA say:

(124) S.13: Direct:

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

(125) S.26: Harassment

> (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
>
> violating B's dignity, or
>
> creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(126) S.27: Victimisation:

> 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.

(127) The burden of proof is set out in S.136 (2) EqA. This provides:

"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."

(128) S.136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

(129) The guidance in ***Igen Ltd v Wong 2005 ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent.

(130) The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

(131) In ***Laing v Manchester City Council 2006 ICR 1519 EAT***, the EAT stated that its interpretation of Igen was that a Tribunal can at stage one have regard to facts adduced by the employer.

(132) In ***Madarassy v Nomura International PLC 2007 ICR 867*** CA, the Court of Appeal stated:

"*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 a balance of probabilities, the respondent had committed an unlawful act of discrimination*"

(133) In Victimisation claims, the protected act must have a 'significant influence' on the decision to dismiss or the alleged detriment ***Nagarajan v London Regional Transport 1999 ICR 877 HL.*** In ***Igen***, 'significant influence' was clarified to mean 'an influence which is more than trivial'.

(134) Also, with regard to victimisation, the claimant would need to establish that she did a protected act and that there followed detriment; however, in accordance with ***Madarassy,*** something more would be required to indicate a prima facie case of discrimination to shift the burden of proof.

Unauthorised Deductions – S.13/23 ERA

(135) Under s.13 of the Employment rights act 1996, an employee has the right not to suffer an unauthorised deduction. Under S. 13 (4):

Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Constructive Unfair Dismissal – S. 94, 95, 98 ERA

(136) Under S. 95 Employment Rights Act 1996 ('ERA'), an employer is treated to have dismissed an employee in circumstances where he is entitled to terminate the contract by reason of the employer's conduct.

(137) The legal test for determining breach of the implied term of trust and confidence is settled. That is, neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee ***Malik v BCCI 1997 ICR 606***.

(138) The correct test for constructive dismissal was set out and established in ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221*** as follows:

- Was the employer in fundamental breach of contract?
- Did the employee resign in response to the breach?
- Did the employee delay too long in resigning i.e. did he affirm the contract?

(139) In ***Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*** it was confirmed that any breach of the implied term of trust and confidence was repudiatory.

(140) In ***Ishaq v Royal Mail Group Ltd UKEAT/0156/16/RN***, the EAT, following a review of relevant authorities, approved the principle that it is enough that an employee resigns in response, at least in part, to a fundamental breach by the employer citing the Court of Appeal decision in ***Nottinghamshire County Council v Meikle 2004 EWCA Civ 859***.

(141) In ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833 CA*** the test was in a last straw case was summarised as follows:

"I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

Has he or she affirmed the contract since that act?

If not, was that act (or omission) by itself a repudiatory breach of contract?

If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

Did the employee resign in response (or partly in response) to that breach?"

Conclusions and analysis

(142) The following conclusions and analysis are based on the findings which have been reached above by the Tribunal and are in relation to the agreed issues in the case. The findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

(143) The conclusions were unanimous.

Disability

(144) The claimant relies on anxiety and depression as her qualifying disability.

(145) The Tribunal deliberated extensively on this issue and were not aided by a lack of specific attention or focus by both parties in the evidence *and* submissions. The Tribunal were taken to very little of the documentation, including the medical documentation.

(146) The Disability Impact statement did not set out with clarity the impact on the claimant at the material date. The impact statement was dated 3 June 2022. Paragraph 8 referred to 27 Mental Health assessments, but these were not before the Tribunal. Paragraph 9 referred to the claimant being referred to/accepted *now* for long term integrated psychological therapy. Paragraph 10, which dealt with effect, did not refer to a period and paragraph 11 was written entirely in the present tense.

(147) The Tribunal thus focused its assessment of the issue of disability by its consideration of the contemporaneous documentation. The Tribunal noted that since the claimant's breakdown in July 2019, she did not consult her GP about her anxiety and depression until 3 November 2019. Thereafter, she consulted her GP on 30 November 2019. Both of these occasions were proximate to her annual PDR and her email to Mr Jewell of 28 November 2019 regarding the website. The claimant consulted her GP on 18 February 2020 which the Tribunal concluded was to chase the outstanding referral to the mental health team (page 507). Thereafter, the claimant consulted her GP on 26 February 2020. This was after the two meetings on 25 and 26 February 2020, when the claimant would have realised her employment was at risk. Her anxiety would have been heightened. It was at this point, the Tribunal concluded, that the claimant's anxiety and depression was long term, such that it was likely to last for 12 months from 18 July 2019. The impact on the claimant was in relation to her feeling very low (page 486, 509), losing concentration and feeling low (page

495), sleep deprivation (page 496, 500, 501, 509), missing/irregular periods (page 500, 507) and poor motivation (509).

(148) The claimant was experiencing these effects from July 2019 to February on a recuring basis and the effects were likely to recur beyond 26 February 2020, for a period beyond 12 months from the first occurrence, especially given that the stakes regarding the claimant's future employment uncertainty were significantly raised from 26 February 2020 (C6 of the guidance applied). The claimant's menstrual cycle was affected too which also a normal day to day activity (in the sense in being regular) even though it is gender specific (D3, D^ of the guidance applied). The claimant was also impaired by neglect of her sleep (D16 of the guidance applied). In the appendix dealing with factors which would be reasonable to take into account as having a substantial effect on normal day to day activities, persistent general low motivation is included.

(149) In the light of this conclusion, it was not necessary for the Tribunal to assess the subsequent medical evidence as it was not informative of the claimant's long-term prognosis from any earlier date.

Protected Acts – 2 (a) to (j)

(150) The Tribunal concluded the claimant's reliance on the alleged protected acts 2 (a) to 2 (c), 2 (e), 2 (f), 2 (h) and 2 (i) were not made out. In no sense could any of these assertions amount to protected acts under any provision of S.27 (1) EqA. The agreed issues in the case were advanced on the basis of the 'doing' of a protected act. These assertions were, broadly, about the claimant informing the respondent of her mental health which were not, without more, assertions of any contravention of the EqA or the doing of anything for the purposes of, or in connection with, the EqA. In addition, 2 (e) and 2 (f) have been found by the Tribunal to not have occurred.

(151) In relation to 2 (d), 2(g) and 2 (j), the Tribunal concluded these were protected acts. First, informing the respondent, on 28 November 2019 that she believed she was being treated like a criminal because she had a nervous breakdown, was the bringing to her employer's attention that she felt she was being ill treated because of a mental impairment, which the claimant (at that time) considered a long-term underlying mental impairment. She need not have said, expressly, she considered she was being discriminated against because of a disability. Second, on 26 February 2020, the claimant emailed Ms Levin setting out that she felt the company had given up on her and stopped investing in her since her nervous breakdown in July 2019 and she felt treated as deadwood and had felt scared to communicate the severity of her anxiety. She referred to problems with her menstrual cycle and insomnia. She said had been treated differently. Third, in respect of seeking reasonable adjustments in relation to her grievance, the Tribunal concluded that this was requested by the claimant via her Solicitor on 23 March 2020, who explained that the claimant was unwell, that it was inappropriate to proceed via a formal process to clarify matters which had initiated and exacerbated her condition and as a result, requested the claimant's grievance to be dealt with via correspondence.

Victimisation – 3 (a) to (p)

(152) 3 (a) - In respect of the refusing to allow the claimant to add her sustainability work on her CV, the Tribunal concluded that this predated the first protected act. The claim fails on that basis alone. The claimant said this happened in October 2019. In any case, the Tribunal has already said in its findings above that the claimant's case on this was very inadequately advanced, such that the alleged comparative case she was making, could simply not be made out.

(153) 3 (b) - In respect of demoting the claimant on the website, this allegation too was not in scope. This allegation predated the making of the first protected act. The claimant said this had happened in November 2019, the detail of which she had set out *in* her first protected act on 28 November 2019. This sequence was clear from paragraph 23 of the claimant's witness statement. In any case, the Tribunal concluded that the rearrangement of the website, commensurate to qualifications, was not, objectively viewed, a detriment in circumstances where the claimant was not ARB accredited and had chosen not to pursue this.

(154) 3 (c) - In relation to the meeting on 18 December 2019 and Mr Adams' comments and conduct, the Tribunal concluded that Mr Adams provided constructive feedback to the claimant. The claimant was praised and encouraged to 'own her title'. The Tribunal concluded that Mr Adams felt the claimant was not ready for a promotion which was a conclusion he was entitled to reach having regard to his actual or informed knowledge of the claimant's work, behavioural/relationship issues with her colleagues, difficulties with the BH project and his own direct experience of the claimant's report error. This was partially illustrated by Mr Hammond's email of 17 July 2019 (pages 171-172). It was also the case that Mr Adams was concerned that the claimant not being a fully qualified architect presented issues. In any case, the Tribunal also concluded there was no causal link to the claimant's making of a protected act on 28 November 2019. The Tribunal noted that at her appraisal, the claimant had, on the contrary, been praised for her resilience (page 186). The Tribunal concluded it was likely that Mr Adams would have been made aware of and read the appraisal of the claimant (and others). He also said that promotions were discussed once a year with the Associate Directors (paragraph 19 of his witness statement) (Ms Pont was present at the claimant's appraisal too).

(155) 3 (d) - In relation to the meeting on 25 February 2020, the Tribunal accepted there was a genuine business need behind the main premise of the meeting. Several large projects were on hold: Northcote, St James and Wildwood, these were cited and this evidence was not challenged (page 195). The claimant's contemporaneous response was notable in that the claimant offered to reduce her hours to enable her to pursue a PhD. She did not challenge the business rationale or suggest there was anything untoward about the meeting or the timing. The Tribunal concluded that the decision to consider the claimant's position would have been influenced by the claimant's length of service (less than 2 years) and a concurrent view of the claimant that her lack of accreditation was an issue and challenges to date with the claimant's work, behavioural/relationship issues and report error. It was also uncontested that other short serving staff were dismissed around this time too. Whilst such a

meeting was a detriment, the Tribunal concluded there was no causal link to the protected act on 28 November 2019. It was also not the case that the claimant was singled out for discussions about reduced hours. This was a suggestion made by the claimant in the context of an alternative solution alongside the claimant's desire to undertake a PhD, working to 'her' benefit.

(156) 3 (e) to (h) - In relation to the meeting on 26 February 2020, the Tribunal has already found that there was no request by the claimant for a private meeting with Ms Pont. In relation to the comments of Mr Adams at this meeting and the threat to terminate the claimant's employment, the Tribunal essentially repeats the reasons for its conclusions above in relation to the 25 February 2020 meeting. This meeting was an extension of that meeting with more detailed discussion around the claimant's lack of accreditation. Retaining the claimant as a consultant was also intimated at this meeting which was not consistent with any personal dislike of the claimant or retaliation, after all that would still require to be client facing for the respondent. Had this been a dismissal meeting, there would have been procedural questions. The ambiguity about the respondent's intention at this meeting and the claimant's status after this meeting was explored in evidence from which the Tribunal concluded that the claimant was not dismissed at this meeting. This was consistent with the claimant's and respondent's course of dealings with each other thereafter including seeking an OH opinion on the claimant, the prosecution and resolution of the claimant's grievance, putting the claimant at risk of redundancy in July and the claimant's election to resign in September 2020.

(157) 3 (i) - In relation to the taking the claimant's laptop away from her, the Tribunal concluded that this allegation was a non-starter. The claimant was on sick leave during a period when the lockdown was imposed, at which time the laptop could be reallocated to an employee working without a reliable machine at home. That was a complete answer. There was no detriment and no causal link to any protected act.

(158) 3 (j) - In relation to placing the claimant on furlough leave, this was not unique to the claimant but most other employees owing to the prevailing lock down. The claimant was furloughed because of lockdown, which in the claimant's case was implemented when she returned from sick leave on 6 April 2020. The claimant said in evidence that she accepted and agreed the arrangement. The furlough was extended on 18 May 2020, which the claimed accepted in writing. That acceptance was in the bundle at page 297. The Tribunal concluded that placing the claimant on furlough, whilst a detriment (though not a breach of contract because of the claimant's agreement), had nothing to do with any protected act.

(159) 3 (k) - In relation to asking the OH physician questions, the Tribunal has already found that the questions were neither unusual nor hostile. On the contrary, they were quite normal and it would have been more unusual if not asked. The responses might have informed the respondent of possible subsequent responsibilities, actions or enquiries. There was no detriment.

(160) 3 (l) - In relation to time taken to deal with the claimant's grievance, the time period was from 30 April 2020 to 23 July 2020. It was thus approximately 11 weeks. This was a long period. However, this was mitigated by the size and nature of the grievance but moreover, this was during a period of lockdown during which employees were furloughed, some were working part-time and some had left. This evidence was not challenged. In addition, the claimant was advised of the delay and of the aforementioned explanation, albeit upon enquiry. The grievance investigation entailed interviewing no less than 12 individuals. That was a significant task. In this context, the delay was not unreasonable or without reasonable excuse. It was a detriment to the claimant to wait for this long, but the Tribunal concluded this had nothing to do with any of the claimant's protected acts.

(161) 3 (m) - In relation to not agreeing to make reasonable adjustments to the grievance process, the claimant's request for the grievance to be dealt with via correspondence was agreed. This was confirmed by Ms Levin in her email of 8 April 2020 (page 273) and confirmed in the claimant's own witness statement (paragraph 46). There was no detriment as asserted.

(162) 3 (n) - In relation to keeping the claimant on furlough until August 2020, the Tribunal repeats its conclusions above (in relation to furlough) but in addition, by 15 July, the respondent was also considering multiple redundancies. Even if continuing to furlough the claimant rather than proceeding with the redundancy process thereafter constituted a detriment, this had nothing to do with any protected act.

(163) 3 (o) - In relation to not calling the claimant about furlough, the Tribunal did not find, for reasons expressed in its findings above, that this happened. There was no detriment.

(164) 3 (p) - In relation to generally holding up the claimant and preventing her from progressing in her career, this was a very wide, ambiguous and unspecific assertion. The Tribunal concluded however that any restrictions to progress were rooted in the claimant not being a UK qualified architect because of her non-ARB accreditation. With genuinely and reasonably held concerns about the claimant's work, relationships and behaviour, there was no connection with any protected act.

(165) For completeness, the Tribunal concluded that it was more likely than not that because of the working relationships between Ms Levin, Mr Adams and Ms Pont in particular and because of their overlapping involvement in matters relating to the claimant, that each had knowledge of the protected acts.

(166) The Tribunal also concluded that even if it was wrong in its conclusions about some of the alleged protected acts, which it has concluded were not protected acts (see above), following the reasons for its conclusion about the alleged detriments, there was no causal link at all to any of those asserted protected acts either.

(167) The burden of proof did not shift in relation to any of the alleged detriments.

Direct Discrimination – Disability & Race - 6 (a) to (i)

(168) The Tribunal concluded that only allegations 6 (h) and (j) could be in scope in relation to the claimant's allegation of Direct Disability discrimination following the Tribunal's conclusion that the claimant was a disabled person with effect from 26 February 2020.

(169) The Tribunal refers to the reasons for its conclusions above (victimisation) in relation to these issues in the direct disability discrimination claim. The Tribunal concluded the claimant was not treated less favourably than an actual or hypothetical comparator by reason of her disability of anxiety and depression. No actual comparators were named. In fact, in paragraph 50 of the claimant's witness statement, the claimant had a speculative belief only as she referred to her knowledge that other furloughed employees, *whose projects were still active,* had returned to work at the end of June 2020. No further detail was provided in relation to who these employees were, which projects or whether her Voentorg project was live again by that point. There was a wholesale lack of comparative detail. The burden of proof did not shift.

(170) In relation to the direct Race Discrimination claim, there was no evidence or insufficient evidence from which the Tribunal could conclude that the occurrence of any of the issues had anything to do with the claimant's race. The Tribunal refers to the reasons for its conclusions under victimisation above. The claimant was not treated less favourably than an actual or hypothetical comparator because of her race. No actual comparators were named. In paragraph 39 of the claimant's witness statement, she said that *throughout* her employment, Ms Pont had made *numerous* comments about her level of English, her accent and the colour of her skin. There was no evidence of any of these numerous occasions, by reference to date, context, to whom/with whom these had been raised or why they had not been raised at the time. These were and are, after all, serious allegations. The Tribunal had some regard to the respondent employing the claimant knowing she was of Iranian origin and her level of English and accent. The Tribunal also accepted Mr Adams' evidence that as a business they had 29 nationalities working for them. The burden of proof did not shift.

(171) In the light of the above conclusions, the Tribunal did not need to address the respondent's knowledge of disability.

Harassment – Disability & Race - 8 (a) & (b) 9 to 11

(172) In relation to issue 8 (a) this was not in scope as the Tribunal has concluded the claimant was a disabled person after this incident. ***Peninsula Business Service Ltd v Baker UKEAT/0241/16.***

(173) In relation to issue 8 (b), because of the reasons for the Tribunal's conclusions above (victimisation), the questions of the Occupational Health Physician were not unwanted conduct related to the claimant's disability and/or the purpose or

effect was not to violate the claimant's dignity or create an intimidating, degrading, humiliating or offensive environment.

(174) In relation to issue 9 (a), the Tribunal refers to its reasons for reaching its conclusions above (victimisation). Mr Adams' comments about the claimant's lack of ARB accreditation was not unwanted conduct related to race but a genuine and reasonably held concern about the claimant's lack of comparative qualification which presented a perception challenge for some larger clients and which concerns he had expressed before. The Tribunal also concluded that the claimant's work, behaviour/relationships and report error had not served to close that perception gap. The comparison with a more junior staff member was, in the Tribunal's conclusion, used, anecdotally, to illustrate a client's concern and attention to personnel deployed to work on their accounts This was not unwanted conduct related to the claimant's race and/or the purpose or effect was not to violate the claimant's dignity or create an intimidating, degrading, humiliating or offensive environment.

Unauthorised Deductions - 12 to 13

(175) Based on the Tribunal's reasons for its conclusions above (victimisation), the Tribunal concluded that the claimant did not suffer any unauthorised deductions from being placed on furlough from April through to the end of August 2020. This was because in the light of the claimant's agreement, there were no sums less than the amount properly payable to the claimant which were not paid.

(176) In relation to the period from the end of August to 16 September 2020, the position was less clear. It was right that the claimant appeared not to accept being furloughed thereafter/in that period – her email to Ms Levin of 25 September 2020 stated that she was not accepting the extension (to furlough) to September 2020. In response, Ms Levin said the claimant would receive any adjustments in October 2020 as the September payroll had been processed. In the October payslip, the claimant received £3163.46 (holiday pay), -£666.67 furlough pay (as a deduction) and £326,92 (bank holiday pay). There was no analysis in evidence or submissions of whether this left the claimant with an underpayment and if so, how/why and how much. The claimant's closing submissions simply stated the position generically without any specific analysis having regard to these payments. The Tribunal did not know what amount of accrued leave the claimant had and/or whether any of the sums reflected a period of paid garden leave during which time the claimant was treated as being on leave. In these circumstances the claimant had not established a claim for unauthorised deductions for this period.

Constructive (Unfair) Dismissal – 14 to 16

(177) The Tribunal repeats its reasons for reaching its conclusions above (victimisation) in relation to the claimant's claim for constructive dismissal. The Tribunal concluded as a result that the respondent did not breach the implied term of trust and confidence by reference to any single incident or a series of incidents which amounted to a breach of the implied term. Neither was there

conduct of the respondent which had previously crossed the ***Malik*** threshold which was then resurrected by a further (final) act.

(178) The Tribunal did consider that it needed to analyse two additional incidents (before it reached its conclusion) above.

(179) First, in relation to the time it took to reach a decision on appeal. The claimant stated her intention to appeal on 28 July 2020 and appealed by letter on 3 August 2020. Further to receipt of questions from the appeals officer on 17 August 2020, the claimant provided her responses on 27 August 2020. The appeal outcome report was then finalised on Friday 11 September 2020 and sent to the claimant on Thursday 17 September 2020. The appeal outcome report was comprehensive - 21 pages with 223 paragraphs. This was commensurate to the claimant's appeal grounds which were 30 pages in length. The additional questions and answers were required because the appeal was dealt on submissions at the claimant's request. In this context, there was no undue delay or any unreasonable excuse for the time it took for the appeal outcome to be concluded. The respondent did delay by a few days in providing the consultant's appeal report to the claimant (though the claimant did not know that at the time) owing to a belief that the consultant had sent this on, but that delay was only a few working days. Viewed holistically and objectively this did not contribute/add anything to any breach of the implied term in isolation or cumulatively with any other incident or to resurrect anything else.

(180) Second, the Tribunal had regard to the decision to put the claimant at risk of redundancy. This was done for genuine business reasons and other employees were affected too. This was a business decision which had, more likely than not, its origin in the concerns over larger projects being on hold and because of the onset of Covid. The claimant being in a standalone pool because she was the only senior architectural designer was a decision open to the respondent. The respondent in fact did not take any further steps as the grievance process remained outstanding. This did not contribute/add anything to any breach of the implied term in isolation or cumulatively with any other incident or to resurrect anything else.

(181) The claimant's counsel's written submissions for this part of the case were very inadequate. There was no focus on the evidence heard at the Hearing, the submissions were, save for one paragraph (63), entirely on the law without application to the evidence during trial or proper focus on 63 paragraphs of assertions in the claimant's further particulars.

Anonymity applications under Rule 50

(182) Both parties made applications for anonymity. In the claimant's case this was made on the day before the trial was to commence. In the respondent's case, this was made via its written application and submissions following the conclusion of the evidence and the Hearing.

(183) The Tribunal understood the claimant's application, which was discussed at the outset of the Hearing (the Tribunal did not at that stage have the written application before it) as one advanced under Rule 50 (3) (b) namely:

(184) An order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record.

(185) In discussions with the claimant's counsel, it was said that the application was about anonymisation of the claimant's name in the publication of the Tribunal's Judgment online.

(186) The test for such applications is contained within the Rule 50 (1) which says:

> A Tribunal may at any stage of the proceedings, or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

(187) Rule 50 (2) provides for mandatory consideration of the principle of open justice:

> In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(188) The relevant ECHR Articles potentially engaged are Article 6 (right to a fair and public hearing), Article 8 (right to respect for private and family life) and Article 10 (freedom of expression).

(189) The effect of these competing Articles and the principle of open justice has received much Judicial scrutiny, from which it is clear that the Tribunal must first assess if the Articles are engaged and if they are, to counterbalance any conflict between the competing rights and undertake a balancing exercise about any interference with those rights in a proportionate way.

(190) The claimant's application was advanced in submissions in a very limited way. The key basis for the application was in paragraph 6 of the claimant's submissions which said that by not granting the Order, the claimant would suffer on-going harm and/or prejudice. It was said that the claimant was vulnerable and had provided extensive details and medical evidence about her disabilities which included anxiety and depression. The publication of her name in a publicly available document, it was submitted, would almost certainly deepen and exacerbate that anxiety and depression. It would also have detrimental effect on her prospects of obtaining future employment.

(191) The Tribunal did not have before it, any evidence about any causal connection between publication of the claimant's name (rather than the fact or outcome of the litigation) and the effect of that on the claimant's anxiety and depression or any evidence about the detrimental impact on future employment. There was no medical or other evidence (for example in the claimant's own witness statement) about this. Neither, for example, any recruitment specific/led evidence about the nature of the architecture industry, geographically or otherwise, or any evidence about how and why her search for employment would be impacted.

(192) The Tribunal accepted that Article 8 was engaged. The Tribunal had had to consider medical and related impact evidence to determine whether or not the claimant was a disabled person under S.6 EqA and if so, from when. There was evidence of a personal health nature (the cause and effect of the claimant's depression) before the Tribunal which was, no doubt, about the claimant's private and/or family life.

(193) In undertaking its balancing exercise, the Tribunal noted that the claimant was a party to the claim – the person electing to bring a claim, rather than a non-party or non-witness. This is a relevant consideration (***TYU v ILA SPA Limited UK EAT/0236/20/VP*** see paragraphs 44 and 62, citing ***Simler J in British Broadcasting v Roden,*** citing the Court of Appeal in ***R v Legal Aid Board ex parte Kaim Todner 1999 QB 966 AC***. This is an important factor and in the Tribunal's conclusion a weighty one given the Court of Appeal's comments in ***Kaim Todner:***

"*Moreover, it held that it is not unreasonable to regard the person who initiates proceedings as having accepted the normal incidence of the public nature of court proceedings so that in general such a party has to accept the embarrassment and reputational damage inherent in being involved in litigation"*

(194) The Tribunal also considered that a considerable amount of the evidence on disability could have been determined at a Preliminary Hearing in advance of the Final Hearing. This was not considered by the claimant or her supporting Union. The evidence and issues at the Final Hearing became bound together (with challenges around a number of the alleged protected acts) and thus the intelligibility of the Judgment would be impacted upon by any restriction on publicity. The Tribunal noted the comments in ***TYU*** paragraph 77, which cited the European Court of Human Rights decision in ***Vicent Del Campo v Spain 2019 25527/13*** regarding the use of a cipher in respect of the intelligibility of a Judgment, but in both cases, these comments were expressed in relation to a non-party or non-witness.

(195) The Tribunal also had regard to the absence of any direct evidence (as referred to above) rather it had an assertion only that there would be an impact. The reference to embarrassment in the claimant's written application was not considered to be sufficient. The reference to the claimant's private life being harmed was also not developed with evidence or examples or in submissions, beyond an assertion. Similarly in relation to career impact.

(196) The principle of open justice is paramount – "one of the most precious in our law" (***R v Secretary of State for Justice 2016 1 WLR 444).***

(197) The burden of proof rests on the person seeking derogation from the fundamental principle of open justice to do so with clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice (***Fallows v News Group Newspapers Ltd 2016 ICR 801***).

(198) In pursuance of the foregoing analysis and undertaking the balancing exercise, the claimant's application fails.

(199) The respondent's application also fails as there was wholesale non-engagement with the interference with the ECHR Articles or in respect of which individual or individuals this was necessary. The application appears to have been nothing more than an after thought and an application simply made because the claimant made one without any proper analysis of why it was sought. At its highest, it was said that the industry was small. That was about it.

(200) The claims are dismissed.

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Employment Judge Khalil

24 March 2023

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