EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101077/2022

Held in Glasgow on 6, 7, 8 and 9 February 2023

Employment Judge Campbell
Members Ms D McDougall and Mr S Keir

Ms K Steele	**Claimant** **In Person**
Reed Specialist Recruitment Limited	**First Respondent** **Represented by:** **Mr M Briggs - Counsel**
Paystream My Max Limited	**Second Respondent** **Represented by:** **Mr D Johnson - Legal Manager**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:

1. The claimant was an employee of the second respondent between the dates of 6 July 2021 and 16 August 2022;

2. The claimant was not an employee of the first respondent, but the first respondent acted in the capacity of employment service provider in terms of section 55 of the Equality Act 2010 in relation to the claimant between 6 July 2021 and 30 April 2022;

3. The claimant was not the subject of direct discrimination by reason of her disability, and her claim under section 13 of the Equality Act 2010 is dismissed;

4. The claimant was not the subject of discrimination for a reason arising in connection with her disability, and her claim under section 15 of the Equality Act 2010 is dismissed;

5. The first respondent failed in a duty to make reasonable adjustments for the claimant by not adequately verifying with its clients the specifics of assignments offered to the claimant, and the claimant's complaint under sections 20 and 21 of the Equality Act 2010 succeeds to that extent;

6. The claimant did not suffer unlawful deductions from her wages under section 13 of the Employment Rights Act 1996 and her complaint is dismissed;

7. The claimant was not owed payment for accrued holidays under the Working Time Regulations 1998; and

8. The claimant is awarded the sum of £4,000 together with interest at 8% per annum from the date of 1 September 2021, payable by the first respondent, in respect of her successful claim.

REASONS

General

1. This claim relates to the claimant's status as a worker between June 2021 and August 2022. The first respondent is a recruitment agency. The second respondent is an intermediary or umbrella company which employs individuals for the purpose of providing their services to business such as the first respondent, so that those services can in turn be provided to end user clients on fixed assignments.

2. It was not agreed between the parties whether the claimant was an employee of either respondent, and if so, which. She alleged that she was an employee of the first respondent. Both respondents argued that she had been an employee of the second respondent but not the first. This was a matter the tribunal therefore had to determine.

3. The claimant alleges a number of types of discrimination against one or both respondent, and claims that certain sums due to her were not paid. The claims are described in more detail below.

4. The hearing took place over four days. The claimant represented herself, the first respondent was represented by Mr Briggs of counsel and for the second respondent Mr Johnson appeared, who is its in-house legal manager.

5. Evidence was heard on behalf of the first respondent from Ms Candice Cameron, Recruitment Consultant and Mr Brian Cargill, Area Director. Mr Johnson himself gave evidence on behalf of the second respondent. The claimant also gave evidence. Each individual was found to be generally credible and reliable in their recollection of events. Any more specific comments about the witnesses or their evidence are dealt with below in the findings of fact and/or discussion and decision.

6. A joint bundle of documents was prepared for the hearing, and numbers in square brackets below correspond to page numbers of that bundle.

7. It had been decided at an earlier case management hearing that the evidence in chief of each witness would be given by way of a written statement. Accordingly, the approach taken in the hearing was to have each witness confirm their statement under oath or affirmation, deal with any limited matters in chief and then be cross-examined by the other parties and as necessary re-examined. The tribunal also asked the witnesses questions.

8. The claimant provided a schedule of the losses she claimed and spoke to this in her evidence.

9. The parties had also been ordered to prepare a list of issues for the tribunal to determine. This exercise had been substantially completed in advance of the hearing. The tribunal summarised the issues as below.

10. The parties provided submissions after the evidence had been heard. Each provided a note which they supplemented by oral submissions.

11. The hearing dealt with liability in relation to the issues and also remedy as appropriate.

Legal issues

12. The legal issues to be decided by the tribunal were as follows:

Time limits

(1) The claimant presented her claim form on 16 February 2022. Were all or any of her complaints of disability discrimination and harassment presented within the normal 3-month time limit in section 123(1)(a) of the Equality Act 2010 (EQA), as adjusted for the early conciliation process and where relevant, taking into account that section 123(3) says that conduct extending over a period is to be treated as done at the end of the period?

(2) If not, was it just and equitable to extend the time permitted for presenting any such claims pursuant to section 123(1)(b) EQA?

(3) Was the claimant's claim for unlawful deduction from wages under the Employment Rights Act 1996 (ERA) presented within three months of the date of the last deduction complained of?

Employment status of the claimant

(4) What is the relevant period in which the claimant worked?

(5) Was the claimant an employee of either respondent during the relevant period?

(6) If so, which respondent?

(7) Was the claimant a 'contract worker' in relation to the first respondent within the scope of section 41 EQA?

(8) Was the first respondent an 'employment service provider' within the scope of section 55 EQA?

(9) If so in either case, between which dates?

Disability discrimination claims

(10) Did either respondent directly discriminate against the claimant contrary to section 13 EQA? The protected characteristic relied upon is the claimant's hearing impairment and she relies on a hypothetical comparator of an employee in similar circumstances to her who did not have a hearing impairment and consequently who did not need to use hearing aids in daily life.

(11) Did either respondent treat the claimant unfavourable by reason of something arising in consequence of her disability contrary to section 15 EQA?

(12) If so was such treatment justified by being a proportionate means of achieving a legitimate aim?

(13) Did either respondent fail to make a reasonable adjustment for the claimant contrary to sections 20 and 21 EQA? The claimant alleges the provision, criterion or practice which put her at a substantial disadvantage was being required to carry out work during assignments which required her to remove her hearing aids. She alleges that the first respondent ought to have made the adjustments of only offering her, or placing her on, assignments which did not require her to remove her hearing aids.

(14) Did either respondent harass the claimant contrary to section 26 EQA?

Non-payment claims

(15) Was an unlawful deduction made from the claimant's wages by either respondent contrary to section 13 ERA?

(16) Did the claimant accrue annual leave with either respondent which remained untaken at the end of her period of working, and for which she was not paid, contrary to the Working Time Regulations 1998?

Remedy

(17) If any of the claimant's complaints are successful, what compensation or other remedy should be granted?

Applicable law

1. Direct discrimination in employment is deemed unlawful by virtue of section 13 EQA which states:

> ***13 Direct discrimination***
>
> *(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.*
>
> *…*
>
> *(2) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

2. Discrimination for a reason arising because of a disability is separately prohibited, subject to limited circumstances where it may be justified, under section 15 ERA which says:

> ***15 Discrimination arising from disability***
>
> *(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

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

3. An employer may be under a duty to make reasonable adjustments for a disabled person. The provisions are set out in sections 20 and 21 EQA in the following way:

1 ***Duty to make adjustments***

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

a. removing the physical feature in question,

b. altering it, or

c. providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

a. a feature arising from the design or construction of a building,

b. a feature of an approach to, exit from or access to a building,

c. a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

d. any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

4. Employers must not harass workers on the basis of what is said in section 26 EQA as follows:

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—

i. violating B's dignity, or

ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

a. A engages in unwanted conduct of a sexual nature, and

b. the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

a. A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

b. the conduct has the purpose or effect referred to in subsection (1)(b), and

c. because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

a. the perception of B;

b. the other circumstances of the case;

c. whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

5. Workers have a right not to have deductions made from their pay without their explicit advance consent, and a right not to have their pay withheld altogether, as explained in section 13 ERA:

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

a. the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

b. the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

a. in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

b. in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) 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.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

6. Workers have an entitlement to receive a minimum number of days of paid annual leave. They must receive payment for those days, and be paid for any days accrued but not taken at the end of their employment, as the Working Time Regulations 1998 state:

Entitlement to annual leave

13.

(1) Subject to paragraphs (5) and (7), a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).

(2) The period of leave to which a worker is entitled under paragraph (1) is—

…

(c) in any leave year beginning after 23rd November 1999, four weeks.

(3) A worker's leave year, for the purposes of this regulation, begins—

a. on such date during the calendar year as may be provided for in a relevant agreement; or

b. where there are no provisions of a relevant agreement which apply—

…

(ii) if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

…

(4) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (2) equal to the

proportion of that leave year remaining on the date on which his employment begins.

(7) Where by virtue of paragraph (2)(b) or (5) the period of leave to which a worker is entitled is or includes a proportion of a week, the proportion shall be determined in days and any fraction of a day shall be treated as a whole day.

…

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

The applicability of the above statutory provisions to the claimant's case is dealt with below in the section headed 'Discussion and Decision'.

Findings of fact

Initial engagement

1. In June 2021 the claimant was seeking work after having been made redundant from a role she had held. She initially made contact with the first respondent by submitting her CV online and receiving a call from Ms Candice Cameron, who was one of its Recruitment Consultants. The first respondent is an employment agency and the division in which Ms Cameron worked was set up to provide workers to end user clients on fixed assignments.

2. The first respondent engages workers in two ways. It either engages them directly as employees or offers them the opportunity to provide their services through an intermediary or 'umbrella' company. A candidate can work through their own umbrella company, or can be engaged by one which had been established by others. The first respondent will often suggest umbrella companies to candidates who they can approach to be taken on. The second

respondent is one such umbrella company. The options are made clear to candidates at the beginning of the relationship and it is the candidate's choice which method they opt for. Ms Cameron dealt with workers in the latter category.

3. The claimant became an employee of the second respondent on or around 6 July 2021. She completed a process of signing a contract of employment online on that date. A copy was produced [126-130]. It states that it was 'electronically signed' by the claimant on 6 July 2021. The claimant would have had to give a positive answer to a number of questions in an electronic form on the second respondent's website before the contract would be treated as electronically signed. She would have clicked on a link to confirm her agreement to becoming an employee on the second respondent's terms. The claimant's name is shown as 'Kathy Steele' although she did not go by that first name. This was because the first respondent had picked up her first name wrongly as Kathy and passed it to the second respondent. It would have been made clear to the claimant that by accepting those terms she was entering into a binding employment contract. Therefore, the terms of this document applied to her even though she did not sign a hard copy and even though her first name was incorrectly added. Along with the contract she was given a 'Personal Illustration' document showing how her pay would be calculated [131].

4. The second respondent invoiced the first respondent for the claimant's services, received a payment from the first respondent and then paid her wages under deduction of income tax and employer/employee National Insurance contributions. It adopted the practice of paying 'rolled up' holidays. In other words, at regular intervals its employees would receive a payment equivalent to the amount of annual leave they had accrued and this was intended to cover any holidays they wished to take whenever those fell. Consequently, when an individual such as the claimant wished to take a leave day they required to arrange with the end client that they would not be working on that day and they would not receive a payment from the client for the day. The second respondent allowed employees alternatively to accrue leave but

not be paid for it as they went along. They would then receive a payment equivalent to a day's pay when they took a day of leave. This was less popular and not the option the claimant chose. Under both options the amount paid is the same. The only difference relates to timing.

5. Through an error in the first respondent's IT system, the claimant was ascribed an email address which did not belong to her. As a result of this Ms Cameron sent a number of emails to the claimant but she did not receive them. The parties also communicated by telephone and mobile text message, and did so effectively.

6. The first respondent uses a 'Candidate Application Form' to record the details of individuals who provide services to them, whether as employees or arm's-length workers through an intermediary. Usually the candidate would attend the first respondent's offices and complete the form in person, but in the wake of the Covid-19 pandemic the forms were often completed remotely. In the claimant's case, Ms Cameron asked her a number of questions by telephone and then using the responses given she input the information into the form herself [94-102]. This contains some information which is accurate but also has the erroneous email address.

7. Within the form, under the heading 'Health & Disability', there is a question which asks whether the candidate has *'a disability which requires a special arrangement for interview*'. On the basis of her conversation with the claimant Ms Cameron chose the option 'No'. The form does not ask whether a candidate has a disability which would impact on the assignments they could take. The claimant was not asked directly about this at the point when she was added to the first respondent's system. The claimant told Ms Cameron that she had hearing problems which meant she could not take on telephony-based roles such as call centre working. She did not say she had a hearing impairment or wore hearing aids, which was the case.

8. The claimant received regular payslips from the second respondent when working on assignments. Examples were produced [210-247]. These were emailed to the claimant using her correct address and she received them. The

claimant's evidence was that she thought the second respondent was a payroll company engaged by the first respondent rather than her employer. She believed the first respondent was her employer.

First assignment

9. The claimant was offered an assignment by Ms Cameron which was due to begin on 19 July 2021. The end client was named UK Paper Rolls (UKPR). The claimant accepted the assignment. It was open-ended in duration. She believed it was a project administrator role, although it was not. Instead, it involved cold-calling customers of a bank and offering them discounted products or services. Nevertheless she carried out the assignment until Monday 30 August 2021, which was the date that UKPR brought it to an end.

10. The first respondent issues workers with a letter at the beginning of each assignment, containing details of any intermediary or umbrella employer, the start date, whether there is an end date or alternatively that the assignment is open-ended, who within the client the individual will report to, where the client is located and the rate of pay which will be paid to the umbrella company. The first respondent sent such a letter to the claimant about the UKPR assignment on 12 July 2021 [107-109], although she did not receive it as it went to the erroneous email address they held for her. Nevertheless it accurately represented the terms of the assignment.

11. The claimant was paid by the second respondent at her agreed rate of £11.50 per hour for the whole of the assignment she worked with UKPR.

12. The claimant understood that the first respondent operated a system of paying workers which involved a week of lying time. The true position was that workers' hours were usually calculated on a weekly basis up to and including Friday of each week. To allow for a worker's weekly hours to be calculated and verified, sent to the umbrella company employing them, and then pay and deductions calculated, workers would usually be paid by the end of the week following the one they worked. This was not a week of lying time.

13. The claimant was in contact with Ms Cameron at various points during her assignment, mainly by text message. On 28 July 2021 she sent Ms Cameron a message saying *'I was a manager last month'* followed by an emoji showing a face crying with laughter. The claimant's evidence was that she thought the emoji conveyed sadness or upset, which is how she felt at the time due to the perceived step down in role she had taken. Ms Cameron did not understand that this is what the claimant was trying to say, and replied *'Is this meant for me'* followed by a similar 'crying with laughter' emoji. The claimant replied to say *'Yes'* and Ms Cameron responded saying *'Lol what do you mean.'*

14. The claimant then asked Ms Cameron if there were *'any jobs going in ADMIN no call centres as this is 100 [%] call centre'* [112]. She described the issue as being that the customers she called were rude to her and suspected her of being a scammer. She said it was not the job she wanted or needed but she did not want to leave the client high and dry. Ms Cameron offered to speak to the client about the work but the claimant initially said she should not bother, but that she (the claimant) would rather be doing work similar to that of another person placed with the same client by the first respondent, who was not making customer calls [113].

15. On 29 July 2021 Ms Cameron offered again to speak to the client and this time the claimant asked if she could because she did not want to carry out the work she was doing for three months. She went on to say:

'I don't know if I told you I wearing 2 hearing aids can't wear them at this job it's on the phone all day I am struggling to hear customers why I wouldn't apply for a call centre but I am in the job now what can be done'

16. Ms Cameron replied to say that the claimant hadn't mentioned wearing hearing aids before, and that she would *'speak to the client and see'* [114]. Ms Cameron did not go to the client to explore whether the claimant's work could be changed to reduce or remove the telephony aspect. In her statement she said that she telephoned the claimant to ask again if she should speak to the client, and that the claimant said she should not divulge that she wore hearing aids. The claimant said in her evidence that the conversation did not

happen, and asked why she would not want adjustments to be made for her given that she was deaf and wore two hearing aids.

17. The claimant also understood that she should have been given notice of her assignment coming to an end, but UKPR terminated the assignment summarily. The other worker assigned to UKPR through the first respondent had her assignment terminated in the same way. She was doing similar but not identical work to the claimant. The claimant called Ms Cameron and asked about receiving pay in lieu of notice. Ms Cameron knew that it was normal but nor mandatory for a client to give notice or make payment in lieu of a week's notice, to cover the worker financially while they found another assignment. This was the position contractually between the first respondent and its clients.

18. The position of UKPR was that the claimant had reacted badly to being told that her assignment was immediately being brought to an end. A senior manager within the business reported to the first respondent that the claimant had thrown a coffee cup at a wall and raised her voice, before being led out of the building where she continued to cause a disturbance. UKPR paid the first respondent a sum to cover a week's notice for the other person whose assignment was terminated, but reversed its decision to pay notice to the claimant.

19. Ms Cameron was sympathetic to the claimant's position in having her assignment terminated abruptly, but she had no power to compel the client to make a payment in compensation. She attempted to find another assignment for the claimant quickly and offered her the option to begin one on Thursday 2 September 2021, three days after the assignment with UKPR had come to an end. The claimant agreed.

20. The claimant remained unhappy at UKPR ending her assignment without notice or any payment in lieu. She was also aggrieved at what she saw as a false accusation of unprofessional behaviour. Ms Cameron remained sympathetic to her and provided the email address of her line manager, Mr Brian Cargill who was an Area Manager. On 6 September 2021 the claimant

emailed Mr Cargill [138]. The claimant referred to what she understood to be lying time pay due to her (although she was paid for each day of her assignment up to and including her last day). She denied throwing a coffee cup as she had been accused of doing. She did not want the allegation to remain unanswered and asked what was the next step.

21. Mr Cargill replied on 8 September 2021 [137] to say that it was disappointing to hear what had apparently happened. He explained that the first respondent did not use lying time and that people were simply paid a week in arrears to allow time for their hours to be recorded and converted into pay. He also explained that the first respondent asked clients out of courtesy to provide a week's notice of terminating an assignment, and had asked UKPR to do so, but regrettably the client had declined. They had the final say.

22. The claimant emailed back to Mr Cargill on 9 September 2021 [137] to say that she appreciated his efforts but believed the situation was one for HR and ACAS to deal with because a serious allegation had been fabricated about her. She asked whether a copy of relevant CCTV video could be obtained which she expected to show her behaving normally and therefore disprove the account of the UKPR manager.

23. The claimant was in contact with Ms Cameron via text message at the same time as these email exchanges. She said it was breaking her heart and that she had been crying because someone had lied about her. She also said the matter was affecting her mentally.

Second assignment

24. The claimant's second assignment was with a client named Dow Waste Management (Dow). Ms Cameron first raised it with the claimant by telephone and then emailed a summary of the details of the assignment to her on 31 August 2021 [133-136]. The role was described as 'administrator'. No other details of the duties or activities involved were provided.

25. There was a discrepancy between the evidence provided by the claimant and Ms Cameron in relation to how the role had been described. Ms Cameron said

in paragraph 31 of her witness statement that she explained that there was *'likely to be a high volume of telephone work required'.* The claimant's evidence before the tribunal was that she was told telephone calls would only be *'minimal'.* The tribunal preferred the claimant's account. She had just completed an assignment which involved constant telephony which she had found difficult, complained about, and only carried on with because she did not want to lose earnings. It was unlikely that she would agree to a similar assignment immediately after.

26. As with the UKPR assignment it confirmed that the first respondent would engage the claimant through the second respondent. As in the description of the first assignment, the following wording was used:

'You will be employed or engaged by your intermediary directly. No contract of employment will therefore exist between you and Reed or between you and the Client.'

27. By this point Ms Cameron was using the claimant's correct email address and the claimant received the document. The assignment was to begin on 2 September 2021 and had an open end-date.

28. The assignment began on 2 September 2021 and ended on 16 November 2021. The claimant understood the role to be that of an administrator, as this was the description used by Ms Cameron when offering her the role. It was more akin to a receptionist role. She had no issue with carrying out filing or computer-based work, but the role involved handling a large number of incoming and outgoing phone calls. She had the same issue with this as at UKPR, i.e. she could not handle a high volume of calls without having to remove her hearing aids and struggling to hear people both on calls and around her. Again however she persevered in the role.

29. The claimant took a day of leave in late September 2021. It was not clear whether she requested the day or whether it was one the client required her to take as a local holiday, although nothing turns on which of those it was. When she received her payslip for that week she saw that she had not been paid for that day. She believed that she had wrongly had wages deducted and

sent a text message to Ms Cameron on 7 October 2021 to say *'Why have I been docked nearly 70 quid Candice x'.* Ms Cameron could not access the claimant's pay details and asked her to raise the issue with the second respondent. Ms Cameron checked with the client who told her that the claimant had taken the Monday of the September holiday weekend as a leave day. It was therefore covered by her rolled up holiday pay from the second respondent rather than a payment from the client.

30. On Thursday 4 November 2021 the claimant felt unwell at work and went home early. She did not go to work the next day and sent a message to Ms Cameron to say she had a bad ear infection and would need antibiotics [161]. She took the next day as a holiday. Again that was covered by her rolled up holiday pay.

31. On 16 November 2021 the claimant told Ms Cameron she had booked a Covid-19 test for 4pm that day. There had been a number of cases at her child's nursery. As a result of her test she was advised shortly after to self-isolate for ten days [168].

32. The claimant was told by Ms Cameron that the client wished to end her assignment on 16 November 2021 as there was no further work for her to do.

Third assignment

33. The claimant was offered a third assignment on 25 November 2021 and began working on 1 December 2021. This was with a client of the first respondent named Blantyre Fabrications. The claimant was again sent a summary note of the assignment [170-172]. As with the previous notes, it was confirmed that the claimant was being engaged via the second respondent. The note described the assignment as being open-ended. She understood that it would guarantee her work until 23 December 2021. This role was within the accounts department of the client and involved working with files and computer work, but minimal telephony. It was therefore more in line with what the claimant was looking for.

34. The client decided to cut the assignment short after 4 December 2021 and the claimant did not work beyond that date. The claimant understood that it was because she had completed all the work that needed to be done. Ms Cameron asked the client for clarification but did not appear to get any more of a response at the time. At a point some time later the client suggested to Mr Cargill that the claimant did not have the necessary familiarity with its systems. In any event, it was within the client's power to end the assignment when it chose.

Illness and sick pay

35. From 1 December 2021 the claimant was certified as medically unfit to work and she provided fit notes to the second respondent. She received Statutory Sick Pay from the second respondent in the amount of £96 per week. She received it for the maximum permitted period of 28 weeks. It expired on 8 June 2022.

36. The claimant did not immediately tell the first respondent that she was signed off from work, and so Ms Cameron offered her two roles in early December 2021 by text message. The claimant declined them. She said one which was offered to her on 10 December 2021 and based in Glasgow, involved too much commuting [175]. She was asked whether the second, in Ibrox, was too far on 16 December 2021 but does not appear to have responded.

37. Ms Cameron found out on 2 February 2022 that the claimant was certified as unfit to work. The claimant sent her a text message to this effect. She said she thought she would send the message as *'no one at Reed has bothered to'*. She said she would *be 'off sick for some time due to the stress and anxiety you Candice your manager Bryan and Reed as a company has caused me I have a tribunal ref number a case is on going'.* This was a reference ack to the non-payment of notice by UKPR and the claimant's view of how the first respondent had dealt with the matter. By this point she had contacted ACAS and commenced Early Conciliation.

38. The claimant telephoned the first respondent's offices on a number of occasions on and around 14 February 2022. She wished to speak to Ms

Cameron to get an update in relation to what she still saw as the outstanding matter of the accusations of unprofessional conduct by UKPR and its unfair refusal to pay her notice. She did not get to speak to Ms Cameron. She was told that Ms Cameron was not available. Some of the staff she spoke to appeared to be dismissive of her or treat her calls as trivial.

39. Also on 14 February 2022, the claimant sent a further message to Ms Cameron which said she had not heard back since her previous message, and asked whether she was still employed by the first respondent. She emailed Mr Cargill the same day and asked for a response by email or telephone. Again she did not appear to receive a reply.

Grievance

40. The claimant sent a letter to the first respondent on 22 February 2021 in which she said she was raising a formal grievance [186].

41. The grievance letter was acknowledged by Mr Cargill by email on the same day. He said that the claimant's email of 14 February 2022 was also being reviewed.

42. The first respondent too no further action of note in response to the claimant's grievance. This was principally as she commenced her tribunal claim on or around this time, having initiated ACAS Early Conciliation on 23 December 2021 and concluded that process on 6 January 2022.

Termination of employment

43. The second respondent terminated the claimant's contract of employment on 16 August 2022. This was done by email from a Ms Toni Hind to the claimant [197-198]. She explained that she was exercising a term of the claimant's contract of employment that allowed termination if the employee had not worked on an assignment for at least a month and in that time had not contacted the second respondent to indicate their availability for further work.

By this point the claimant had not worked on an assignment for eight months and had not indicated that she was looking for another one.

Discussion and decision

44. The tribunal reached the following conclusions in relation to the legal issues in the claim.

Jurisdictional matters

Status of the respondents

45. The tribunal had to determine whether either of the respondents was the claimant's employer. It decided that the second respondent was the claimant's employer between the dates of 6 July 2021 and 16 August 2022, and that the first respondent was not the claimant's employer at any time.

46. The above conclusions are supported by the evidence provided to the tribunal, including:

    a. This was the belief of both respondents, who had each acted in similar capacities for many other workers;

    b. The documentation provided by both respondents stated that this was their status – the first respondent said in its notices of assignment that the claimant was being engaged through the second respondent as an intermediary and the second respondent issued the claimant with a contract of employment which she electronically accepted;

    c. The second respondent paid the claimant her wages, holiday pay and sick pay; and

    d. The second respondent terminated the claimant's employment.

47. The tribunal concluded that, while the first respondent was not the claimant's employer, it acted as an 'employment service provider' within the scope of section 55 of EQA. Section 56 provides as follows:

56 Interpretation

(1) This section applies for the purposes of section 55.

(2) The provision of an employment service includes—

(a) the provision of vocational training;

(b) the provision of vocational guidance;

(c) making arrangements for the provision of vocational training or vocational guidance;

(d) the provision of a service for finding employment for persons;

(e) the provision of a service for supplying employers with persons to do work;

48. The first respondent fell within paragraphs (d) and (e) of section 56 between the dates of 6 July and 30 April 2021. After that date it was not operating in that capacity as the claimant deactivated her account and unsubscribed from any emails from the first respondent offering work. Between those dates it was therefore capable of being liable under sections 13, 15, 20 and 21 of EQA if the facts supported such a conclusion.

Time bar

49. The claimant commenced ACAS Early conciliation on 23 December 2021. Any event complained about on or after 24 September 2021 was accordingly within time, whether occurring on a single date or as part of a continuous act carrying on until at least that date.

50. Noting the claimant's complaints as detailed below, it was appreciated that some under each of sections 13, 15, 20/21 and 26 EQA and section 13 ERA were out of time and some were within time.

51. The tribunal opted to use its power to hear all of the complaints which were technically out of time on the basis that it was just and equitable to do so. It took into account:

a. The claimant not being legally or otherwise professionally represented at the time when the matters arose which she complained about;

b. That the tribunal would have to hear little or no additional evidence to do so, given that it would require to familiarise itself with the factual background in order to decide the claims which were within time;

c. Any complaints which were out of time were only late by a small margin, and there was no apparent loss of relevant documents or detrimental effect on the recollection of those involved;

d. It was possible that some matters appearing to be out of time could be part of a continuous act, or conduct extending over a period;

e. The respondents were essentially neutral in their positions on this question and did not put forward arguments as to why the tribunal should not take this approach.

52. The tribunal accordingly agreed to consider each of the claimant's complaints on its merits.

Complaints of direct discrimination under section 13 EQA

53. The claimant alleged that she was directly discriminated against because of her disability. Her complaints are made only against the first respondent. The ways in which she alleged she was less favourably treated than her hypothetical comparator were as provided by her in a set of further written particulars in response to an order of another employment judge on 22 April 2022 [46-52] as supplemented by her evidence in the hearing. Those were as follows:

a. Ms Cameron did not offer her or put her on assignments which better suited her hearing capacity after 28 July 2021;

b. Ms Cameron ignored the claimant when she raised issues she was experiencing with her assignments related to her hearing impairment, and so was put into assignments requiring extensive telephone use;

c. On 10 December 2021 Ms Cameron offered her an assignment which she could not take up due to the distance she would have to travel;

d. No further assignments were offered after 10 December 2021; and

e. Ms Cameron locked the claimant out of her online account with the first respondent.

54. In a complaint of direct discrimination, the onus is on the claimant to prove that they have a protected characteristic which entitled them to be covered by the EQA. The first respondent accepted that the claimant had the protected characteristic of a disability by virtue of a significant hearing impairment that required her to wear hearing aids in her day-to-day life.

55. It is also for a claimant to prove 'primary facts' which at least provisionally suggest that discrimination has taken place because of the protected characteristic - see for example ***Royal Mail Group Ltd v Efobi [2021] UKSC 33***. If a claimant can do so, the onus moves to the respondent to show that no discrimination occurred, and if it cannot do that the complaint is likely to succeed. If a claimant cannot identify those primary facts, the onus does not transfer to the respondent and the complaint is likely to fail.

56. The primary facts put forward by the claimant were as listed at (a) to (e) in paragraph 53 above.

57. The tribunal found that none of the complaints of direct discrimination were well founded. It accepted that the events of (a), (c) and (d) occurred, but they were not because of her disability and the claimant was not treated any less favourably than a person in the same circumstances but without a hearing impairment.

58. It is true that in relation to (a) Ms Cameron did not actively offer assignments to the claimant, or put her on assignments, which were better suited to her hearing impairment after 28 July 2021 because the next assignment, with Dow, caused similar problems. However, Ms Cameron did not know that would be the case going by the description of the role which she had been given by the client. She offered the role to the claimant in the same way as

she would have offered the role to any other candidate, based on the information she was given.

59. Similarly, Ms Cameron did offer the claimant roles in December 2021 as per (b) which she had to turn down because it involved too much travel, but this was not unfavourable treatment, as the claimant could and did decline them without repercussions. Ms Cameron at this point was trying to help the claimant by finding a new assignment for her following the Blantyre Fabrications role coming to an unexpectedly early end. The issue of travel was not linked to the claimant's hearing impairment.

60. The tribunal found that Ms Cameron did not offer the claimant any further assignments – allegation (c) - as by this point she was involved in a process of raising a complaint about the termination of the UKPR role. Further, by the beginning of February 2022 the claimant had told Ms Cameron that she was ill. Again the reason was not the claimant's hearing impairment.

61. The tribunal did not accept the assertion that Ms Cameron 'ignored' her when she explained the difficulty her role caused because of her hearing impairment on 28 July 2021 – point (b). Ms Cameron was sympathetic in response and offered to speak to the client to make them aware of the situation and to see if the role could be adapted.

62. The tribunal did not accept that Ms Cameron locked the claimant out of her online account. If she had accidentally reset the claimant's password, that would not have been because of the claimant's disability. Again, the probability was that Ms Cameron would have done the same thing had the claimant been someone else without a disability.

63. In summary therefore the tribunal was not satisfied that the claimant had made out a case of direct discrimination which would put the onus on the first respondent to prove that there was a non-discriminatory reason for its actions. In any event, the evidence as a whole was sufficient to show that the first respondent did not act in a discriminatory way. To the extent that matters happened as the claimant described them, they did not involve the first

respondent treating her less favourably than it would have treated a person without her protected characteristic.

Complaints of discrimination arising from disability under section 15 EQA

64. For a complaint under section 15 to succeed it must be shown that the claimant was unfavourably treated by reason of something arising in connection with her disability. Unlike complaints under section 13, there is no need to identify a comparator. If a valid complaint is provisionally made out, the respondent in question may be able to argue that the treatment is justified by being a proportionate means of achieving a legitimate aim. If it is able to do so the treatment will not be unlawful.

65. The claimant relies on her inability to use a telephone for a prolonged period as the 'something' arising in connection to her disability. Using a telephone causes her difficulty because she cannot use a headset and wear her hearing aids at the same time. It also makes her more prone to ear infections and migraines. She experiences tinnitus. The claimant alleges that the first respondent knew this to be the case. The tribunal accepted that Ms Cameron was generally aware from 28 July 2021 onwards that the claimant's hearing impairment made it difficult for her to work with telephones more than minimally.

66. The claimant alleges unlawful treatment by the first respondent as follows:

    a. The claimant told Ms Cameron on 12 November 2021 about contracting an ear infection and nearly passing out while on an assignment, and Ms Cameron was unsympathetic and took no steps to help;

    b. On or around 23 November 2021 the claimant had to take time off from her assignment as she had an ear infection and suspected Covid-19, later positively confirmed. Ms Cameron initially asked the claimant whether she would be going back to the assignment, then later told the claimant that it had been ended;

c. On 30 August 2021 Ms Cameron sent the claimant a text message saying *'When are you ready to go back to work again?'*

d. On 10 December 2021 Ms Cameron offered the claimant assignments outside of her area, knowing that the travel involved would make her incapable of accepting them;

e. On 9 September 2021 and 14 February 2022 the claimant was told by Ms Cameron and Mr Cargill that they would respond to her complaint about not receiving notice pay for the UKPR assignment. Her concerns were not dealt with quickly or sensitively.

67. Dealing with each of the complaints in turn, and starting with the first, the tribunal noted that no evidence was led on this point. The claimant exchanged emails with Ms Cameron on 9 and 16 November 2021 which are friendly and in keeping with the relationship both has at the time. They show Ms Cameron giving thought to how the claimant was coping with being off ill. It is therefore not accepted that Ms Cameron was unsympathetic on a call on 12 November 2021. Had the tribunal accepted as likely that Ms Cameron was unsympathetic, it could not be determined on the evidence whether the reason for that approach was the claimant's illness-related absence or something else.

68. By initially asking the clamant if she would be returning to the assignment with Dow once well, and then updating the claimant to say that the client had decided to end the assignment, Ms Cameron was not treating the claimant unfavourably by reason of her disability. The initial question was either favourable or neutral treatment. It was a natural thing for her to do in the circumstances. Conveying to the claimant later that the client had decided to end the assignment was not a form of treatment by the first respondent. The decision itself was taken by the client and the first respondent was not responsible for it. The part of the first respondent was confined to telling the claimant about the decision. In that sense to tell the claimant about the assignment ending was neutral or positive. If the assignment was being ended it was better that she knew that.

69. The claimant did not produce a text message dated 30 August 2021 in which Ms Cameron asked her when she would be ready to work again. In any event, such a message in the context in which it would have been sent was not unfavourable treatment. It would have been designed to help the claimant find another assignment as soon as possible given the abrupt end to the UKPR role, as the evidence showed Ms Cameron attempting to do. Further, the tribunal could not see how the sending of such a message, however it might have been perceived by the claimant, was because of something arising in connection with her disability. There was no connection between her disability and the UKPR assignment coming to an end, for example.

70. Ms Cameron did offer the claimant two assignments in December 2021, according to the evidence. The tribunal found that the claimant's reason for declining each was that she could not take it up because of the amount of travelling involved and incompatibility with her domestic arrangements. There was no evidence however of Ms Cameron consciously offering the claimant roles which she would not be able to accept, or only confining the assignments she offered the claimant to that type. In any event, Ms Cameron was in the position of offering those roles to the claimant only as the third assignment had been ended earlier than planned. There was no evidence that that happened because of the claimant's disability generally, or her difficulty using telephones. The decision was not connected to her disability. Again, therefore, the tribunal could not see any link between the offering of further assignments in December 2021 and anything arising in consequence of the claimant's disability.

71. The final complaint made under section 15 is that both Ms Cameron and Mr Cargill did not pursue the matter of notice pay under the UKPR assignment effectively or sensitively enough. The tribunal again found itself unable to uphold this complaint. There was sufficient evidence of both individuals, particularly Mr Cargill as the main client point of contact, seeking clarity of the client's position and pursing a payment on her behalf. Their efforts were adequate and proportionate in the circumstances. Further, there was no

discernible connection between their respective approaches to the matter and anything arising by reason of the claimant's disability.

72. Therefore the tribunal did not uphold any of the claimant's complaints under section 15 EQA.

Complaints of failure to make reasonable adjustments under sections 20 and 21 EQA

73. A claim of failure to make reasonable adjustments requires that a provision, criterion or practice, or a physical feature, or the absence of an auxiliary aid put the claimant at a particular disadvantage compared with people not sharing her disability, and that it would be reasonable for the first respondent to make an adjustment which would wholly or partly alleviate the disadvantage. The employer must have known or reasonably been expected to know about the disability and the disadvantage caused at the time the adjustment allegedly should have been made.

74. The claimant says that there was a provision, criterion or practice in the form of the requirement for her to use telephones on her first and second assignments (UKPR and Dow respectively). This placed her at a particular disadvantage compared with individuals who have full hearing as she had to remove her aids in order to use the telephone. When she did so she had difficulty hearing people on calls and also around her. This made her work less effectively and caused stress at times due to the communication challenges which arose. It drew criticism from callers. She also had secondary issues of proneness to ear infections and tinnitus at least part of the time.

75. The claimant pursued this complaint only against the first respondent. She maintained that the following adjustments reasonably should have been made. She did not say when the adjustments ought to have been made:

    a. A risk assessment should have been carried out, or the claimant should have been referred to occupational health;

    b. The first respondent should have made clients aware of the claimant's hearing impairment at some point before she was placed in an

assignment, to ensure the assignment was suitable or to allow adaptations to be made;

c. Modified or specialist equipment could have been arranged such as a telephone amplifier or flashing light alarm;

d. Mentoring being offered to the claimant to support her in coping and generally around her mental health;

e. Identifying risks to her health and safety and ensuring she was protected.

76. The first respondent rightly argued in submissions that any relevant provision, criterion or practice (**'PCP'**) had to be its own and not one applied by another party. It should not be held responsible for its clients' actions such as the way they offer work to individuals like the claimant via itself. Therefore, if a client needed a worker to be able to use telephones, even extensively, then that was not the first respondent's responsibility. Similarly, although clients could and did give inadequate or inaccurate information about the assignments they were offering, this was not the first respondent's fault.

77. The tribunal considered carefully the circumstances of the case, and in particular the concerns and problems raised by the claimant to Ms Cameron on 28 and 29 July 2021. In that text message conversation the claimant expressed for the first time that she had a disability by virtue of her hearing loss and that she was experiencing difficulty with the role which had been misdescribed. She explained that the two issues were connected by the requirement to use telephones extensively, which was not implicit in the original job description. Ms Cameron understood the position, was sympathetic, and said *'Ok I will speak to them and see'.*

78. Ms Cameron did not take up the issue with the client. Nothing changed in the interim. Ms Cameron laudably attempted to support the claimant's appeal for notice pay from the client, and sought to find a new assignment for the claimant as soon as possible after the one with UKPR ended. As a result, the claimant was only out of work for some two days.

79. However, the same issue the claimant experienced at UKPR arose with Dow. The role was inaccurately described by the client and the claimant again found herself unexpectedly in the position of using telephones extensively throughout her working day and suffering as a result.

80. Although not expressed in such terms by the claimant herself, the tribunal found that the first respondent applied the PCP to its workers of requiring them to accept and begin working on assignments without being given a full and accurate description of the role. This was a common occurrence as Ms Cameron confirmed. It was an act of the first respondent and not its clients. It did not affect other workers, or affected them less significantly than the claimant, as they could adapt to the precise requirements of the assignment once it was underway. The claimant could not do that, or at least not if the role involved significant use of telephones.

81. Recognising that the claimant did not frame a PCP in this way, the tribunal was however mindful that she was unrepresented, that the concept of PCPs can at times be difficult generally to articulate, and that she was making complaints phrased similarly although not identically to this.

82. The tribunal also reached the view that the first respondent could have made an adjustment for the claimant by verifying clearly with the client the nature of any role it was going to offer her, or which she provisionally accepted. Such an adjustment would have been reasonable as it would have alleviated the disadvantage the claimant faced as compared with non-disabled workers looking for roles, and it would not have been particularly onerous to carry out. The client could have been asked for a more detailed summary of the skills and duties required rather than reliance be placed on generic role descriptions which did not have fixed or universal meanings. At the very least, the client could have been asked to confirm whether and to what extent any telephone duties were part of the job.

83. The above duty could not have applied to the first respondent at the time that the claimant was placed in her first assignment, as it did not have the required knowledge (or reasonable expectation of knowledge) of both the nature of the

claimant's disability and the way in which it affected her when working. However, the first respondent gained that knowledge on 28 July 2021 courtesy of the claimant's text messages to Ms Cameron, and so the duty applied from then on and in relation to the claimant's placement in any further roles, including the one with Dow.

84. Consequently, the tribunal decided that the first respondent failed to fulfil a duty to make reasonable adjustments for the claimant at the beginning of September 2021, before placing the claimant on her second assignment. It also failed in the same duty when initiating her third assignment in early December 2021, although the claimant did not suffer to the same extent as a consequence because that role involved much less use of telephones. The first respondent did not fail in the duty at any later point because the claimant was not offered any more roles which she was potentially prepared to accept.

85. The tribunal did not consider that the first respondent failed in any other way to make a reasonable adjustment for the claimant. The requirement to use telephones in roles was not a PCP of the first respondent, as was submitted on its behalf. That was a requirement of the client. The tribunal did not consider that there was a need to carry out any of the other adjustments the claimant suggested. They would have been disproportionate and unnecessary to alleviate the effect of the real PCP. The alleged adjustment listed at (b) within paragraph 75 above is in essence a similar articulation of the adjustment which the tribunal found ought to have been made, as set out above.

Complaints of harassment under section 26 EQA

86. Harassment in this context involves a person engaging in unwanted conduct in a way related to the claimant's protected characteristic, which has the effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. The perpetrator can be the employer itself or another individual such as a colleague deemed to be acting on its behalf.

87. When deciding whether harassment has occurred, a tribunal must consider not just the effect on the claimant of the behaviour complained of, but whether it is reasonable for the claimant to be affected in that way.

88. The claimant alleged harassment by the first respondent alone. She put forward a number of instances of harassment as follows:

    a. Being given misleading and contradictory information by Ms Cameron and Mr Cargill about whether the first respondent used lying time;

    b. Ms Cameron sending a text message to the claimant on 28 July 2021 stating 'LOL';

    c. Not being taken seriously when raising her complaints on 9 September 2021 about non-payment of notice by UKPR;

    d. Having her second assignment prematurely ended on 23 November 2021 while absent from work due to Covid-19 isolation, after Ms Cameron had told her the position would be safe;

    e. Being treated in a humiliating and embarrassing way by staff of the first respondent when she telephoned and asked to speak to Ms Cameron on 14 February 2022;

    f. Ms Cameron on 29 July 2021 disregarded her concerns raised about the first assignment not meeting the description that had been given, involving cold calling rather than being a project administrator;

    g. The second assignment being misdescribed (in late August 2021) as a computer-based role when it was for a receptionist;

    h. The third assignment was said to last until at least 23 December 2021 but was brought to an end after three days; the claimant was notified at short notice by text of the change.

89. The tribunal's findings in relation to each allegation are as follows.

90. First, whilst the information initially given to the claimant by Ms Cameron, and then later by Mr Cargill, could be taken in a way to suggest it was

contradictory, this was not material enough to amount to harassment. Viewed objectively, it would not have been reasonable for the claimant to view it in that way.

91. The tribunal accepted that the claimant was upset by Ms Cameron's text message reading 'LOL' on 28 July 2021. She believed that this was a dismissive or mocking response to her own message expressing disappointment at the nature of the first assignment, which she was comparing with a managerial role she had just recently left. The message simply read *'I was a manager last month'* and contained an emoji of a face crying with laughter. The tribunal found that whilst the claimant had intended the emoji to convey that she was sad or upset, it was understandably taken by Ms Cameron as expressing amusement. She did not fully understand why the claimant was sending it, and hence answered *'Is this meant for me'* with a similar emoji. The exchange therefore involved a simple misunderstanding on the claimants' part as to what the emoji she used would normally express, and a similar misunderstanding by Ms Cameron as to the claimant's state of mind. Again, applying the legal test objectively, the claimant could not reasonably consider Ms Cameron's messages as fitting within any of the types of scenario which constituted harassment.

92. The tribunal did not accept on the evidence that the claimant was not taken seriously when raising her complaint about the unexpected termination of the UKPR assignment and subsequent non-payment of notice. Nor could it be seen how any perception of the first respondent's treatment of the matter would reach the threshold of harassment.

93. The unexpected ending of the claimant's second assignment was not an act of the first respondent. It therefore cannot be an act of harassment on their part. Again, in any event, the conveying of the client's decision to the claimant was not extreme enough to qualify as harassment.

94. The claimant complained about the way she was dealt with by colleagues of Ms Cameron when trying to reach her by telephone in February 2022. Only the claimant's evidence on this point was available. The tribunal had some

sympathy with the claimant on this matter. It appreciated how the claimant could well feel humiliated, and with just cause, at making multiple unsuccessful attempts to engage with Ms Cameron by text message and telephone, and to be sensitive to how Ms Cameron's colleagues were treating her enquiries. However, there was no evidence that the treatment of the claimant by those individuals was related to her protected characteristic. They may not have known about it at all. If they did know about it, it was unclear whether that played a part in how they dealt with her. Taking the claimant's evidence at its highest, she was dismissively treated by colleagues of Ms Cameron who knew she was repeatedly trying to reach her over a claim for pay from a client. That cannot amount to harassment as the connection to her disability is not there.

95. Dealing with the complaint that on 29 July 2021 Ms Cameron disregarded the claimant's concerns about the nature of the work with UKPR not meeting the role description, the tribunal finds that this allegation is not supported by the evidence. As soon as the matter was raised (on 28 July 2021) Ms Cameron asked the claimant whether she wished Ms Cameron to speak to the client. She explained to the claimant that she did not have any other assignments to offer at that time, the implication being that she would have been willing to move the claimant to a new assignment if she had wished. She went on to say that the position could change daily, and so new assignments might open up at any time. She asked the claimant again on 29 July 2021 if she should speak to the client. When the claimant this time said yes, she agreed that she would. Leaving aside the fact that Ms Cameron did not ultimately speak to the client, she was not at this point disregarding the claimant's concerns at all and her conduct cannot be described as anything constituting harassment.

96. It is true that the second assignment offered to the claimant in early September 2021, with Dow, was inaccurately described. That said, it was not uncommon for roles to be given generic descriptions by clients which did not fully match the skills or activities required. There was no wrongful intent on Ms Cameron's part. Again, viewed objectively this did not meet the threshold of harassment.

97. The termination of the third assignment, with Blantyre Fabrications, was not an act on the first respondent's part, much less an example of harassment. The client had the right to end the assignment, however disappointing that was, and the first respondent was entitled if not obliged to confirm that to the claimant. It was not an act of harassment by the first respondent to convey the decision by text message given that this was a method of communication extensively used between the claimant and Ms Cameron, and one she had been content to use. Ms Cameron's offers of other assignments shortly after, even if the claimant ruled them out on grounds of logistics, is consistent with the picture that she could only mitigate the effects of clients' decisions as regards when assignments were ended. She could not control them.

98. The tribunal therefore determined that the first respondent did not harass the claimant in any way alleged.

Complaints of unlawful deductions from pay under section 13 ERA and in relation to accrued holidays

99. The claimant's complaints of unlawful deductions from her pay and in respect of accrued holidays were as follows:

    a. whenever she took a day's holiday during an assignment she was not paid for it;

    b. she was not paid for a week of lying time; and

    c. she did not receive a week of notice pay in compensation for the UKPR assignment being instantly terminated.

100. The tribunal's conclusion in relation to the first of those complaints was that it was unfounded. The evidence showed that the claimant was fully paid by the second respondent for any annual leave she accrued. This was done by way of designated accrued holiday payments which were made as part of every payslip. Whether knowingly or not, she chose to be paid for holidays in this way (and not the alternative which was to store up and then be paid the appropriate amount when she took a day of leave). Had the claimant been

paid by either respondent for a day's leave at the time she took a holiday she would have been compensated twice.

101. The tribunal also concluded on the evidence that the first respondent did not operate a system of using lying time to delay the payment of workers. The evidence showed that workers would be paid at the end of the week following the one in which they worked, to allow time for their hours to be calculated by the client and sent to the first respondent, then for that information and the necessary payment to be sent to the second respondent (or another similar intermediary), and finally for the second respondent to make the necessary deductions and arrange the payment to the worker.

102. The tribunal was also satisfied on the basis of the evidence that whilst it was normal for clients to pay for notice when ending an assignment unexpectedly, and that the first respondent encouraged them to do so, there was no obligation on the client to make the payment and the first respondent had no power to compel a client to do so. Ms Cameron and Mr Cargill made reasonable attempts to persuade UKPR to make a payment in respect of the claimant but that party chose not to do so. Whether it was correct in saying that the claimant's conduct was unacceptable or not (and the tribunal makes no finding that the claimant did behave unacceptably on her last day of the assignment) was ultimately beside the point.

103. Therefore, none of the claimant's complaints about unlawful deductions from pay are unsuccessful against both respondents.

Remedy and disposal

104. The tribunal found that all of the claimant's complaints were unsuccessful when applying the relevant legal tests to the facts available, with the exception of the reasonable adjustment claim to the extent explained above.

105. The tribunal therefore had to consider what remedy was appropriate to grant the claimant in respect of the successful part of her case.

106. The claimant did not incur a financial loss as a result of the first respondent's breach as she went on working in her second and third assignments until they

were brought to an end by the client for reasons which could not clearly be traced to her disability or the effect it had on her working. The second assignment was terminated as there was no more work for her to do after she contracted Covid-19 and the third was brought to an end either because she had completed the work much quicker than envisaged (the reason given at the time), or because the client considered that she did not have the skills or experience to use some of their systems (the client's suggestion some time after the event).

107. The tribunal considered whether an award should be made for injury to the claimant's feelings. In her schedule of loss she sought the sum of £5,000 without further details of how that figure was arrived at.

108. The tribunal considered the claimant's evidence in relation to the stress and frustration she experienced on starting the role with Dow, so shortly after leaving her first assignment where she had complained of having to use telephones constantly. With Dow she also had to use telephones extensively, albeit not constantly. She had to accept and direct incoming calls and also make outgoing calls. This caused her some stress and humiliation as she had to remove her hearing aids which had the effect of her being less able to interact with people on the phone and also people around her in the office.

109. According to the well known authority of ***Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102*** a tribunal should consider which of three possible bands or categories of treatment, in order of gravity, applies to the treatment of a claimant before it. The first band is for single and/or lesser acts of discrimination, for example ones with minor effect. The middle and upper bands should be applied to more serious and sustained acts of discrimination.

110. The claimant did not provide any medical evidence specifically to deal with the effect of the telephony-based duties on her health and her feelings, but the tribunal accepted her own evidence to the extent it was relevant and useful. Based on that, the tribunal considered that the first respondent's breach of duty fell within the lower of the three ***Vento*** bands. This was

primarily because the breach was not particularly egregious or deliberate, and the first respondent had generally tried to be supportive to the claimant in other ways. At the relevant time (i.e. between 6 April 2021 and 5 April 2022) the lower ***Vento*** band corresponded to an award of between £900 and £9,000.

111. Considering the effect of the breach on the claimant, the tribunal determined that it should fall towards the middle of the lower band. Although the breach of duty was more by oversight than intent, the effect on the claimant was material enough to warrant an award of that size. The tribunal therefore decided to award the claimant £4,000 in compensation.

112. Finally, interest applies to awards of compensation for injury to feelings. Interest will run at the statutory rate of 8% per annum from the date of discrimination, which is taken to be 1 September 2021 being the date when the second assignment was being arranged.

113. Therefore the tribunal disposes of the case as set out at the outset of this judgment.

Employment Judge: **B Campbell**
Date of Judgment: **7 April 2023**
Entered in register: **12 April 2023**
and copied to parties