RESERVED

EMPLOYMENT TRIBUNALS

Claimant: Ms V Nicholson

Respondents:
1. Finance4me Limited (dissolved)
2. Mr P McFadden
3. Mr L Trotman

HELD AT: Liverpool (by CVP) **ON:** 20, 21, 13, 14 & 25 February 2023 and 11 & 16 May 2023 (in chambers)

BEFORE: Employment Judge Shotter

Members: Mr A Egerton
Mr N Williams

REPRESENTATION:

Claimant: In person
Respondent: Mr T Kenward, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's application to strike out the response fails.

2. The claimant did not have a disability as defined by section 6 of the Equality Act 2010 and the Tribunal does not have the jurisdiction to consider her claims of disability discrimination brought under the Equality Act 2010 which are dismissed.

3. In the alternative, her claims of disability discrimination brought under sections 13, 15, 20-21 and 26 of the Equality Act fail on their merits and are dismissed.

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REASONS

Preamble

The hearing

1. This has been a remote hearing by video which has been consented to by the parties. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of 760 pages in the main bundle and 59 pages in the supplemental bundle both agreed with the parties on the first day of the liability hearing, the contents of which I have recorded where relevant below. The Tribunal was provided with witness statements and agreed list of issues. The bundle has a number of witness statements/impact statement produced by the claimant. The claimant agreed that the relevant statement was found at pages 580 to 623 and this is the statement dealing with liability and disability status the Tribunal took into account.

2. The Tribunal made it clear to the parties that as the first respondent no longer existed as of 26 August 2021 following a creditors' voluntary liquidation, it would be concentrating on the second and third respondent's liability for disability discrimination. The fact that the second and third respondent were formerly directors of the first respondent did not, in itself, cause them to be liable for any alleged discrimination by other employees unless they were party to it in some way. It is unfortunate that the claimant has been unable to, at times, differentiate between the acts she complained of carried out by other employees that did not involve the second and third respondent. There was also confusion concerning what acts were alleged against the second and third respondent individually as the claimant found it difficult comply with case management orders that she divide up her statement up to deal with allegations brought against respondent one and then respondent two. It is also unfortunate that the list of issues does not differentiate between the first, second and third respondent. Nevertheless, the Tribunal took the view that it was appropriate and in the interests of justice not to adjourn the case but allow the claimant to deal with this in her cross-examination of the second and third respondent.

3. The consequence to the Tribunal coupled with lengthy witness statement from the claimant dealing with allegations against a raft of other employees for which the second and third respondent were not by virtue of them being directors of the first respondent, jointly and severally liable or vicariously liable, the less than easy to read bundle (where the numbers changed between the individual Tribunal panel) and technological difficulties experienced on the first day of the in chambers hearing, a second in chambers hearing was required for which the judge gave up a holiday and members made themselves available bearing in mind the passage of time before a decision making hearing date could be arranged.

Claimant's application to strike out

4. At the outset of the hearing the claimant applied to strike out the second and third respondent's defence on the basis that they were in breach of the unless order made on the 6 February 2023 sent the parties on 7 February 2023. The first and second respondent provided affidavits sworn by employees on the 9 February 2023 confirming the documents requested by the claimant could not be found. The claimant complained that she had been

sent a copy of her unsigned employment contract and a number of text messages were missing from the bundle that had an "array of dates." The claimant's application was refused, the claimant having accepted that given the disclosure to date and substantial size of the bundle (766-pages) and then the supplemental bundle (59-pages although this contained the affidavits and respondent's four witness statements) it would not be fair to strike out the Grounds of Resistance. It transpired that the claimant herself already had possession of some the documents she maintained were missing from the bundle. The claimant agreed to re-send the documents to counsel who did not have a copy. As the hearing progressed it became apart that the missing documents the claimant had complained about were in the bundle with the exception of one email from the second respondent, which on the face of it may not be relevant as it deals with an apology for an incorrect date, not an issue in these proceedings. It transpired by the end of the final hearing the document was not relevant to the agreed issues.

5. The parties agreed that a supplemental bundle should be produced by the respondent including the one missing document, the documents relating to training, witness statements and affidavits referred to by the Tribunal above.

Claimant's disability

6. The claimant was diagnosed in 2013 with chronic fatigue syndrome (CFS) and myalgia encephalomyelitis ("ME"). She states it is a "hidden disability" that must manage her energy carefully to cope with her condition and has done so since 2014. The respondent disputes the claimant is disabled under section 6 of the Equality Act 2010 ("the EqA") on the basis that there is no meaningful evidence of the condition having a substantial adverse effect on the claimant's ability to carry out day-to-day activities.

The pleadings

7. In a claim form received on 28 October 2019 following ACAS early conciliation between 11 September 2019 to 11 October 2019 , the claimant, who had less than 2-years continuity of employment to bring a complaint of unfair dismissal under the Employment Rights Act 1996, claims the following:

7.1 Direct discrimination and discrimination arising from the claimant's disability contrary to sections 13, 15 and 39 of the Equality Act 2010 ("the EqA");

7.2 Failure to make reasonable adjustments in respect of the claimant's disability contrary to sections 20, 21 and 39 of the EqA.

7.3 Harassment under section 26 of the EqA.

Agreed issues

8. At the outset of the liability hearing we discussed with the parties the agreed list of issues, which were unchanged from the lists of issues produced at various case management preliminary hearings. The claimant agreed that the live issues were as follows and a separate list was produced in order that the parties and Tribunal could refer to them throughout the final hearing;

RESERVED

1. **Disability**

1.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about [June to October 2019]. The Tribunal will decide:

- Did she have a physical of Chronic Fatigue Syndrome (CFS) and ME?

- Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

- If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

- If so. would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

- Were the effects of the impairment long-term? The Tribunal will decide:

1.1..1 did they last at least 12 months, or were they likely to last at least 12 months?

1.1..2 if not, were they likely to recur?

2. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

2.1 Did the respondents know or could reasonably have been expected to know that the claimant had the disability? From what date? C SAYS FROM THE OUSET.

2.2 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCP:

- Requiring employees to undertake the volume of work assigned to them.

2.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that because she was required to manage her energy, she was unable to undertake the volume of work assigned to her and/or without causing her health and condition to deteriorate.

2.4 Did the respondents know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

2.5 Did the respondents fail in their duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

- returning to her drafting role
- moving her to another available and suitable role,
- reducing her workload,
- providing training and support
- referring her to occupational health and implementing recommendations for adjustments.

2.6 By what date should the respondent reasonably have taken those steps?

3. **Harassment related to disability (Equality Act 2010 section 26)**

3.1 Did the respondents do the following alleged things:

- Placing her under pressure to continue with the roles allocated following her refusal to do so on 16th July 2019.
- Mr McFadden and Mr Trotman embarking on a campaign to force her out of the company by;
- orchestrating complaints about her conduct and behaviour from colleagues;
- calling her to many meetings and pressurising her;
- piling work on her to cause her to burn out;
- behaving rudely and dismissively towards her;
- refusing to allow her to return to her administrative role;
- lying about the availability of alternative roles; • refusing to refer her to occupational health;
- dismissing her on concocted grounds.

3.2 If so, was that unwanted conduct?

3.3 Was it related to disability?

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

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

4. **Direct disability discrimination (Equality Act 2010 section 13)**

4.1 What are the facts in relation to the allegations at 3.1 above:

4.2 Did the claimant reasonably see the treatment as a detriment?

4.3 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances without a disability would have been treated? The claimant relies on a hypothetical comparison.

4.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of disability?

4.5 If so, has the respondent shown that there was no less favourable treatment because of disability?

5. **Discrimination arising from disability (Equality Act 2010 section 15)**

5.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

5.2 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

- The allegations at 3.1 above

5.3 Did the following things arise in consequence of the claimant's disability:

- The claimant's inability to undertake the roles and workload allocated to her.

5.4 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

5.5 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

5.6 If not, was the treatment a proportionate means of achieving a legitimate aim?

5.7 The Tribunal will decide in particular:

- was the treatment an appropriate and reasonably necessary way to achieve those aims;

- could something less discriminatory have been done instead;

- how should the needs of the claimant and the respondent be balanced?

Evidence

9. The Tribunal heard evidence under oath from the claimant. On behalf of the respondent the Tribunal heard from the second and third respondent, who set up the first respondent and were directors until it ceased trading, Claire Goward, who had been employed as the operations manager and Tara Philips, a HR advisor who worked for an independent human resources advisory business contracted to provide HR services for the first respondent.

10. There were a number of fundamental conflicts in the evidence to be resolved by the Tribunal, which it has clarified as set out in the findings of facts below. In short, it did not find the claimant was an entirely credible witness for the reasons stated, preferring to rely on the contemporaneous correspondence including the agreed transcripts of recorded meetings, and the evidence given by the respondent's witnesses, particularly Claire Goward, found to have given credible straight-forward evidence supported by the contemporaneous documents unlike the claimant's evidence which was found by the Tribunal to have been exaggerated at times and unreliable.

11. The Tribunal has taken a great deal of time to understand the claimant's claims as set out in a particularised claim part one and a lengthy witness statement. In short, the claimant alleges that when the chairman of Meeting Of Creditors ("the MOC") moved to the administration department the claimant and two of her colleagues were told that they would be covering his duties as a "temporary arrangement." The claimant had "little training" and his cases were allocated between three employees. The claimant has already complained to her line manager Claire Goward about workload on drafting and the fact adjustments were needed, namely, not being required to "add another job so I am working on two jobs" and the need to train the claimant "fully" in drafting. The claimant also maintains on 1 July 2019 she requested reasonable adjustments in relation to SIP calls which were not put in place. The Tribunal found the claimant had exaggerated her evidence as she had never requested any adjustments to workload until asked to cover the MOC meeting role and the 13 June 2019 email had not been sent.

12. The claimant raised a number of allegations against a number of managers employed by the first respondent. In the Grounds of Complaint reference is made to Tara Philips, a human resource officer from an independent HR company who provided the first respondent with HR advice. It is notable the claimant alleged at the welfare meeting she had with Tara Philips a record of the meeting had been taken by her "I have since requested a copy of this meeting and have been ignored." The claimant described how she called HR for an update and the recording of the meeting and she was never called back. The claimant also maintained she was never provided with a copy of a checklist she had completed with Claire Goward. The claimant alleges she was harassed into taking on the second job of MOC dealing with meetings. These are all allegations which, on their face of them, do not appear to involve the second and third respondent as there was no evidence of their involvement, either directly or indirectly. The Tribunal has deal with this below in its findings of facts open to the possibility that the second and third respondent were somehow instrumental in acts of disability discrimination by others, which it found after considering all of the evidence, they were not.

13. With reference to the second and third respondent, the first allegation against the first respondent was that the claimant had tried to speak to him when he was in his office with another employee called Antony, a manager, and he "wouldn't speak to me and couldn't give

me a reason why." The claimant described how on the 23 July 2019 she attempted to speak to the second and third respondent. The second respondent raised his hand and she had been told "I cannot discuss issues with my own employers." The claimant alleged the second and third respondent had changed shift patterns from 10am to 7pm to 9am to 6pm when she needed a late start. There was no reference to the claimant working a 9.30 to 6.30 shift which was agreed between the parties at the liability hearing, and shift pattern does not form any part of the allegations set out within the list of issues. Given the claimant's less than credible evidence on the balance of probabilities the Tribunal preferred that of the second and third respondent to the effect the second respondent had not put up his hand to stop her talking in a dismissive manner.

14. The claimant alleges she asked the third respondent on 7, 13 and 16 August 2019 to move her back to the administration team "as I knew there were vacancies" and he refused to make the reasonable adjustment. She alleges her 21 August 2019 email was ignored by both the second and third respondent, the claimant was not moved and they were booking "back-to-back SIP calls" when the claimant should have been allocated "3 max." The claimant complains the workload was "not sustainable…I could not do back-to-back SIP calls" it could also be fatal as I have hypoglycaemia (…declared on my start form)." The claimant also alleged the second and third respondent on the same date "ignored" her "all day…they then sent an email repay roll stating they will speak about payroll and no other issues, meaning they didn't want to speak to me…" The claimant was dismissed "it was their intention all along…indirect discrimination and disability discrimination, the claims against her by other employees having "been exaggerated" and the investigation "flawed and not impartial." For the reasons set out above the Tribunal did not find the claimant's evidence credible, she exaggerated and was found to be an inaccurate historian, for example, there was no evidence, medical or otherwise, that the claimant's workload was "unsustainable" and a non-sustainable workload could be fatal. The clear evidence before the Tribunal, which was not disputed by the claimant, was that her workload had decreased, she performed well and required no reasonable adjustments until the situation arose when asked to undergo training to provide cover on MOC meetings. As indicated by the Tribunal below, the claimant contradicted her own evidence concerning her requesting reasonable adjustments and a screen shot of an email allegedly sent on the 13 June 2019 but not received, evidence which concerned the Tribunal.

15. The Tribunal noted that the passage of time may have affected the cogency of the evidence including that given by the claimant, as witnesses were unable to recall the dates and minutia of what transpired having moved on from the respondent into new work during the years that have passed. The Tribunal has not made adverse inferences by the lack of some documentation. It is apparent from the affidavits that the second and third respondent attempted to obtain unsuccessfully documents from the senior corporate recovery administrator, namely the training grid, training file, starter form, one to one form and signed employee contract. The Tribunal did not accept the claimant's argument that the second and third respondent were responsible for the safe keeping of the documents, particularly given the fact that proceedings were initially issued against the first respondent only who had ceased trading and entered into a creditors voluntary liquidation on the 3 March 2020.

16. The Tribunal has considered the documents to which it was taken in the bundle, the agreed chronology incorporated into the finding of facts, written and oral submissions, which the Tribunal does not intend to repeat in full and has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts having resolved the conflicts in the evidence on the balance of probabilities.

Facts

17. The first respondent was in the business of offering credit counselling services to customers with financial issues including arranging Individual voluntary arrangements ("IVA's") for them if they qualified. Patrick McFadden and Leon Trotman, directors, started the business up in 2010. It was small business employing approximately 20 employees including solvency practitioner, Kate Cutler, who together with the first respondent was regulated by the Institute of Chartered Accountant England & Wales ("ICAEW") and audited every 12-months. The second and third respondent oversaw the business and did not become involved in the minutiae of training individual employees, 1-2-1 meetings and general HR matters, which were left to individual managers. In short, neither the second or third respondent were aware of what training employees undertook, all they were concerned with was the day-to-day running of the business and by 2019 keeping the business afloat as it was in financial difficulty and had been visited by the bailiff on a number of occasions. The second and third respondent were fighting for their livelihood and the survival of the company. The claimant had a good relationship with the directors describing them as "nice lads" until the events that gave rise to these proceedings as the second and third respondents were concerned she was being properly managed and performing to such an extent that she quickly advanced within the company with their approval. .The second and third respondent had no idea the claimant considered herself to be disabled needing reasonable adjustments until she refused to take on the role of MOC on the basis that she was disabled.

18. In or around mid-2019 the first respondent was in such a precarious financial state that the second and third respondents were selling the business coming in including drafting to a third party, with the result that at least fifty percent of work was lost across the whole company, and so the Tribunal finds preferring the evidence given on behalf of the respondents and Claire Goward, who was a credible witness giving straight-forward answers to the questions put to her in cross-examination supported by contemporaneous evidence including documents reflecting the claimant accepted workload had decreased. The Tribunal has referred to this below in greater detail.. The claimant's evidence at this final hearing that she was overworked was not credible at all, given the financial situation, and it was apparent from the contemporaneous documents that the claimant was not in fact doing back-to-back meetings as alleged, and a number were short telephone conversations adjourned from the previous day with appropriate breaks between telephone calls. The Tribunal took the view that the claimant exaggerated her evidence in terms of workload described by her as "ridiculous" and variety of work she had in an attempt to support her complaint that the IVA drafting role workload with the Meeting of Creditors calls would have "burned her out" giving the impression that she was required to take on two different roles when the reality was that the claimant was required to merely provide cover in relation to the Meeting of Creditors calls. The claimant was to be trained as a contingency to provide cover, which she refused to even consider as an option.

19. Claire Goward was employed as the operations manager, and she knew the claimant when they were employed and worked together in a different company..

Disability

20. The claimant was diagnosed with ME in 2013, following which she undertook Cognitive Behavioural Therapy ("CBT") in 2013 and met with a NHS ME nurse in 2014 for a

6 sessions. The CBT and meeting with the ME nurse provided the claimant with the tools to manage her ME condition, which she successfully did for a number of years including the relevant period int this litigation. At no stage from 2014 onwards did she seek any medical intervention for her ME, and was unable to point to any day-to-day activities adversely affected by the ME for a period of approximately 5-years including the relevant period. The claimant was given the opportunity on a number of occasions to bring this evidence to the Tribunal and she did not, instead the claimant in oral evidence alleged she was "always ill" when there was no evidence of this. The Tribunal asked the claimant questions about her medical condition. The claimant offered up further GP records she had not disclosed, which was not helpful given the claimant's evidence that she did not see the GP or any professional about her ME after some unknown date in 2014 . It is notable the claimant was in a position to give evidence about injections she paid for privately to manage migraines, a medical condition she was not relying on as a disability. The claimant's evidence was that she managed her condition, did not miss any work and the Tribunal took the view she had not discharged the burden of proving she was disabled under section 6 of the EqA, the claimant unable to point to any day-to-day activity she was unable to carry out. The Tribunal has dealt with disability status in greater detail in its conclusion.

The claimant's employment

21. The claimant was originally employed in the administration department as an IVA administrator from the 18 October 2018 at £20,000 per annum. The claimant was offered and accepted a position drafting IVA proposals at £22,000 and her salary was substantially increased eventually to £25,000. There is a dispute as to when the claimant was promoted but nothing hangs on this, and the Tribunal accepted the claimant's evidence that it was in January 2019. The Tribunal also accepted the claimant's evidence that she completed a form confirming she had ME at the outset of her employment. The claimant accepted the second and third respondent knew nothing of this form and the fact she had ME, and the Tribunal found that the second and third respondent did not possess knowledge until the fall out over the claimant being requested to undergo training in respect of providing cover for the Meeting of Creditors calls role in July 2019, as recorded below.

22. In April 2019 the claimant confirmed she was "doing well" in oral evidence and it is undisputed her salary increased to £24,000.

23. It is notable that throughout the claimant's employment prior to the dispute over the Meeting of Creditors calls role the claimant performed well, she had not time off work (other than 2-days for flu which was unrelated to her ME) and did not refer to ME at any stage or request reasonable adjustments. In evidence the claimant referred to starting work at 10am (the usual starting time for a shift involving a number of employees) due to her disability, however, in oral evidence on cross-examination the claimant confirmed it the "main point" of her taking the job and it was not an adjustment for her medical condition.

The disputed screen shot 13 June 2019

24. The claimant relies on a screen shot of an email message allegedly sent on the 13 June 2019 at 18.31 to Claire Goward referring to her work load stating "I am concerned that the work load is not going to be adjusted to manage my condition. It's needs to be realistic and not burn me out otherwise I will be absent from work as my condition isn't being managed properly and it is making me feel drained and ill. I can do this job, but I need adjustments where necessary to ensure I can work and not be ill." The email had no signature unlike other emails, and it did not appear to have been sent in response to any

earlier email sent by Claire Goward, who disputes receiving the email and that the claimant at any stage referred to work load, reasonable adjustments and her medical condition until after the request made on 15 July 2019 that the claimant complete MOC calls training. It is notable that there was no response to the email and nor was there any discussion or meeting, and the Tribunal took the view that had Claire Goward ignored the claimant's request, as alleged now by the claimant, there would have been further communications from the claimant who was keen on keeping the respondent under pressure as evidenced by the numerous emails she sent to the respondent and HR after the 15 July 2019 request.

25. The Tribunal concluded on the balance of probabilities that the email appears out of context given the contemporaneous transcripts of meetings setting out the frequent references to the claimant confirming she had not made a request for any reasonable adjustments until asked to complete the MOC calls and training for it. Claire Goward was pressed on this issue, and confirmed she had checked and looked back to her emails but it could not be found. Claire Goward was a credible witness on other matters, and the Tribunal was satisfied Claire Goward had not received the 13 June 2019 email, there was no discussion or issue concerning reasonable adjustments at that stage of the claimant's employment, and nor had the claimant ever been absent from work due to her medical condition, or warned the respondent of an imminent absent due to workload against a background where work across the board had reduced substantially. Taking into account the factual matrix and context in which the email had allegedly been sent, it made no sense and appeared to be more relevant to the claimant's arguments later when she incorrectly referred to being asked to undertake two different roles simultaneously.

26. In conclusion, the Tribunal found on the balance of probabilities (taking into account the claimant's contradiction in her own evidence) that (a) until 15 July 2019 the claimant had not asked for and nor did she need any adjustments to her duties, (b) the claimant did not send the 13 June 2019 email, and (c) 15 July 2019 was the first date the claimant put her managers that she believed herself to be disabled with ME and needed the reasonable adjustment of not being training to take MOC calls which she did not want to do, preferring to continue working on drafting despite a reduction of approximately 50 percent in her workload.

<u>Drafters requested to complete MOC raining</u>

27. In or around 15 July 2019 the claimant and her two colleagues were asked to undertake MOC call training by Kate Cuttler. The claimant's evidence is that she underwent 1 hours training and allocated MOC calls, evidence the Tribunal did not find credible. MOC calls was largely generated by an automatic system and the training of the claimant's colleagues took a maximum of 2 days and the Tribunal did not find it credible that the claimant was told to start working on files after 1-hours training, and it is supported in this by the claimant herself, who at the time took the view it would take at least 5-days to train her taking into account the fact that she knew about most of the processes having worked for 7-years on the supervisory team in another company.

28. In cross-examination of the second respondent the claimant put to him that she had been trained in the MOC role which took one hour and after that she was given cases. The claimant's case is on the one hand she was expected to carry out work on the MOC role after 1 hours training and yet later when discussing reasonable adjustments stated the training would take 5-days training and "5 more if needed". The claimant's evidence that she had been provided with MOC work following 1 hours training was not credible. The Tribunal on the balance of probabilities find the claimant was not asked to do two roles at the same

time with an increase in her workload as stated by the claimant. The evidence before the Tribunal was the claimant never carried out MOC work, she was never trained, she was not expected to carry out both roles simultaneously and she was expected after training to step in if required and provide MOC calls cover, for example, holidays and sickness.

Allegations of disability discrimination

29. The claimant complained to Claire Goward. On the 15 July 2019 at 17.14 the claimant texted Claire Goward about what happened that morning referring to them "both being in tears on a Monday morning…I will not be doing anything to do with meetings until I am fully trained and confident as a drafter…I am trying to patience [sic] with all the changes in work, and never had a day off so it speaks volumes when I had to go home today, and I am upset that I have been put in that position in the first place the expectations are not realistic or sustainable…" Claire Goward provided HR's number.

30. The claimant rang HR and complained of disability discrimination referring to adjustments having been made for her start at 10am (which was not the case as conceded by the claimant in evidence) and she had been told that she would receive training to complete meeting of creditor calls, which "made me very anxious". The claimant did not say she had undertaken 1 hours training and expected to carry out the work on files after that, which reinforces the Tribunal's conclusion that this did not happen and the claimant did not carry out any work in the MOC role.

Date of knowledge

31. The second and third respondent were informed of the position and instructed Tara Philips, form independent HR company, to go into the business, meet up with the claimant in a welfare review meeting and provide the first respondent with management support. By either the 15 or 17 July 2019 at the latest the second and third respondent were aware the claimant consider herself to be disabled and the reasonable adjustment she sought was not to be required to undergo training or carry out the role of MOC calls.

Welfare meeting 17 July 2019

32. Tara Philips held the welfare meeting with the claimant on the 17 July 2019 which ended with the claimant agreeing the recommendation was "fair.". The following was discussed as recorded in the transcription agreed between the parties:

29.1 The claimant referred to ME and chronic fatigue.

29.2 She complained that she had been "told they would be starting to complete the Meeting of creditor calls and would receive training on the same" and this was too much for her. The claimant stated "training was planned for Monday which she missed as she had left." The claimant's statement was different to the description she gave to the Tribunal, which was that she had been trained for one hour and then given files.

29.3 It was agreed the claimant would take part in a second meeting on the 18 July and a reasonable resolution would be found.

Reconvened welfare meting 18 July 2019

33. Tara Philips discussed the position with the second and third respondent, and the discussion that took place with the claimant on the 18 July 2019 reflected what was agreed beforehand as Tara Philips was supporting management to resolve the position. The meeting was recorded and the parties have agreed a written transcript. The 18 July 2019 meeting covered the following points:

33.1 The claimant did not want to take on the MOC role as she had not been fully trained in her drafting role because she could not learn both roles together.

33.2 That she had "**cracked**" [the Tribunal's emphasis] her ME and being asked to train for the MOC role would "just put me back." The reference by the claimant to cracking her medical condition reinforced the Tribunal's conclusion on its finding that there was no substantial adverse effect on the claimant's day-to-day activities.

33.3 The claimant indicated that she needed to put up and establish "barriers" and will only learn the MOC role when a confident drafter. A perfect day was "a day of SIPS and a day of admin." In short, the claimant was attempting to control what work she could be allocated as a matter of principle.

33.4 The claimant confirmed **"I've not asked for a single reasonable adjustment since I've been here and not because I feel I can't…they're lovely lads and I know I needed something I've got absolutely no qualms in going I need a chair or car parking space but my legs work…I've never asked for a single thing and the one thing I have asked for…so I've said I can't**" [the Tribunal's emphasis.] There are numerous references like this made by the claimant which undermines her evidence that she sent the 13 June 2019 email requesting adjustments which gave rise to a serious credibility issue that also impacted the claimant's evidence on disability status.

33.5 The claimant confirmed she was happy to do the meetings when she had the full draft meeting as she had worked pre and post IVA before.

33.6 When asked " if we get the correct draft training in for you, get you up to a point where you are feeling confident with that and then bring in this meeting role, you'd be quite happy with that" to which the claimant replied "yes." When asked how long it would take, the claimant responded "**drafting can take years…the works not there because I said at the moment whilst it's quiet why don't you teach me drafting**" [the Tribunal's emphasis]. The Tribunal noted that the information provided by the claimant at this meting undermined her evidence that she was subjected to an excessive work load in that the claimant herself confirmed the work was not there and it was "quiet" and it was explained to her "why don't we use this time wisely…they're saying the works not there that's why you are doing meetings."

33.7 The claimant threatened litigation stating "I'm not gonno go…because what they're trying to do is push me until I break and I won't because I'll just end up going to court with them." The Tribunal found there was no basis for this allegation.

33.8 The claimant confirmed the disability discrimination was "I've got to start again from scratch, whilst learning another role they have given me…**I don't see why I**

should have to step back and go on admin because they're not going to make an adjustment for me.." [the Tribunal's emphasis]. The claimant made it clear that she did not want to go back into the administration department, in contrast to her evidence before this Tribunal that this was a reasonable adjustment the respondent should have carried out. The Tribunal has dealt with this further below.

33.9 The claimant indicated migraines were part of the ME. However, in evidence before the Tribunal the claimant confirmed that migraines was unconnected to the ME. The claimant also indicated her "dodgy thyroid" was "fixed." There was no evidence either migraines or a "dodgy thyroid" had any substantial adverse effect on day-to-day activities before the Tribunal.

33.10 The claimant confirmed her understanding that it would be difficult to train her in the drafting role. When it was put to her "if it's not there other than teaching you the theory behind it, your managers aren't going to be able to teach you what to do because the jobs not there to do it just yet. It's when it comes in." the claimant responded "yes, so let me do admin, the job I know before they start burning me out again…my old job…a different job role…"

33.11 The claimant confirmed her understanding that the MOC role was temporary and this was reiterated by Tara Philips who adjourned following a discussion about this. The claimant changed her position and maintained "they burn me out quickly and learning new stuff and everything else can be an absolute killer…I'm not going to able to learn it it's going to make me ill." She stated "I don't mind doing a dual role but I'm not going to be doing meetings until I'm confident in drafting." The claimant objected to the training, and the barrier was the need for further training in drafting before any training could take place on the MOC call role.

33.12 The claimant agreed she would work with her manager to produce a list of drafting tasks she was comfortable with and those she needed more support, confirming it was a "fair" way to proceed and pointing out "**I've not asked for a single reasonable adjustment, it's not because I feel scared, I know if I wanted to ask him anything I could and I am doing really well** and I don't know if that's why they think plonk meetings on her she'll be able to do this" [the Tribunal's emphasis].

33.13 The claimant confirmed she was not being individually targeted, "this is to do with business needs…As soon as I am fully trained, because these are my gaps, this middle bit, drafting, SIPs, but I can do SIPS now and holding a meeting is my gap. Once I have done that I can do everything."

33.14 An agreement was reached that the claimant and a manager would produce a list of training needs "establish what's needed and get that in place where possible" and if she cannot be trained because the work is not available "those things that can be realistically trained to you by using previous cases or ones that come through, they can get than in place and then they can move on to the meeting aspect." The claimant confirmed this was fair.

34. One working day after the welfare meeting on the 19 July 2019 the claimant made six calls requesting the recording of the meeting stating that she "needs this by close of business today," threatening to raise a formal complaint and "she is going to get onto her solicitor as you are ignoring her." The claimant also emailed at 17.09 raising a formal complaint. The Tribunal notes that the claimant's attitude was completely different to when

she allegedly sent the 13 June 2019 at 18.31 to Claire Goward about workload adjustments which were not chased up or discussed, reinforcing the Tribunal's view that the 13 June 2019 email was not sent, given the claimant's practice of sending assertive and threatening communications when she was not getting her own way.

35. On the 19 July 2019 Tara Philips confirmed to the second and third respondent the discussion and agreement reached. Claire Goward was spoken to about the training. Tara Philips described the claimant's allegations of disability discrimination as follows; "are due to the expenditure of energy that will come with the learning and duty, directly linked to her condition of ME…Victoria is of the opinion there are multiple gaps in the knowledge around the drafting role, which she is unable to identify herself, and until she feels comfortable with her abilities in her main role, she is unwilling to increase her skill set". The advice given was for the claimant and manager to identify and provide the missing training. Tara Philips recorded "I have clearly agreed with Victoria that some of these areas may be on a hoc basis and therefore the business cannot provide her with training if there are no examples to use, to which we have agreed support will be given to her as and when those items come in…"

47 In a draft letter dated 19 July 2019 from Tara Philips the first and second respondent were sent the outcome of the wellbeing meeting and a copy of the transcript. The letter sent to the claimant reflected the discussion and agreement reached as follows: "We have committed to your manager creating a list of duties involved in the drafting role. Your manager will then support you in training in the areas lacking through a mixture of previous cases and ad hoc cases as they come through the workload. **Your manager will support you at any point when you are unsure or feel underconfident on case work in a manner which is suitable to your learning style. The manager will ensure all areas of available immediate training are completed build you a training plan for meetings….Meeting cases are estimated to 1 hour of your working day. You will not be required to complete this task until training is complete**" [the Tribunal's emphasis].

48 It was made clear to the claimant that the MOC call work was temporary and the claimant was not required to do this work until (a) she was trained in areas of drafting she was lacking, and if this could not be possible due to lack of work (b) a training plan for meetings was to be prepared and the claimant complete the training. The claimant was required to "commit to the training plans being developed and communicate with your manager when unconfident or unsure on any internal process." A list of expectations was set out including the training plan being drafted, review of drafting duties to clarify training areas, training to be completed, meeting training to be provided "on the completion of drafting training." Tara Philips added "I would recommend discussing an occupational health review to ascertain any reasonable adjustments which can support you in the work place regarding training and development."

36. On the 19 July 2019 a training grid was agreed between the claimant and Claire Goward, and the Tribunal finds that once the respondents became aware of the claimant's position reasonable adjustments were put in place including the training needs and the claimant not required to carry out any MOC call duties until she had been fully trained. It is undisputed the claimant was not trained and nor did she carry out any MOC call duties at any stage of her employment.

37. The claimant continued to chase for the outcome and sent a number of emails to HR and also emailed Claire Goward on the 19 July 2019 concerning making an appointment

with her GP regarding work related stress referring to her shift starting at 10am and the meeting of creditors role being "pushed onto me."

38. In an email sent to the NHS nurse who had assisted the claimant in 2014 with whom no further contact had been made until the 21 July 2019 email, the claimant wrote "my employment are asking me to take on 2 roles and do not seem to understand the implications of this on my disability…the impact and burn out…" There was no response from the nurse.

39. In an email sent on the 22 July 2019 the claimant requested an occupational health appointment and complained "Why my own employer had been told not to speak to me…I knocked on the office on Friday to ask Pat for a private word…he said he couldn't speak to me…I can only communicate in writing from now on, for health reasons…and for legal reasons. I require everything in writing." The Tribunal finds there was no evidence the second and third respondent had been "told" not to speak to the claimant. The claimant was setting up this litigation and demanded written communications. She had no intention of undergoing any training, whether it be in MOC call work or drafting where the available training was minimal due to the downturn in work. As far as the claimant was concerned by the 22 July 2019 she no longer wanted to work for the respondent and made her feelings well known, she was aware the drafting work was substantially reduced and the business required her to provide cover for the MOC call work, for example, when Kate Cutler was on holiday, which she was not prepared to accept.

40. In an email sent by a disgruntled employee complaining about the claimant's attitude in work to the second and third respondent on the 22 July 2019 reference was made to the claimant's "constant negativity in the office" making staff feel they did not come to work.

<u>Meeting 23 July 2019 Kate Cutler, the claimant and Claire Goward.</u>

41. Kate Cutler informed the claimant that "we do need drafters to learn meetings, which we are obviously going to ask you to do but **given the conditions raised we will give you more support and more time to do that…normally we would expect someone to pick it up in a couple of days but with yourself, we would give you a week's full training and support moving forward"** [the Tribunal's emphasis] to which the claimant responded that she would be seeking further medical advice, had emailed her doctor and specialist nurse and "I have requested occupational health."

42. Kate Cutler proposed "as we don't have enough drafting work to keep everyone busy, **we can replace the drafting training that you are doing at the moment and just take off you complete for a week so you can concentrate on meetings**…**we will support you and we will give you the extra time and replace it with one for another**…essentially your primary role would be drafting and then if for example, Claire was off holiday or we had loads of meetings one day then **drafters would be asked to deal with the overflow rather than it being a dual role with half the time doing drafting**…" [the Tribunal's emphasis].

43. The claimant pointed out **"I have never asked for one reasonable adjustment**" and the reasonable adjustment she was seeking was "**that I'm not over faced**…I need to speak with occupational health, I don't think it is going to be workable…I can't commit to it, no…I want to learn it at some point but just don't know when" [the Tribunal's emphasis].

The grievance

44. Following the meeting the claimant raised a written grievance on the 24 July 2019 indicating "I will be seeking further professional medical advice regard the issues raised. I will be seeking further legal advice also…I will give you an update when I have seen medical professionals." The claimant has made a big issue of the respondent failing to seek occupational health advice to deal with adjustments. The Tribunal accepted on the balance of probabilities that Kate Cutler and Claire Goward were under the impression the claimant was seeking her own medical evidence and that she never got back to them (or the second and third respondent) concerning this. With reference to the second and third respondent they played no part in discussions relating to occupational health and medical evidence, leaving it to managers.

45. Another employee complained about the claimant's behaviour on the 25 July 2019 "she has talked to me like in charge…she is rude regularly and very abrupt…recently I have been left with all the harder more difficult tasks…I have sat with her a couple of times and tried to show her how to do things…if she doesn't want to do something we get the answer I can't do that…."

46. The claimant accepted in oral evidence she had "demanded" the respondents communicate with her in writing when she could communicate orally, admitting that she did not trust the respondents by July 2019. The claimant's allegation that the statements made by employees were fabricated and/or part of a conspiracy aimed at engineering the claimant's dismissal was not supported by the evidence. On the balance of probabilities the Tribunal found the claimant was disruptive at work and rude to colleagues. The claimant did not dispute that the complaints came from employees, one in the drafting team the others administration and sales. The claimant accepted she was "pulling people up and they didn't like it." When asked whether the claimant was saying it was untrue she responded "their opinion" and the office was "toxic."

47. The relationship between the claimant, her work colleagues and managers had broken down by July/August 2019 and the claimant made this very clear to all with the result that employees raised legitimate complaints against her and it was apparent at this early stage that the relationships were beyond repair. The allegations were not concocted by the second and third respondent to achieve a dismissal and the Tribunal found the concerns expressed by the claimant's colleagues were reasonably held to be genuine by the second and third respondent..

48. The claimant was sent a grievance hearing date and a USB stick containing the recordings on the 29 July 2019.

Grievance meeting held with the second respondent and claimant 31 July 2019

49. The grievance meeting was held on the 31 July 2019 and recorded. The following is relevant:

49.1 A number of matters were discussed including the second respondent asking the claimant "when there's not enough drafts…did suggest to you on the meetings side to take absolutely everything away from yourself because obviously we are aware like you said we need reasonable adjustments. It's not the same playing field as these guys… so when she said she would take absolutely everything off you in terms of drafting and everything else so you can concentrate solely on meetings, to

support you, you're no goono be rushed, just learn the training aspects nothing else if gonna be put to the role, erm would that not work?" The claimant responded "no, because I'm just being over faced all the time with changing too many things around. I need stability…I need to be learning one full job at a time."

49.2 A discussion took place concerning the reduction in work "So with the drafts at this moment in time, as you can see, there's not a lot of work there with the drafting" to which the claimant responded "hum hum".

49.3 When it was put to the claimant the drafts were drying up her response was "hum hum". The claimant did not dispute there was not enough drafting to keep three people busy, there was only enough to keep one drafter full time and the idea was for cover to be provided during "holidays."

49.4 The second respondent asked "I understand with the training aspect you don't wanna learn 2 things at once and it becomes confusing but if we're not training on drafting because the drafts aren't there, in the interim how do we fill those voids? That's why I'm asking for your suggestions. The claimant responded "No, no, but you understand why I'm annoyed, it's not to do with the, it's the way it's been dealt with and handled**. I want to learn the meetings but I'm not going to be told without even when I've given a medical reason…I'll learn the meetings but I'm not going to be told…it was literally there's your training for an hour, there you go, mark off, here's 3 meeting off you pop and do it…I was…angry coz I'd already been given cases and told to do one…I need someone to sit down and teach me from the billy basics up, like a 5 year old**…"[the Tribunal's emphasis]. The claimant's response underlines the Tribunal's finding that the claimant was angry because she did not want to work on MOC calls and was not going to be told to change the work she was doing, even when there had been a substantial downturn.

49.5 The second respondent made it clear "anything you do so, trust me, it will be looked into coz…any way we can find to resolve it. To which the claimant responded "I tried to speak to you on Friday and tried to speak to you the other day" there was no reference to the allegations before the Tribunal including the second respondent allegedly putting out his hand in a dismissive manner, which the Tribunal concluded undermined the claimant's evidence that this incident took place. Later on in the transcript the second respondent confirmed the claimant could knock on his door, "Like I say, when you came in the first time I was with [name blanked] and we were going through a serious conversation on another matter at that point so,. An explanation the claimant accepted stating **"it seems like there's loads of misunderstanding**" [the Tribunal's emphasis] in contrast to her case that the second respondent's actions fell within the section 26 EqA definition of harassment. .

49.6 The second respondent made it clear to the claimant that the claimant could be trained up on meetings "drafting training is intense as well…**so rather than give you both and potential burn out…give one at a time**…which would be meetings because the drafts aren't there for the interim as you can see. That's why I was a bit confused with how your full day has been taken up because I know how many drafts are in there, there's not enough for that many people" [the Tribunal's emphasis] to which the claimant agreed. This evidence supports the Tribunal's finding that the second respondent agreed the claimant would concentrate exclusively on MOC call training with no drafting or any other work, for a period of 5-days or longer if needed,

and this was a reasonable adjustment taking into account the claimant could not be trained on drafting work as there was insufficient to train her on at the time.

49.7 The second respondent brought up the administration side of work "you were excelling for 6-months…you went from 22 to 24…it can't stay open forever" to which the claimant responded "exactly" and when asked if there was anything else asked for her salary to be increased to £25,000.00 and a reimbursement.

50 The meeting finished with the second respondent making it clear that "we have to find a resolution that works, like we say catering to your needs, coz the last thig we want is that burning out process to begin…" No pressure was put on the claimant, and the Tribunal found far from behaving rudely and dismissively towards her, the second respondent was kind an carefully listened to what she had to say before suggesting possible resolutions that took into account her medical condition. The second respondent was under the impression that the claimant was getting her own medical advice, and it appears when she was asked "you want to get medical advice first, so what would you like to do about that," the claimant's response was "we can do training."

Grievance outcome 1 August 2029

51 The second respondent confirmed the grievance outcome in an email sent on the 1 August 2019. In short, the claimant was not expected to start working until she had been trained, initially for a 5-day period and "commits for further training for any areas that is unavailable in archiving or current workloads." Reference was made to "drafts beginning to slow down, so this training is unable to be completed prior to the meetings training. It is therefore necessary for meetings training to take place in order to fill gaps within the workload in the interim." The grievance outcome letter confirmed the indications given to the claimant earlier that there was not enough work coming in on drafting including examples to train the claimant in. The evidence before the Tribunal was the respondent was unable to fully train the claimant on the drafting before commencing training on meetings and it was not a reasonable adjustment to wait until the drafting work possibly increased in the future and completing the training on drafting (which on the claimant's account could take years) before moving on to training the claimant to deal with MOC calls.

52 The claimant did not appeal the grievance outcome and nor did she dispute what had bene discussed.

53 Kate Cutler was on holiday in August 2019 which delayed the training on MOC calls. The claimant continued in her reduced drafting role looking for a new job and making it clear to other employees that she was doing so, expressing negativity and criticisms about their work and the business. The claimant had been instructed by Kate Cutler to deal with any issues with the work by putting it right herself and not re-referring it to other employees, for example, administration. The claimant ignored the instructions and it became apparent she was causing problems with colleagues who did not want to be working with her due to the confrontational and rude way she behaved, and so the Tribunal found. In short, the Tribunal accepted Claire Goward's credible evidence that the claimant was vocal, spoke to her manager in a "rude tone", very negative, had numerous conversations with colleagues expressing her negative feelings and "storming" out of the office if she did not like the answer. The Tribunal took the view that the employment relationship had irretrievable broken down.

Job advert

54 The claimant had indicated to the second respondent that she was applying for new employment during this period, which she did. The claimant made an application through a recruitment company for the position of debt manager and IVA advisor with the first respondent. There was a dispute in the evidence as to whether the first respondent had instructed the recruitment agency to advertise the vacancy as submitted by the claimant. The second respondent indicated that there was no vacancy, the recruitment agency had no instructions to recruit on behalf of the first respondent and it was a speculative advertisement put out by the recruitment company. Apart from the claimant's communications with the recruitment agency there is no evidence the first respondent intended to recruited a debt manager/IVA advisor either before or after the claimant was dismissed, and on the balance of probabilities the Tribunal preferred the evidence of the second respondent that there was no vacancy and insufficient work to fill any vacancy. It is undisputed the first respondent was struggling financially, did not have enough work "right across the board and was on the verge of insolvency. Further, the claimant applied for the role in early August following the grievance outcome when the second respondent was making reasonable adjustments in the knowledge that the claimant was seeking new employment but without any termination date being given by her. The claimant was then disciplined and dismissed after the advert had already gone out and the claimant applied which suggests the first respondent was not replacing the claimant unless there was a Machiavellian attempt by the second and third respondent to engineer a conspiracy of complaints against the claimant with a view to dismissing her, which the Tribunal did not find was the case.

55 During this period the claimant complained about Kate Cutler stating she was unhappy, no longer wished to continue being a drafter and as there were no other roles available would be looking for new employment. On the 16 August 2019 the claimant spoke with the third respondent wanting to be moved back to her administration role, which was not possible as there was no vacancy and not enough work. The note taken by the third respondent records the following "Because she said she now does not want to be here an look for a new job, I stated that if that is the case and you are resigning we will honour a week's gardening leave pay. This way she can actively find employment and something she will enjoy. She refused this." In short, the claimant had decided to seek new employment, which she did, and continue preparing her case for litigation with no intention of undergoing training.

56 The claimant complained about being unhappy and was looking for new employment. The third respondent was aware some of the complaints from other employees and he confirmed that if the claimant was resigning the first respondent will pay her one week's gardening leave in order that she could actively find new employment, which the claimant refused.

The first respondent's financial difficulties and changing the monthly payment date

57 In order to manage the financial position all employees including the claimant, were informed that was to be changed from the last working day of each month to 5th of each month.

58 In an email sent on the 22 August 2019 the claimant requested one weeks garden leave on the basis that she was too ill to work instead of reduced sick pay. The claimant had not resigned and on this basis garden leave was refused, having requested in an email a salary raise to £25,000.

59 On the 21 August 2023 a number of employees complained about the claimant's behaviour. A disciplinary invite letter was drafted by HR and sent to the second respondent who forwarded it the claimant. The invite referred to "your alleged conduct in relation to your performance and non-completion of calls with clients." The employees who had made oral complaints about the claimant put it in writing. Complaints ranged from colleagues been obstructed by the claimant, "she isn't willing to help in any way…I have witnessed her belittling my colleagues and making them feel awkward…constantly putting the company down…speaks about how she is actively looking for another job and hates it here…she is making people feel uneasy with the negativity and more importantly is affecting people's bonuses." Another colleagues complained "I find her rude to others around her often and abrupt…her moaning and negativity drags others down…she keeps throwing more complex cases to me rather than learn them…cherry pick cases which leave us with the difficult work…she ranted…her tone and attitude…shocking…people are very uneasy because of her mood swings and tone of speaking with people…" Another employee complained about the claimant "always moaning" "coming over…criticising others about their work…can you look into this for me..."

60 In oral evidence on cross-examination the claimant described herself as "assertive." The claimant confirmed that the relationship had broken down between the claimant and managers, "it was not a nice place to be" and her "relationship with staff was problematic," her "workload was massive," she wanted to leave work; "I wanted out." She remained in her drafting role, unhappy, not wanting to work with Kate Cutler and causing a disruption with colleagues because of this, and so the Tribunal found.

Disciplinary hearing 23 August 2019

61 The disciplinary hearing was recorded and the Tribunal had before it a lengthy transcript which it considered in detail. The second respondent conducted the disciplinary hearing into "grievances made in writing by your colleagues regarding your refusal to complete work that had been asked of you and also your attitude towards colleagues." The hearing started at 9.57 and ended at 11,29, and it clear from the transcript that the second respondent was taking the allegations seriously and listening carefully to what claimant had to say.

62 The lengthy transcript included a reference to employees being unhappy about about "how you spoke her" a reference to the claimant's treatment of Kate Cutler, to which the claimant responded "yeah" not denying that there had been a "scenario." The claimant's reaction to the complaints was "totally exaggerated, that's fine that's an opinion…it is opinions. You know how I speak I'm loudly and very assertive" commenting about the second respondent "people say you're rude and abrupt but you're not, you're very assertive and it's opinion…" When asked by the second respondent "where you speak about cases and she says you speak to her abruptly in a rude and patronising way, and very loud on the floor and in front of people" the claimant responded "no they don't like being pulled up on stuff that they aren't doing" repeating that the second respondent was also rude and abrupt. The claimant was taken through the allegations individually with the second respondent pointing out the consistency in the complaints about the claimant's behaviour and the claimant's response was "maybe I should start raising grievances against everybody…they're saying I've got moods swings and stuff and I've already said I'm unhappy…I don't think I'm aggressive I think I'm assertive."

63 The second respondent put to the claimant "the majority of the opinions at the moment seem to suggest you're rude, abrupt, aggressive, and humiliating people on the floor, that's the consensus from here" to which the claimant responded "that doesn't make it true though does it, its an opinion…I'll keep saying it and I know its bothering you but it is an opinion…I'm assertive and I say things I don't sugar coat things…" The claimant admitted that she had been told not to send cases back but to deal with them and admitted she had sent them back, maintaining the second respondent was "trying to back me in a corner." It is apparent from reading the transcript that the claimant was aggressive in her responses and yet at no stage did she maintain the complaints about her were fabricated with a view to getting her out of the business. The second respondent insisted on an adjournment stating "sometime you know Victoria even when I'm speaking about something you're coming across as aggressive now" to which the claimant responded "yeah" before she alleged that the third respondent had changed his attitude towards her "since the day you found out I was ill, since the day I waked out of office and you shooed me away." It is notable that the claimant did not mention the allegation that the second respondent had held up his hand and treated her in a rude and dismissive fashion. The Tribunal concluded had the second respondent done so the claimant, as was her practice, would have mentioned it and she did not because the incident did not take place.

64 The second respondent asked the claimant "do you think there's a clear correlation between you being unhappy and not wanting to be here and the reactions" to which she responded that there was. The second respondent towards the end of the meeting after the second adjournment stated "there's been a wave recently and I think it's in correlation with you not wanting to be here…when there's a wave of negativities like there is then there's several people suggesting an obstruction of work, I do think it best…if we part waves…with the amount of negativity that is across the board…I think its best…I wish the resolution could be different…that's gonna impact the revenue of the business…I know people are saying aggressive." The claimant responded "I don't think I'm aggressive, if they saw me aggressive, they'd know aggressive."

65 The claimant was dismissed with payment of one week's notice. The Tribunal did not accept that there was an orchestrated campaign to "force" the claimant "out of the company." The Tribunal accepted the evidence of the second respondent that the complaints were from different employees concerning different incidents and different departments, as conceded by the claimant at the time, who was aware which departments they had emanated from. The allegations against by the claimant were so serious that no reasonable employer could ignore them; the claimant was causing disruption with individuals, including managers by her attitude. The first respondent had a duty of care towards all staff, and taking into account the second respondent's explanation, the Tribunal found there was no causal link between the second respondent's decision making process, the claimant's health and her request for reasonable adjustments; he was exclusively concerned with the deteriorating relationships between the claimant and those she worked with that were having a detrimental effect on the business against a backdrop of the first respondent being in financial difficulties.

66 The decision to dismiss was confirmed in a letter dated 27 August 2019 which largely reflected what was said during the disciplinary hearing.

67 The effective date of termination was 23 August 2019.

RESERVED

The Facebook entries and credibility issues

68 The Tribunal was referred to two Facebook entries, the first sent on the day of the second respondent's wedding "happy Let's live a Life Day" and the second on an unknown date. With reference to the first Facebook entry the claimant's evidence was that it related to a friend and not the second respondent. Mr Kenward submitted it went to credibility as it was aimed at the second respondent. The Tribunal was unable to make any findings one way or another.

69 Soon after the claimant received the disciplinary outcome she wrote a Facebook entry in Latin responding to the outcome letter. Turning to the undated 2nd Facebook entry the Tribunal is satisfied that this was aimed at the respondents and does give rise of credibility issues given the inference that the claimant was a legal expert in discrimination having attended "Staffordshire Law School [middle finger emoji] and hashtag LLB hons in law". It became apparent on cross-examination the claimant did not have a law degree.

Appeal

70 The claimant appealed the dismissal on the 10 September 2019 referring to the first respondent's application to strike off the company on Companies House. The written appeal ran to 11-pages referring to her "**excellent memory and recall**," [the Tribunal's emphasis]. With reference to the 6 grievance complaints the claimant stated "I am direct I am assertive if they thought I was rude that it their opinion…I believe the claims have been exaggerated…two faced people were putting grievances behind my back" There is no reference to the allegations being concocted. The claimant referred to asking for a transfer to the administration role and being told there was no position in the administration team.

Appeal hearing

71 There was no appeal hearing. The third respondent had informed the claimant that he intended to process her appeal based on the information she had provided. On the 9 October 2019 the third respondent sent the claimant the appeal outcome in a detailed 6-page letter which referred to "your appeal was initially delayed as we waited your confirmation of your agreement for your letter being a written submission." The claimant's grounds of appeal were dealt with individually and rejected.

Law

Disability discrimination arising from disability

18 Section 15(1) of the EqA provides-

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B less favourably 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.

19 Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

1.1 In order for the claimant to succeed in her claims under s.15, the following must be made out: there must be unfavourable treatment;

1.2 there must be something that arises in consequence of claimant's disability;

1.3 the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

1.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

20 Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in the well-known case of Pnaiser v NHS England and anor [2016] IRLR, EAT:

20.1 "A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

20.2 The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. The Tribunal examined closely the conscious and unconscious thought process of the second and third respondent and their witnesses who gave evidence before it, concluding the explanations they gave were untainted by disability discrimination.

20.3 Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

20.4 The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's

disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. The test is particularly relevant to Ms Nicholson who failed to establish any causal link.

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

21 Whether or not treatment is "unfavourable" is largely question of fact but this does not depend just on the disabled person's view that he should have been treated better - Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65. There must be a measurement against "an objective sense of that which is adverse as compared to that which is beneficial" - T-System Ltd v Lewis UKEAT/0042/15 *(22 May 2015, unreported).*

22 In Sheikholeslami v University of Edinburgh [2018] IRLR 1090, the EAT held that the approach to this issue requires :An investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment, then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.

23 The actual disability does not need to be the cause of the unfavourable treatment under s.15 but it needs to be "a significant influence" or "an effective cause of the unfavourable treatment" - Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT. It will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact – Pnaiser cited above.

Objective justification

24 With regard to the objective justification test, when assessing proportionality, the Tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer: Hensman v Ministry of Defence UKEAT/0067/14/DM. The test is an objective one according to which the ET must make its own assessment – Grosset v City of York Council [2018] EWCA Civ. 1105.

25 When carrying out the balancing exercise and considering proportionality the question is whether the conduct can be shown to be an appropriate and reasonably necessary means

of achieving the legitimate aim, and it will be relevant for the ET to consider whether or not any lesser measure might have served that aim - Birtenshaw v Oldfield [2019] IRLR 946 EAT. The ET should give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim.

Disability discrimination – failure to make reasonable adjustments

26 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first 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. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA.

27 The EHRC's Employment Code states that the term PCP 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision' -para 4.5. The protective nature of the legislation meant that when identifying the PCP, a Tribunal should adopt a liberal rather than an overly technical or narrow in order to identify what it is about the employer's operation that causes disadvantage to the disabled employee.

28 In the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

The PCP

29 A substantial disadvantage is one which is more than minor or trivial – s.212(1) EqA 2010. The ET must be satisfied that the PCP has placed the disabled person not simply at some disadvantage viewed generally, but at a disadvantage which is substantial - Royal Bank of Scotland v Ashton [2011] ICR 632.

Reasonableness of adjustments

30 The statutory duty is for R to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of "reasonableness" imports an objective standard - Smith v Churchills Stairlifts plc [2005] EWCA 1220.

Harassment

31 The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. Where there is disagreement between the parties, it is important that an Employment Tribunal makes clear findings as to what conduct actually took place. Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if: A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and 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 — S.26(1)(b).

32 S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

33 Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended - Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is submitted that a claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention.

Related to a protected characteristic

34 This is a very broad test, but some guidance about how the ET should approach the issue was provided in UNITE the Union v Nailard [2018] EWCA Civ. 1203. The ET should make findings as to the mental processes of the alleged harassers.

Burden of proof

35 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

36 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which

inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Conclusion – applying the law to the facts

Burden of Proof

37 The claimant has not proved, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent subjected her to disability discrimination and the burden has not shifted. If the Tribunal is wrong on its application of the burden of proof, and the burden shifted to the respondent to prove on the balance of probabilities that the claimant's disability was no part of the reason: Igen cited above, it would have gone on to find the explanation given on behalf of the respondent untainted by disability discrimination including the decision to dismiss.

Law and conclusion: Disability status

38 S.6(1) of the Equality Act 2010 ("EqA") provides that a person, 'P', has a 'disability' if he or she 'has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

39 Schedule 1 of the EqA 2010 sets out factors to be considered in determining whether a person has a disability. S.6(5) of the EqA 2010 provides for the issuing of guidance about matters to be taken into account in deciding any question for the purposes of determining who has a disability. When considering whether a person is disabled for the purposes of the EqA regard should be had to Schedule 1 ('Disability: supplementary provisions'), the Equality Act (Disability) Regulations 2010, and the 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' under 6(5) of the Equality Act 2010.

40 The relevant time to consider whether a person was disabled is the date of the alleged discrimination; see the well-known case of McDougall v Richmond Adult Community College [2008] IRLR 227, [2008] ICR 431.

41 For any claim to succeed, the burden is on the claimant to show, on the balance of probabilities, something an 'impairment' whether it is a mental or physical condition. In the case of Millar v ICR [2005] SLT 1074, [2006] IRLR 112, the Court of Session held that a physical impairment can be established without establishing causation and, in particular, without being shown to have its origins in any particular illness. The focus **should be on what the claimant cannot do**, and this test is particularly relevant the claimant's case as she failed to discharge the burden of showing a substantial adverse effect on day-to-day activities.

42 In Goodwin v Patent Office [1999] ICR 302, EAT, the EAT referenced four component parts to the definition of a disability and judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows: 'What the Act is concerned with is an impairment on the person's ability to carry out activities. **The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired.** Thus, for example, a person may be able to cook, but only with the greatest difficulty. **In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to**

do (or not do) the acts. **Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves**. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected [the Tribunal's emphasis].' The Tribunal had this in mind when considering the claimant's position that after 2014 she had managed to put in place the advice given by a specialist ME nurse with the effect that there appeared to be no adverse effect on day-to-day activities.

43 Morison J (President), provided some guidance on the proper approach for the Tribunal to adopt when applying the provisions of the Disability Discrimination Act 1995. Morison J warned of the risk of "disaggregating" the 4 questions –i.e. whilst they can be addressed separately, **it is important not to forget the purpose of the legislation, and to look at the overall picture** [the Tribunal's emphasis]. The four questions were to be answered by the Tribunal in order. This four-stage approach was approved more recently by the Court of Appeal in **Sullivan v Bury Street Capital Limited** [2021] EWCA Civ 1694, where Singh LJ listed the questions as:

43.1 Was there an impairment? (the 'impairment condition')
43.2 What were its adverse effects [on normal day-to-day activities]? (the 'adverse effect condition');
43.3 Were they more than minor or trivial? (the 'substantial condition');
43.4 Was there a real possibility that they would continue for more than 12 months? (the 'long-term condition').

44 Singh LJ emphasised that these are questions for the Tribunal; although it may be assisted by medical evidence, it is not bound by any opinion expressed. This is also relevant to the claimant's case, given there was a scarcity of medical evidence.

45 Appendix 1 to the EHRC Employment Code states account should be taken not only of evidence that a person is performing a particular activity less well but also of **evidence that 'a person avoids doing things which, for example, cause pain, fatigue** or substantial social embarrassment; **or because of a loss of energy and motivation**' (the Tribunal's emphasis)— para 9. In the claimant's case, given her less than credible evidence on other matters, the Tribunal concluded that the claimant wanted to avoid carrying out MOC calls because she was angry at management's approach and had no intention of taking part in any training despite the work she was carrying out in drafting being substantially reduced and not because of a loss of energy/burn out.

46 Appendix 1 to the EHRC Employment Code states that 'normal day-to-day activities' are activities that are carried out by most men or women on a fairly regular and frequent basis, and gives examples such as walking, driving, typing and forming social relationships. The Code adds: 'The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work.' The

Guidance gives examples including shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities**. Normal day-to-day activities can also include general work-related activities** and study and education-related activities, **such as interacting with colleagues, following instructions, using a computer**, driving, carrying out interviews, **preparing written documents**, and keeping to a timetable or a shift pattern - para D3 (the Tribunal's emphasis). The Tribunal concentrated on what the claimant Ms Nicholson could not do, concluding there was no substantial adverse effect on any day to day activity during the relevant period, and the problems she had interacting with her colleagues which ultimately led to her dismissal were not related to her medical condition.

More than minor or trivial (substantial)

47 The focus must be on the extent to which the impairment adversely affects the claimant's ability to carry out normal day-to-day activities. Substantial is defined in S.212(2) EqA as meaning 'more than minor or trivial'. In determining whether an adverse effect is substantial, the tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability she would have if not impaired and in the claimant's case the Tribunal found on the evidence before it that there was no difference.

48 The test is whether an adverse effect is 'substantial' in the light of the statutory definition: the Guidance and Code are supplementary to this. In terms of establishing whether the effect of an impairment is substantial, the Guidance, paragraphs B2-B17 sets out several factors to be taken into consideration. The Secretary of State's Guidance sets out a number of factors to consider including: the time taken by the person to carry out an activity [paragraph B2]; the way a person carries out an activity [B3]; the cumulative effects of an impairment [B4]; the cumulative effects of a number of impairments [B5/6]; the effect of behaviour [B7]; the effect of environment [B11] and the effect of treatment [B12].

49 Appendix 1 to the EHRC Employment Code states: 'The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people' — para 8. This should not be interpreted as meaning that in order to assess whether a particular effect is substantial, a comparison should be made with people of 'normal' ability — which would be very difficult to ascertain.

50 In the well-known case of Paterson V. Commissioner of Police of The Metropolis [2007] ICR 1522, EAT A dyslexic police officer wanted adjustments to be made under the DDA in respect of his application for promotion. In comparison with 'the ordinary average norm of the population as a whole', the tribunal considered that the dyslexia had no more than a minor or trivial impact on his day-to-day activities. Allowing P's appeal, the EAT (the President of the EAT, Mr Justice Elias, presiding) emphasised that, in assessing an impairment's effect on a claimant's ability to carry out normal day-to-day activities, a tribunal should not compare what the claimant can do with what the average person can do. **Rather, the correct comparison is between what the claimant can do and what he or she could do without the impairment.** Referring to what is now para B1 of the Guidance, Elias P observed that in order to be substantial '**the effect must fall outwith the normal range of effects that one might expect from a cross section of the population'**, but '**when assessing the effect, the comparison is not with the population at large… what is required is to compare the difference between the way in which the individual in fact**

carries out the activity in question and how he would carry it out if not impaired' [the Tribunal's emphasis].

51 Section D of the Guidance provides an indication of the parameters as to what may constitute a normal day to day activity and the Appendix provides two illustrative lists of factors which it might be reasonable and unreasonable to regard as having a substantial adverse effect on a person's ability to carry out day to day activities. "Normal day-to-day activities" is not intended to include activities that are normal only for a particular person or small group of people, nor does it include work of a particular form. Equally it does not include normal activities that the person in question is not actually required to perform in their day-to-day life - Vance v Royal Mail Group plc EATS 0003/06). The Guidance which suggests a number of factors are to be considered (see paras B1– B17). These include the time taken by the person to carry out an activity (para B2) and the way in which he or she carries it out (para B3). A comparison is to be made with the time or manner that might be expected if the person did not have the impairment.

The effect of treatment (measures).

52 Paragraph 5(1) of Schedule 1 to the EqA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, *likely* means 'could well happen' — the well-known case of Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL In assessing whether there is a substantial adverse effect on the person's ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored.

53 The guidance provides that this provision includes treatments such as counselling, the need to follow a particular diet and therapies in addition to drug treatments. This provision applies even if the treatment results in the effects being completely under control or not at all apparent. There are situations where medical treatment may create a permanent improvement or "cure". Where treatment is continuing it may be having the effect of "masking" or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if the evidence establishes that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment [B13].

54 The claimant's case is that she has modified her behaviour by changing her lifestyle following CBT in 2013 and 6 sessions with the specialist nurse in 2014 and engaging in overwork that burns her out will re-trigger the CFS/ME because it is a "hidden" recurring condition. In order to establish that taking on the training and occasional duties of MOC calls exacerbates the adverse effect of the impairment, evidence is required that objectively supports the claimant's impairment does affect her ability to carry out those activities. The claimant has not provide this evidence. There can be situations where the coping strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities' — para B7 of the Guidance. The Guidance gives the example of a person who needs to avoid certain substances because of allergies who may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment

ceases to have a substantial adverse effect. In the claimant's case based on the evidence before it the Tribunal concluded on the balance of probabilities that the strategies put in place by the claimant in 2013 and 2014 which continued to the relevant period appeared to have altered the effect of ME/CFS to the extent that by 2019 it no longer had a substantial effect on day-to-day activities and the claimant did meet the definition of disability.

55 The claimant referred the Tribunal to two documents, the first dated 29 October 2021 provided by the NHS setting out symptoms of ME/CFS, the treatments "that may help you manage the condition" including CBT, energy management and medicine. There is a reference to there being "currently no cure" however, "some people with ME/CFS will improve over time." The second document is from a charity which provides a number of guides including "The basic guide to pacing." It confirmed that "some people with mild or moderate ME are able to work part time or even full time as they move into recovery." Under the heading Equality Act 2010 there is a reference to "ME is a long-term fluctuating condition **which in most cases** has a substantial and long-term adverse effect on the ability of an employee to carry out normal day-to-day activities" [the Tribunal's emphasis.] It appears from the advice there are instances when an employee with ME may not experience a substantial and long-term effect and it does not automatically follow that someone with ME are deemed disabled by the very fact that they have been diagnosed in the past with ME. The issue for the Tribunal in relation to Ms Nicholson is the credibility of her overall evidence which impacted on her statement that she was "ill all of the time" when she clearly was not according to the factual matrix.

56 The Tribunal was unable to satisfy itself that the claimant's medical condition fell under section 6 of the EqA without more evidence, including expert medical evidence other than the claimant's GP who deals with the position in 2013 and 2014, which is not in dispute. It is notable the GP symptoms described symptoms and that they can vary during the day but are managed stating that the condition "can substantially impact her ability to perform tasks and made worse by excessive work/exercise … and would be classed as a disability". The problem before the Tribunal was that neither the GP not the claimant refer to any normal day-to-day activities that have been substantially effected. It is not sufficient for the claimant to rely on the position in 2013 without dealing with what was taking place in 2019 when the evidence before the Tribunal was that the claimant was not excessively working or exercising.

57 The fact that "most people with CFS/ME are likely to fall under the remit" of the statutory legislation suggests that there are some people who do not, and the Tribunal on the balance of probabilities concluded without further evidence the claimant was one of the exceptions taking into account the fact that she was an unreliable witness who exaggerated.

<u>Conclusion on disability status</u>

58 In conclusion, dealing with the agreed issues, with reference to the question did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about (January to August 2019), the Tribunal found on the balance of probabilities the following:

59 The claimant had a physical condition of Chronic Fatigue Syndrome and ME.

60 With reference to the issue did it have a substantial adverse effect on her ability to carry out day-to-day activities, the claimant has not produced any satisfactory evidence that the CFS/ME diagnosed in 2013 and treated by 2014 with no further reference in any of the GP records or medical reports to 2019, had a substantial effect on day-to-day activities and the claimant has not discharged the burden of proving she was disabled.

61 With reference to the issue, if not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment, the Tribunal found she had CBT in 2013 and 6-sessions with a specialist NHS nurse in 2014 and after this date she claimant changed her lifestyle in accordance with the advice and there was nothing she could not do as a normal day-to-activity. Despite being given two opportunities to prepare an impact statement and on being asked question on cross-examination by Mr Kenward and by Tribunal when dealing with disability status, the claimant was unable to give coherent evidence as to day-to-day activities affected by her CFS/ME; the reason being there were none. The position reflected the fact the claimant worked full time for a number of years with no issues, and as recorded by the claimant in numerous documents referred to above, did not need any reasonable adjustments. The claimant was found to have given less than credibility evidence regarding the 13 June 2019 email. The claimant's contemporaneous evidence at the time was that she had never asked for a reasonable adjustment, and the Tribunal is concerned with the contradictions in the claimant's own evidence and its effect on her credibility. The Tribunal are not medical .experts, and without further medical evidence it is not in a position to make findings as to the deduced effect.

62 The GP's evidence letter dated 17 December 2019 was that the claimant "has suffered from many symptoms of CFS/ME such as feeling extremely fatigued, pain, migraine, headaches, sleep disturbance and feeling dizzy." The reference is the claimant's health in 2013 following a long period of ill-health and not the relevant period for this litigation when the claimant, contrary to her GP, confirmed she was not taking medication and migraine was not part her CFS/ME. The claimant had suffered from migraines since childhood and she confirmed that migraines were not being relied upon in her claim. The Tribunal was not in a position to determine without further medical evidence whether the migraines suffered by the claimant since childhood were part of the CFS/ME, and even if this as the case, there was no satisfactory evidence migraines adversely affected normal day-to-day. It is notable the GP stated "most people do not make a full recovery" which suggests some people do and it is not clear whether the claimant fell into that category during the relevant period. The claimant referred to feelings of stress when she affected by the respondent's alleged refusal to make reasonable adjustments and the conversations that took place, but there was no suggestion she was complaining of CFS/ME. The claimant frequently referred to conserving her energy expenditure as at means of controlling her medical condition, and describing herself as being in danger of "burn out" with a "massive workload" when the reality was the claimant's workload and that of other people had substantially reduced due to the financial position.

63 With reference to the issue, namely, if so. would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures, and were the effects of the impairment long-term, for the reasons already stated the Tribunal found the claimant had failed to discharge the statutory burden. In oral submissions the claimant conformed that she did not see the GP "unless get worsening symptoms and medication for pain" describing her condition as a "chronic fluctuating condition" contradicting oral evidence that she was ill every day.

64 If the Tribunal is incorrect in its analysis of the claimant's disability and it was sufficient for her to have been diagnosed with CFS/ME in 2013 for which she undertook CBT and six sessions with a specialist nurse to discharge the statutory burden, the Tribunal has dealt with the substantive claims as set out below on the basis of a theoretical disability of CFS/ME and the claimant's submission that it was a "hidden disability.".

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

Knowledge

65 The claimant's case was that the second and third respondent had knowledge of her disability from the outset of employment. However, in oral submissions the claimant agreed the second and third respondent did not see her starter form. The Tribunal found the second and third respondent did not have actual or constructive knowledge until the 15/17 July 2019 at the earliest. As indicated in the factual matrix, the claimant raised no issue and did not mention her medical condition until the was asked to carry out the MOC calls on the 15 July 2019. In addition to having knowledge of the disability the first and second respondent had knowledge of the reasonable adjustments the claimant believed were necessary.

66 With reference to the first issue, namely, did the second and third respondents know or could reasonably have been expected to know that the claimant had the disability, the Tribunal found the second and third respondent had knowledge of the claimant's medical condition on 15 or 17 July 2019 at the earliest, and the reasonable adjustment she was seeking. The second and third respondent did not have knowledge and could not reasonable have been expected to know the claimant was disabled when the decision was made for drafters, including the claimant, to be trained in and provide cover for the role of MOC calls.

67 With reference to the PCP, namely, did the respondent have the PCP of requiring employees to undertake the volume of work assigned to them, the Tribunal found it did not. There had been a decrease in drafting work, the phone logs relied upon by the claimant did not show an excessive workload, and the claimant was not making calls back to back. The claimant was originally to have undertaken training on the MOC calls. The claimant's evidence was that she was trained for 1-hour and given files. The claimant never carried out MOC calls, she did not work on the files and this undermines the PCP she is relying on. The volume of work assigned to the claimant was not an issue to her at time, despite the claimant's reliance on 13 June 2013 email which the Tribunal found was never sent for the reasons recorded above. Mr Kenward submitted the claimant had no time off work as a result of her medical condition, the two days she had absent related to flu, was doing well in her job and never referenced any training needs until she was asked to carry out training for MOC calls, which correctly reflects the evidence before the Tribunal.

68 With reference to the issue, namely, did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that because she was required to manage her energy, she was unable to undertake the volume of work assigned to her and/or without causing her health and condition to deteriorate. The Tribunal found had there been a PCP as described the claimant, she was not substantially disadvantaged because of the approximately 50 percent reduction in her workload. It is notable that the contemporaneous grievances brought against the claimant by colleagues referred to her handing the difficult work across to them to carry out.

69 With reference to the issue, namely, did the respondents know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage,

the Tribunal found that they did not, taking into account the factual matrix including the decrease in work.

70 With reference to the issue, namely, did the second and third respondent fail in their duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage, the Tribunal found that they did not. The claimant says that the following adjustments to the PCP would have been reasonable and the Tribunal found as follows on the balance of probabilities:

70.1 Returning to her drafting role: the Tribunal found the claimant had never left her drafting role. The workload had decreased substantially and there was not enough to keep the claimant in full-time employment or train her in some areas of drafting due to non-availability of cases. The claimant never carried out any training for MOC call work and nor did she carry out any of the work, the claimant's evidence on this issue was found not to be credible and contradicted by the claimant that it would take her 5-days and possibly another 5-days to be trained and yet she was trained in 1-hour before handed across files to work on.

70.2 Moving her to another available and suitable role: there none and it was not a reasonable adjustment for the claimant to return to her old job in administration exchanging her role with that of her male colleague who had recently moved into admin. The evidence before the Tribunal was that a "switch" would result in upheaval for the claimant's male colleague. The claimant was in receipt of a substantially increased salary compared to her original role, she had indicated in the welfare meeting that she did not want to go back into that role and was pressing the second respondent for an increase of £25,000 in pay. Moving the claimant to a lesser role on reduced salary was not a realistic option, and by the time the claimant informed the respondent that she wanted to be transferred back into administration the employment relationship had deteriorated beyond recovery as had the claimant's relationship with her colleagues, and the proposal became a pawn in the litigation threatened by the claimant as early as the welfare meeting. The Tribunal accepted the second respondent's explanation that it was not reasonable to force the claimant's male colleague to switch when the claimant was objecting to continuing in her role as drafter on the basis that she had difficulties in her relationship with managers and colleagues totally unconnected to the alleged disability.

70.3 In oral evidence the claimant referred to the sales job she applied for through the recruitment agency as recorded by the Tribunal above. The Tribunal had difficulty understanding why a telephone based target driven sales role was more suitable for the claimant as a reasonable adjustment in comparison to the MOC call work which the claimant had gathered knowledge about over the 7-years she had worked in a different company prior to joining the respondent. The Tribunal preferred the evidence of the third respondent that the claimant, who had no experience of sales, would not have been suitable even had the vacancy existed, which it had not due to the financial position of the first respondent who had changed the date for paying staff when the recruitment agency had advertised the role.

70.4 With reference to reducing her workload, the Tribunal found that the claimant's workload was substantially reduced and the respondent took her request for adjustments seriously with the result that it agreed she was not to carry out training for drafting and meeting of creditors role at the same time. It was proposed that as the drafting role had decreased the claimant should be trained over a period of 5-days if not longer, on the meeting of creditors role or in the alternative if work was available trained on some drafting processes. The claimant knew the respondent would prepare an agreed training schedule with her and Claire Goward followed this up with her, following which she would concentrate on either the drafting or meeting of creditors training (which ever work was available) and only when she was trained on meeting of creditors would the claimant be expected to provide cover. The claimant was not being asked to increase her workload in any way.

70.5 With reference to providing training and support, an agreement was reached that the claimant and her manager, Claire Goward, would meet and prepare a training schedule before the claimant carried out any work on meeting of creditors. A training schedule was drawn up and agreed, although a copy was not in the bundle. The claimant did not receive the training and she never took part in any meeting of creditors duties because the events were superseded by the respondent attempting to deal with the reasonable adjustments requested by the claimant, the deterioration in the working relationship with the claimant, who no longer wanted to work with the respondent's managers and colleagues with the result that she behaved inappropriately in the workplace with no good reason. It is notable that the claimant went against reasonable managerial instructions by returning work to colleagues and criticising them with the consequence that she was instrumental in a serious deteriorating relationship between herself and others and an irrecoverable breakdown in trust.

70.6 With reference to referring the claimant to occupational health and implementing recommendations for adjustments, this is not an adjustment. All occupational health can do is suggest adjustments. The claimant was seeking her own medical advice, and there was confusion concerning whether occupational health needed to get involved on the first respondent's part. Mr Kenward is correct in his submission that an occupational health referral is not an adjustment in itself, but a possible route to identifying adjustments. Making an occupational health referral does not appear in the list of examples of adjustments in the EHRC Code of Practice on Employment. Finally, neither the second nor third respondent were responsible for arranging occupational health and took guidance from managers and HR professionals.

70.7 The claimant made the adjustment she was seeking very clear, and confirmed at the end that medical evidence was not necessary.

71 With reference to the issue, namely, by what date should the respondent reasonably have taken those steps, the Tribunal agreed with Mr Kenward that no legal duty had arisen to make the adjustments relied on by the claimant. Adjustments had been offered to the claimant that were reasonable in all of the circumstances as recorded in the findings of facts, an ultimately the claimant never undertook any training or carried out MOC calls, her objective from the 15 July 2019.

Harassment related to disability (Equality Act 2010 section 26)

72 With reference to the issue, namely, did the respondents do the following alleged things:

72.1 With reference to the issue, namely, placing her under pressure to continue with the roles allocated following her refusal to do so on 16th July 2019, the claimant was not out under any pressure as alleged.

72.2 Mr McFadden and Mr Trotman embarking on a campaign to force her out of the company by, the Tribunal found this did not happen for the reasons already stated.

72.3 With reference to the second and third respondent orchestrating complaints about her conduct and behaviour from colleagues; the Tribunal found this did not happen for the reasons already stated.

72.4 With reference to calling her to many meetings and pressurising her; the claimant was invited to meetings in an attempt to resolve with her the adjustments she was seeking and reach an agreement to avoid "any burn out." When the claimant met with the second respondent it is notable that the transcript reflects he showed care and kindness intent on resolving the claimant's issues in a professional manner, having taken HR advice. Mr Kenward submitted that the claimant's complaint was inconsistent with her allegation that she wanted to meet with the first and second respondent on 19 and 20 July 2019 described by the claimant in the grievance meeting held on the 31 July 2019 as "loads of misunderstanding." The Tribunal took the view that the claimant's position was also inconsistent with what she was telling people at the meetings, for example, at the welfare meeting she referred to the second and third respondent as "lovely lads and I know I needed something I've got absolutely no qualms in going…I've not asked for a single reasonable adjustment, it's not because I feel scared, I know if I wanted to ask him anything I could." Finally, at the disciplinary hearing held on the 23 August 2019 with the second respondent it was apparent from the transcript that the pressure and aggression was coming from the claimant not the second respondent as recorded by the Tribunal in its findings of facts.

72.5 With reference to piling work on her to cause her to burn out; as recorded by the Tribunal in its reasons, the work was not "piled on" as alleged, to the contrary the claimant had less work to do and there is no evidence she was subject to "burn out" as alleged.

72.6 With reference to behaving rudely and dismissively towards her, the Tribunal found that the claimant's evidence dealing with the second respondent putting out his hand to silence her was confusing in respect of the dates, however it is agreed the claimant walked into and interrupted a meeting the second respondent was conducting. The claimant described how she took issue with the second respondent putting out his hand and failing to bring his meeting to an end to have a meeting with her, which was unrealistic. The claimant was unreasonable in her expectation and perception even had the second respondent raised his hand, which he disputed. It is notable in contemporaneous documents the claimant complains about the second respondent not speaking with her, and there is no mention of his hand being lifted to stop her. The third respondent who was at the meeting confirmed the second respondent did not raise his hand, and it was not anything the second respondent would do. The Tribunal on balance preferred the second and third respondent's evidence on the basis that the claimant made no reference to this in the contemporaneous documents and had it happened as described, she would have.

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72.7 With reference to refusing to allow the claimant to return to her administrative role, the Tribunal has dealt with this above.

72.8 With reference to lying about the availability of alternative roles the Tribunal found the second and third respondent had not lied. As submitted by Mr Kenward, there was no alternative role and had there been, the sales position was not a suitable alternative taking into account the claimant's lack of experience.

72.9 With reference to refusing to refer the claimant to occupational health the Tribunal found the second and third respondent played no part in making arrangements with occupational health, this was a matter for HR. The second and third respondent understood correctly that the claimant was seeking professional medical advice from her GP and the CFS/ME nurse specialist who had supported her in 6 sessions back in 2014. In the grievance meeting the second respondent asked the claimant what she wanted to do about medical advice and her response was that she was happy to do the training.

72.10 With reference to dismissing the claimant on concocted grounds, this did not happen for the reasons stated by the Tribunal above. In short, they were genuine grievances against the claimant and there was nothing to put the second or third respondent on notice that they were not, including the claimant's responses to the allegations in the disciplinary hearing and the second respondent complaining about her aggression towards him.

73 With reference to the issue, namely, if so, was that unwanted conduct, the Tribunal found there was no conduct by the first and second respondent that would meet the statutory definition of harassment.

<u>Direct disability discrimination (Equality Act 2010 section 13)</u>

74 With reference to the issue, namely, what are the facts in relation to the allegations at 3.1 above the Tribunal found as set out above, the claimant has not proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than a hypothetical comparator in the same material circumstances without a disability would have been treated.

Discrimination arising from disability (Equality Act 2010 section 15)

75 With reference to the issue, namely, did the respondent treat the claimant unfavourably in any of the allegations at 3.1 above , the Tribunal found that it had not.

76 With reference to the issue, did the following things arise in consequence of the claimant's disability: the claimant's inability to undertake the roles and workload allocated to her, the Tribunal found there was no satisfactory evidence this arose in consequence of the claimant's disability.

77 With reference to the issue, namely, has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things, the Tribunal found on the balance of probabilities that she had not.

78 There is no requirement for the Tribunal to deal with proportionate means of achieving a legitimate aim, however, in the alternative it found the reasonable adjustments offered to the claimant in respect of the MOC call work in order to persuade her to provide cover an appropriate and reasonably necessary way to achieve that aim. Bearing in mind the financial situation, reduction in work and the reasonable adjustments offered, it was proportionate and reasonably necessary to ask the claimant to undertake training for either a 5-day period or longer concentrating exclusively on MOC calls and nothing less discriminatory could have been done instead. The second respondent was careful in his consideration of balancing the needs of the claimant and the respondent's business. The adjustments offered to her were balanced and measured in a period of great pressure and stress with bailiffs were visiting, work sold the third parties in an attempt to survive, save the business and protect people's employment..

79 In conclusion, in the alternative, the claimant's claims of disability discrimination brought under section 13, 15, 20-21 and 26 of the Equality Act fail on their merits and are dismissed.

RESERVED

Employment Judge Shotter
Date17 May 2023

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE
1st June 2023