



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss C Wilton

AND

Respondent

Capstick Brothers Limited
T/A Fireaway Pizza

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (by video)

ON

4 to 5 May 2023

EMPLOYMENT JUDGE

J Bax

Members

Mr H Launder

Ms R Clarke

Representation

For the Claimant:

Miss C Wilton (in person via Relay UK)

For the Respondent:

Mr M Sutton (consultant)

JUDGMENT

- 1. The Respondent contravened section 40 of the Equality Act 2010 and the Claimant succeeded in her claim of harassment in relation to the allegation 2.2.3 in the list of issues. The other allegations of harassment were dismissed upon their withdrawal.**
- 2. The Respondent contravened section 39 of the Equality Act 2010 and the Claimant succeeded in her claim of victimisation in relation to allegation 3.2.1 in the list of issues. The other allegations of victimisation were dismissed.**

REMEDY

- 1. The Respondent shall pay to the Claimant the agreed sum of £7,450.00 on or before 2 June 2023.**

REASONS

1. In this case the Claimant, Miss Wilton, complained of victimisation and harassment related to a perceived disability of deafness. The Respondent denied the claims.

Background and procedural matters

2. The Claimant presented her claim on 13 June 2022. She notified ACAS of the dispute on 25 May 2022 and the certificate was issued on 9 June 2022.
3. The Claimant had also brought claims of age discrimination and a failure to make reasonable adjustments, which were dismissed upon the Claimant's withdrawal of them on 15 August 2022.
4. At a Telephone Case Management Preliminary Hearing on 24 November 2022, Employment Judge Roper identified the issues in the case. The Claimant was disabled by reason of number of impairments, including mutism. For the purposes of the claim the Claimant relied upon perceived deafness. The Claimant's speech is impaired and she uses the services of Relay UK, an organisation which helps deaf or speech impaired people to communicate over the telephone.
5. The Respondent accepted that the Claimant was an applicant for the purposes of the Equality Act 2010, in respect of the Pizza chef role, but did not accept she was for the purposes of the delivery driver role. The Claimant brought claims of harassment related to a perceived disability of deafness in relation to two things said on 24 May 2022 and a response to her subject access request made on 27 May 2022. The Claimant also brought claims of victimisation, relying on alleged protected acts undertaken on 26 and 28 May 2022. She relied on three allegations of detriment, namely: blocking her number, refusing to consider her job application for the trainee pizza chef role and refusing to allow her to proceed with her application by way of interview.
6. There was a further case management hearing on 23 February 2023, after the Claimant asked for the hearing to be conducted over the telephone. At that hearing the Claimant said she could not attend by video unless her camera was switched off at all times, to which the Respondent objected. It was suggested that the Claimant made an application for reasonable adjustments and provided medical evidence.
7. The application for reasonable adjustments was heard on 28 April 2023. It was agreed to postpone the hearing and relist it so it took place after the

Claimant's partner's claim against the same Respondent, effectively swapping the hearing dates over. The Claimant's application for reasonable adjustments was considered. The application for the camera to be turned off for the whole of the hearing was refused. The reasonable adjustments put in place were as follows:

- a. The Claimant will attend by video and may have the camera turned off at all times apart from when she is giving evidence.
 - b. The Claimant will communicate via Relay UK throughout the hearing.
 - c. When the Claimant gives evidence her camera shall be turned on, however the Claimant may face away from the camera so that she cannot see it.
 - d. If the Claimant has a difficulty during the hearing or requires a break she will inform the Tribunal via Relay UK.
 - e. If the Claimant has not responded to a question or appears not to be responding Relay UK will inform the Judge. The Claimant has explained that she sometimes has problems with her keyboard.
8. At the start of the hearing the issues were discussed. The Claimant said that she was not an applicant for the driver role. S. 40 of the Equality Act 2010 was discussed and that it was worded that, harassment of a person is prohibited if that person has applied for employment. The Claimant said that because there was not an application she would not pursue allegations 2.2.1. and 2.2.2, which related to the conversations on 24 May 2022, and they were dismissed upon that withdrawal. The Respondent accepted that the Claimant was an applicant for the third allegation of harassment. This meant there was one allegation of harassment to be determined. The Respondent accepted that both alleged protected acts were protected acts. The Claimant confirmed that she still pursued the 3 allegations of detriment for the victimisation claim.
9. After giving Judgment on liability, the Respondent requested some time to speak to the Claimant to see if remedy could be agreed, for which time was given. The parties reached an agreement and consented for Judgment to be entered in the agreed sum.

The evidence

10. We heard from the Claimant. For the Respondent we heard from Mr Matthew Capstick and Mr Michael Capstick.
11. We were provided with a bundle of 129 pages. Any reference in square brackets within these reasons is a reference to a page in the bundle.
12. We were also shown 4 short videos including a demonstration of how Relay UK works, demonstration of how the chef role was edited, and transcriptions

of calls between the Claimant and Mr Mackett and the Claimant and her sister.

13. Matthew Capstick made corrections to his witness statement, including that he blocked the Claimant's number about an hour after the messages and before the phone call he received on 27 May 2022. He also added that the emoji sent on 27 May 2022 was an expression of confusion and not connected to her disability. The later addition was significant because it was new evidence. The other changes were made after considering the documentary evidence. We were not satisfied that the changes fatally undermined Mr Capstick's credibility and the evidence in relation to the chef role was unchanged and remained consistent.

The facts

14. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
15. The Respondent is a company operating a franchise which makes, sells and delivers pizzas in the Bridgwater area. This involves deliveries in rural areas. It started in business in September 2021.
16. The Respondent advertises job vacancies on 'Indeed' (a recruitment agency and platform). Since opening the business the Respondent has received 460 job applications. When it receives applications it sifts for the most suitable applicants and invites them for an interview.
17. For the purposes of this claim it was accepted that the Claimant was disabled by reason of a number of impairments including selective mutism and that she has a suspected autistic spectrum disability.
18. The Claimant uses the services of Relay UK to help her communicate with people on the telephone. To speak to someone the Claimant dials their telephone number through the Relay UK App. When the call is answered a recorded message says, "You have a call from a deaf or speech impaired person, please wait for a Relay assistant to join your call." A Relay assistant then joins the call and reads out what the Claimant types. If a Relay assistant does not join the call immediately an automated message says that they are waiting for an assistant.
19. The Claimant's partner, Mr Mackett, worked for the Respondent at the relevant times as delivery driver.

20. At the beginning of February 2022, Mr Mackett was asked to hand out advertising leaflets. It had been suggested family members helped and the Claimant helped him. The Claimant contacted Mr Matthew Capstick about being paid via WhatsApp using his personal mobile telephone number. She was messaged that it was not a job and was cash in hand. We accepted Mr Capstick's evidence that shortly after the exchange he deleted the conversation.
21. On 22 May 2022, the Claimant saw a job advert on Indeed for a delivery driver in the Bridgwater area. The advert, under essential skills, required the applicant to have their own car, moped or scooter.
22. Mr Mackett gave the Claimant, Matthew Capstick's personal mobile telephone number. On 22 May 2022 the Claimant sent a text message to Matthew Capstick, saying Mr Mackett had given her his number and asking if he was still looking for delivery drivers. Mr Capstick replied that, 'they were', and said the Claimant should 'come by the store the next day'. The Claimant replied saying that she did not drive due to her disabilities and wondered whether they would consider her using an e-bike, saying some could go 28 mph. The Claimant did not say who she was in the messages. The Claimant accepted that she had not applied for the role of delivery driver.
23. We accepted the Respondent's evidence that its drivers needed to cover about 40 miles a night, the area of delivery included rural parts and that a car or moped was necessary. The Respondent did not consider the work could be undertaken by an e-bike.
24. Mr Capstick did not respond and the Claimant did not go to the store the next day.
25. At 15:00 on 24 May 2022, the Claimant sent Matthew Capstick a text message asking when she could expect to hear back from him. The Claimant did not receive a reply and the same day used the services of Relay UK to contact him on his personal number. A first call was made at 19:19 but it did not connect.
26. A second call was made at 19:21. The call was answered and hung up on immediately. A Relay UK worker tried to join the call. We accepted that the store was noisy and busy at this time, it being the busy dinner service shift.
27. A further call was made at 19:23. We accepted that the call started with the message, 'Hello, this is Relay UK. Your caller is either deaf or speech impaired.'" A Relay UK assistant joined the call immediately. We accepted that Matthew Capstick was cutting pizzas at the time and was working in a noisy kitchen with several other staff members. He swiped to answer the

- call and put it on speakerphone. The telephone was on a shelf above his head. We accepted that Mr Capstick did not hear every word which was said. In the background there was talking and laughing by other people.
28. There was a dispute as to whether Mr Capstick said, 'why have I got a deaf person calling'. Mr Capstick's evidence was that it was taken out of context and he was asking why he was being called and he was confused. The Claimant's text message, very shortly afterwards, said he had laughed and said why have I got a call from a deaf person. We preferred the Claimant's evidence and accepted that Mr Capstick laughed and said, "why have I got a deaf person calling", when he answered the call. We accepted that Mr Capstick thought that a friend had been 'prank calling' him or that it was a 'cold call' and that when the call was answered he did not know that it was the Claimant calling through Relay UK or that she was on the line.
29. The Claimant typed a question, 'would you hire a deaf person' and it was read to Mr Capstick. Mr Capstick replied by saying that the Respondent was in the hospitality sector and there was a requirement that staff could communicate effectively. This was later repeated in a text message to Mr Mackett.
30. The chat box disappeared and the Claimant ended the call. The Claimant felt hurt and upset by what had happened.
31. At 19:26 on 24 May 2022, the Claimant sent a text message to Matthew Capstick saying that the call had disconnected, but she could hear what he said and it was discrimination. She set out he had said that she could not have a job because it was hospitality and it required communication. She said that she was not deaf but non-verbal and could use an app to communicate. She also said she heard him laugh and say, 'why have I got a call from a deaf person'.
32. The following matters were said in the subsequent text conversation that day:
- a. Mr Capstick replied saying he thought it was a prank call and he had no idea who she was. He also said she could not be a delivery driver without a car.
 - b. The Claimant then said she was Mr Mackett's girlfriend. She said she could not drive but asked if a reasonable adjustment could be made by using an e-bike.
 - c. Mr Capstick asked why she had not come in and introduced herself, rather than a random lady ringing him up. The Claimant responded by saying that she did not have an ACC app and that was down to

the Respondent to pay for it and she was waiting for a reply about the bike.

- d. There was discussion about a bike and Mr Capstick said it would involve cycling 40 miles on a busy night. He then said 'I have no idea who you are' with a 'crying with laughter' emoji.
 - e. The Claimant told Mr Capstick that she would take it further and would start ACAS early conciliation. Mr Capstick replied that he had no idea who she was. He said that she could not delivery drive because she did not have a car and bike was not suitable and it was nothing to do with her being deaf and she could not use her disability to blackmail him. He asked her to get Ben Mackett to call him.
33. On 25 May 2022, the Claimant asked for his company's legal name and address, so she could take it further. Mr Capstick replied by saying "take what further, you applied for a job that doesn't exist, I have no idea who you are. You don't even have a car. Stop messaging me. Go on Indeed and look for appropriate work." He also said that there was not a job available. The Claimant sent a further message in the same conversation asking for a data subject access request for the CCTV of the phone call. Mr Capstick asked her to stop messaging him and said he would speak to Ben when he was in.
34. On 26 May 2022, the Claimant said, in a text message, that she needed confirmation that the company name and address was correct so that she could settle her claim outside of the Tribunal. Further that she wanted to raise a grievance about the discrimination.
35. After this text conversation, Mr Capstick blocked the Claimant's number for text messages.
36. The Respondent had recently advertised for a chef role because one of the pizza chefs had given notice. The chef had a certificate of higher education in food preparation and service and had experience in the sector. The role was originally advertised as a trainee role, although it was later changed to a chef role. We accepted that the Respondent sometimes edited vacancy advertisements to change rates of pay, however no real explanation was provided as to why the change occurred.
37. The Claimant applied for the role on 26 May 2022. Her application gave no information about food related qualifications or experience and set out no interest in cooking. We accepted that the Claimant did have some previous experience, however it was not included on the form and the Respondent was unaware of it.

38. The Claimant's evidence was that she applied for the role because Mr Mackett was working two jobs she was not seeing him and wanted to get him out of that situation. The Claimant was applying for everything she could get. Paragraph 3 of her witness statement referred to not being able to cook for herself. The Claimant explained this was an executive dysfunction and connected to her eating disorder and when she opened the fridge she could not decide what to eat and therefore ate nothing. The Claimant accepted in cross-examination that it could cause a problem in a commercial kitchen but there could be reasonable adjustments and it was different if she was being told what to cook. She was cross-examined on the basis that it was surprising she applied given what she had alleged occurred very shortly before and it was questioned whether the application had been made in good faith, to which the Claimant said, 'you can work in places where a relationship breaks down because you can move past it'. The latter point was not raised in closing submissions.
39. The chef who had given notice, retracted his resignation within 2 weeks of giving it. During that time the Respondent had been trying to persuade him not to leave. The Claimant, when questioning Matthew Capstick, prefaced a question by saying that she knew that the chef still worked there and he had been in contact with her partner. We accepted the Respondent's evidence that they had agreed with the chef a small pay rise and a change to his shift pattern and that there was a change in his personal circumstances. The chef retracted his resignation and did not leave the Respondent's employment and there was no longer a vacancy to fill and the Respondent did not recruit anyone for the position. The chef retracted his resignation at the end of May or beginning of June.
40. Michael Capstick reviewed the applications received for the Chef role, he did not consider the Claimant's application was suitable because it made no reference to food or relevant qualifications and did not show any interest in working in a kitchen. We accepted the Respondent's evidence that none of the applicants, including the Claimant, were interviewed. None of the applicants were told that the vacancy had been withdrawn and the vacancy was simply closed on Indeed.
41. On 27 May 2022 at 17:12, the Claimant sent Matthew Capstick a subject access request via WhatsApp. The request was a PDF attachment called 'Monaco Solicitors - Subject Access Request'. The request identified the Claimant as making it and referred to denial of reasonable adjustments and the discrimination case. It asked for CCTV of the telephone conversation on 24 May and e-mails about her discrimination case. She also specifically referred to searches for the words including: deaf person, Ben's girlfriend, Relay UK and discrimination. [p106]

42. Matthew Capstick at 17:16 responded by messaging “Who are you” with a ‘crying with laughter’ emoji.
43. At 17:19, Mr Capstick messaged Mr Mackett and said that he had had a very strange message from his girlfriend and to come in 5 minutes early the next day to have a chat.
44. By 17:25 that day, Mr Capstick had blocked the Claimant’s number on WhatsApp.
45. Mr Capstick’s evidence was that he did not know who the subject access request had come from and he had not opened it before messaging the Claimant. We rejected that evidence. More time had elapsed between receiving the message from the Claimant and the reply than the reply and messaging Mr Mackett, we considered it was unlikely that he read the subject access request after messaging the Claimant. Mr Capstick read the subject access request and, given the previous messages and their contents, he knew it was the Claimant before he sent her the message.
46. Mr Capstick’s evidence was the emoji was an expression of shock or confusion and he had not intended to offend her. The emoji was at complete odds with confusion, it being one of ‘crying with laughter’.
47. The Claimant considered what was said was very offensive. She felt suicidal and tried to call Mr Mackett, without success. She also spoke to her sister. After hearing the recordings we accepted that she was in a highly distressed state and she did not feel able to call an ambulance because she would not be able to communicate with the paramedics. The Claimant’s sister called the Respondent’s store and said to Mr Capstick that the Claimant had tried to kill herself because of him and Mr Mackett needed to go home. Mr Mackett returned home and took the Claimant to A&E. The Claimant was referred to ‘Open Mental Health’.
48. On 28 May 2022, the Claimant sent a message via Indeed to the Respondent in which she complained about her number being blocked and not considering her for the chef role was discrimination.

The law

49. S. 40 of the Equality Act 2010 provides:

- 40 Employees and applicants: harassment
- (1) An employer (A) must not, in relation to employment by A, harass a person (B)—
 - (a) who is an employee of A's;
 - (b) who has applied to A for employment.

50. S. 26 EqA provides:

26 Harassment

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

51. S. 27 EqA provides:

27 Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- (4) This section applies only where the person subjected to a detriment is an individual.
- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule

Harassment

52. Harassment by perception occurs when the employee is wrongly perceived as having a protected characteristic and suffers unwanted conduct as a result. In Chief Constable of Norfolk Constabulary v Coffey [2020] ICR 145

- it was held that in relation to perceived disability that the putative discriminator must believe that all the elements in the statutory definition of disability are present, although it is not necessary for them to attach the label 'disability' to them. It will depend on whether the putative discriminator perceived the individual to be disabled as a matter of law. It does not depend on knowledge of disability. It depends on whether they perceive the individual as having an impairment with the features set out in the legislation.
53. Not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (Bakkali-v-Greater Manchester Buses [2018] UKEAT/0176/17).
54. As to causation, we reminded ourselves of the test set out in the case of Pemberton-v-Inwood [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.
55. It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in Grant-v-HM Land Registry [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in Betsi Cadwaladr Health Board-v-Hughes UKEAT/0179/13/JOJ.
56. We approached the case by applying the test in Igen v Wong [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):
- "(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*"

57. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment itself cannot found an inference, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).
58. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: “The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the Respondent had committed an act of discrimination”. The Supreme Court in Royal Mail Group Ltd v Efofi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.
59. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the “more” which is needed to create a claim requiring an answer need not be a great deal.
60. “Could conclude” means that “a reasonable Tribunal could properly conclude” from all the evidence before it. This includes evidence adduced by the Claimant in support of the allegations and evidence adduced by the Respondent contesting the complaint.
61. Where the Claimant has proven facts from which conclusions may be drawn that harassment has occurred then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever related to the protected characteristic.

Victimisation

62. There was also a claim to consider under s. 27. The Respondent did not dispute the fact that the Claimant had performed protected acts within the meaning of s. 27 (1) by complaining about discrimination on 26 May 2022 and complaining through Indeed on 28 May 2022. It disputed the allegations that she had been subjected to detrimental treatment because of those acts.
63. A detriment is something that is to the Claimant's disadvantage. In Ministry of Defence v Jeremiah [1980] ICR 13, CA, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, in which Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "*unjustified sense of grievance cannot amount to 'detriment'*". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "*If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice.*"
64. Detriment is to be interpreted widely in this context. It is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes. (see Warburton v The Chief Constable of Northamptonshire Police [2022] EAT 42 paragraphs 48 to 51)
65. The test of causation under s. 27 required us to consider whether the Claimant has been victimised '*because*' she had done a protected act, but we were not to have applied the 'but for' test (Chief Constable of Greater Manchester Constabulary-v-Bailey [2017] EWCA Civ 425); the act had to have been an effective cause of the detriment, but it does not have to be the principal cause. However, it has to have been the act itself that caused the treatment complained of, not issues surrounding it.
66. In Warburton v The Chief Constable of Northamptonshire Police [2022] EAT 42 when it was held at paragraph 64 that:

The "but for" test is clearly not applicable, setting the bar too low. But the "operative" or "effective" cause sets it too high if it leads to the error of

looking only for the main or principal cause. Lord Nicholls' formulation - whether the protected characteristic or protected act "had a significant influence on the outcome" - is the correct test. And "the reason why" is to be preferred to "causation".

67. In order to succeed under s. 27, a claimant needs to show two things; that she was subjected to a detriment and, secondly, that it was because of the protected act(s). We have applied the 'shifting' burden of proof under s. 136 to that test as well.

Conclusions

Harassment

Did the Respondent harass the Claimant on 27 May 2022, by responding to the Claimant's subject access request with "who are you" and a laughing face emoji.

68. When the Claimant telephoned Mr Capstick on 24 May 2022 through Relay UK, Mr Capstick responded by saying 'why have I got a call from a deaf person'. The Claimant then, in the following text message conversation, said that what he had said was discrimination and she was not deaf but non-verbal. The Claimant had made clear in a number of the messages that she was Mr Mackett's girlfriend and that she considered what had happened was discrimination. On 25 May she referred to a subject access request. When the Claimant made the subject access request on 27 May 2022, the contents referred to the same matters as in the text messages, and it identified her name and Mr Mackett as her boyfriend. We were satisfied that Mr Capstick knew it was the Claimant who had sent the subject access request on 27 May 2022. The subject access request specifically referred to discrimination and the conversations. We concluded that Mr Capstick perceived that the Claimant was deaf or was disabled by being non-verbal related to deafness. This was due to what she had said to him in messages and that Relay UK had tried to call on her behalf and what he had said on answering.

69. We accepted that the receipt of the message with the 'crying with laughter emoji' was unwanted. The Claimant had sent a subject access request, identifying who she was and it had followed a large number of text messages about the same matters in which she had identified herself. We considered that a reasonable person receiving such a message, implying that what they had sent was a joke when it was in fact serious, would consider it to be unwanted.

70. The message received by the Claimant was 'who are you' with a 'crying with laughter emoji'. This was sent in direct response to her subject access request. The contents of the request and the previous messages and the things said on the telephone and the references to 'deaf person' and 'non-

verbal' in the subject access request were sufficient for the Claimant to discharge the initial burden of proof that what was said, was related to disability. We did not accept the Respondent's evidence that he was unaware that the Claimant had sent it until after he replied. The Respondent was unable to discharge its burden of proof that what was said was in no way whatsoever related to the Claimant's disability or perceived disability.

71. The Claimant did not cross-examine Mr Capstick on whether he intended to create an offensive environment for her and he said it was not intended. We therefore were unable to find that the message had the purpose of creating the prohibited environment for the Claimant.

72. The use of the emoji and what was said caused significant offense to the Claimant. She found it deeply upsetting, as demonstrated by the events which followed, necessitating attendance at A&E. The audio file demonstrated the level of distress and effect on the Claimant. The Claimant considered that the message was effectively laughing at her and the message she had sent, particularly following the previous messages between her and Mr Capstick. Taking into account those messages and that the Claimant considered that Mr Capstick knew who she was and the history, we concluded that it was reasonable for the message to have had that effect on the Claimant.

73. The Respondent harassed the Claimant.

Victimisation

74. The Respondent accepted that the Claimant had done the protected acts.

Did the Respondent subject to the Claimant to a detriment, as follows, for doing a protected act?

Blocking the Claimant's number

75. Blocking someone's number when they have said that they have a dispute with someone is something which a reasonable person could consider to be to their disadvantage. The Claimant was trying to establish the identity of the Respondent and was seeking to enter into negotiations. At the time the number was blocked the Respondent had not informed the Claimant of who its legal representative was, leaving her without information.

76. The Claimant's number was blocked shortly after Mr Capstick sent his message to the Claimant. This followed on from the subject access request about her discrimination claim and the protected act the day before saying that the Respondent had discriminated against her. It was also relevant that in the messages, which had been exchanged from 24 May 2022, the Claimant had alleged that discrimination had occurred and her text

messages had also been blocked. We were satisfied that the Claimant had proved primary facts which tended to suggest that her number was blocked because she was saying that she had been discriminated against.

77. Matthew Capstick was not questioned by the Claimant about his motives for blocking her number. He had originally provided an explanation in his witness statement that it was in response to being told that it was his fault that the Claimant had attempted to commit suicide, however that was retracted when he accepted that he blocked her before the call was made. The Respondent did not adduce evidence as to why the Claimant's number was blocked and therefore it did not prove that the blocking was in no way whatsoever materially influenced by the protected act.

78. The Claimant was therefore victimised contrary to the Equality Act 2010.

Refusal to consider the Claimant's job application on Indeed?

79. If an application is not considered then we accepted that a reasonable applicant would consider that to be to their disadvantage, in that they would be denied an opportunity to gain employment. In the present case the Claimant's application was considered by Michael Capstick and therefore the alleged act had not occurred. This claim was therefore dismissed.

Refusing to allow the Claimant the opportunity to proceed with her application for the trainee pizza chef position by way of interview or further?

80. We accepted that refusing someone the opportunity to proceed with an application or not interviewing someone would be to their disadvantage, in that they would not be able to obtain the job.

81. In the present case the Claimant relied upon her protected acts, namely complaining about discrimination as the reason why she did not progress further with her application. She relied upon the initial advert being for a trainee and it was changed to being for a chef. The explanation given by the Respondent was that they sometimes edit applications in relation to pay, did not really address why the change had been made.

82. The Claimant also relied upon her telephone number being blocked, so that she could not correspond about the application. We rejected that argument on the basis that the application was conducted through Indeed and correspondence took place through that platform. The Claimant asked questions of the Respondent's witnesses for proof that the chef had retracted his resignation, although she prefaced a question with that she knew he had stayed and been in contact with her partner. The Claimant did not adduce any evidence that the chef had left.

83. The messages sent between 24 and 27 May 2022 were important background and coupled with blocking the Claimant's telephone number, the Claimant established primary facts from which we could conclude that her application was not progressed because she had done the protected acts.
84. When cross-examining Matthew Capstick, the Judge asked the Claimant if she wanted to question him about the reason why her application was not progressed. The Claimant said she was going to ask Michael Capstick those questions. The Claimant questioned Michael Capstick about when he knew that they did not need to hire anyone to replace the chef and why she was not told. The Claimant did not question Michael Capstick about his motivation. The Claimant in her job application did not put any food, catering or hygiene related qualifications forward. She did not detail any skills related to catering or food related work. There was nothing in the application which expressed any desire to work in such an industry. We accepted that the Respondent had other applications. We accepted that on the basis of the application, Michael Capstick did not think that the Claimant would be a suitable applicant. The Respondent, from the time the chef gave notice tried to persuade him not to leave. It was important that none of the applicants were invited for an interview or told that the vacancy had been closed. The Respondent's unchallenged evidence was that the Claimant's application form demonstrated that she was not suitable and that the chef retracted his resignation so that the vacancy no longer existed. We accepted the Respondent's evidence on this issue and were satisfied that the reason why the Claimant's application was not progressed or why she was not invited to an interview was because the chef did not leave and her application gave no indication why she would be suitable for a trainee position. We were satisfied that on the balance of probabilities that was the reason and it was not materially influenced by the Claimant's protected acts.
85. We further found that because the chef retracted his resignation and that the vacancy no longer existed, neither the Claimant or any other applicant would have been or was appointed to the role.
86. Therefore this claim was dismissed.

Employment Judge Bax
Dated 19 May 2023

Reasons sent to Parties on 05 June 2023

For the Tribunal Office