EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Miss C Tocinska	v	Alloga UK Limited

Heard at: Nottingham **On:** 6, 7, 8 & 9 March 2023

Before: Employment Judge Fredericks
Tribunal Member Ali
Tribunal Member Hussein

Appearances
For the claimant: In Person
For the respondent: Ms G Holden (Counsel)

JUDGMENT

The claimant's claims in respect of:-

1. Constructive dismissal;
2. Direct disability discrimination;
3. Failure to make reasonable adjustments; and
4. Harassment related to disability,

are not well founded and so all are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent, a logistics company, from 4 July 2016 to 23 October 2021, when she left following her resignation. Early conciliation

started on 1 October 2021 and ended on 27 October 2021. Her claim form was presented on 1 November 2021.

2. These claims arise within the context of the easing of Covid-19 restrictions in society, and the more restricted or gradual easing in many workplaces, including at the respondent. The claimant claims that she was directly discriminated against because of a disability, that she was harassed by the respondent because of that disability, and that the respondent failed to make reasonable adjustments in response to the disability. The claimant also claims constructive dismissal, which she says arose due to the respondent's handling of her grievance and due to its actions around an occupational health report.

3. The claimant was held to have been disabled at the relevant time under the purposes of *Section 6 Equality Act 2010* by Employment Judge Welch at a previous preliminary hearing. For the purposes of this hearing, then, we considered that the claimant had the disability at the time and it was no longer open to the respondent to argue that she was not disabled.

4. The claimant represented herself and gave evidence himself in support of her claim. The respondent was represented by Ms Holden of counsel. The respondent's sworn witnesses were: Ryan Williams (Operations Manager); Carla Marshall (HR Director); Adam Trowhill (Shift Manager); Lee Alford (Shift Manager); and Stephen Salmon (Senior Operations Manager)

5. We sat as a panel of three in this hearing. The decision we reached on all of the claims was unanimous and so when this judgment refers to 'we', 'our', or 'the Tribunal', it refers to our collective view. We also had access to an agreed bundle of documents which ran to some 259 pages. Page references in this document refer to the pages of that bundle.

6. We finished hearing the case on the final day but there was no time to give an oral judgment with full reasons attached. Instead, we asked the claimant if she would prefer to know the outcome with short reasons attached, with these full reasons to follow in writing. That is what the claimant chose, and so the claimant was told on the final day of the hearing that she was not successful in any of her claims.

Issues to be decided

7. Employment Judge Brewer held a case management hearing in these proceedings on 30 March 2022, and the list of issues was set from that hearing. By the time of this hearing, the issue about whether or not the claimant was disabled had been decided and so that section is excluded from the list of issues reproduced below. A key part of the disability claims relate to the respondent needing to have knowledge of the claimant's disability, in order for it to be shown that the disability was an influence for the way in which the respondent acted. The claimant seemed not to respond to this point in the hearing, and we reminded her throughout the hearing that it is not enough for her claims to have established only that she was disabled at the material time.

8. The sections relating to remedy are also excluded because those issues would have been dealt with separately if the claimant had succeeded in her claims, which she did not. The issues were:

8.1. ***Unfair dismissal***

8.1.1. Was the claimant dismissed?

8.1.1.1. Did the respondent do the following things –

8.1.1.1.1. Fail to obtain an occupational health report on the claimant in July 2021;

8.1.1.1.2. Fail to undertake remote meetings with the claimant in relation to their grievance;

8.1.1.1.3. Fail to allow the claimant to be represented at her grievance meeting by Mr Prikalis-Pastars;

8.1.1.1.4. Fail to allow the claimant to have an interpreter at her grievance meetings;

8.1.1.1.5. Mishandle the claimant's grievance;

8.1.1.1.6. On 8 October 2021, allow or not prevent a senior operations manager, Mr Steve Salmon to be "in the vicinity" of the claimant causing her to have a panic attack?

8.1.1.2. Did that breach the implied term of trust and confidence? The Tribunal will need to decide –

8.1.1.2.1. Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

8.1.1.2.2. Whether it had reasonable and proper cause for doing so.

8.1.1.3. Was that breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled

8.1.1.4. to treat the contract as being at an end.

8.1.1.5. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

8.1.1.6. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

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

8.2.1. Did the respondent do the following things:

8.2.1.1. Fail to provide the claimant with a replacement face mask on 22 July 2021;

8.2.1.2. Threaten to escort the claimant off site on 22 July 2021;

8.2.1.3. Threaten to send the claimant home without pay on 23 July 2021 when the claimant arrived for work having forgotten to bring face mask with her;

8.2.1.4. Fail to provide the claimant with a replacement face mask immediately she asked for one on 23 July 2021;

8.2.1.5. At a grievance meeting on 30 July 2021, Carly Donald asked the claimant what she would do if she forgot her safety shoes?

8.2.2. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who she says was treated better than she was.

8.2.3. If so, was it because of disability?

8.2.4. Did the respondent's treatment amount to a detriment?

8.3. ***Reasonable adjustments (Equality Act sections 20 & 21)***

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

8.3.2. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs –

8.3.2.1. PCP1: only allowing representation at grievance meetings by trade union representatives or fellow employees?

8.3.2.2. PCP2: not having remote hearings?

8.3.3. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that –

8.3.3.1. In relation to PCP1 the claimant was not able to fully and properly represent herself;

8.3.3.2. In relation to PCP2 face to face meetings caused the claimant stress and the fact that her colleagues noted her attended grievance meetings would cause them to ask her questions which would exacerbate the stress.

8.3.4. Did the respondent know or could it have reasonably been expected to know that the claimant was likely to be placed at a disadvantage?

8.3.5. What steps could have been taken to avoid the disadvantage? The claimant suggests –

8.3.5.1. In relation to PCP1, allow representation by, in this case, Mr Prikalis-Pastars;
8.3.5.2. In relation to PCP2, having remote hearings.

8.3.6. Was it reasonable for the respondent to have taken those steps and when?

8.3.7. Did the respondent fail to take those steps?

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

8.4.1. Did the claimant do the following things –

8.4.1.1. Threaten to escort the claimant off the premises on 22 July 2021;
8.4.1.2. Threaten to send the claimant home without pay on 23 July 2021 when the claimant arrived for work having forgotten to bring face mask with her;
8.4.1.3. Fail to provide the claimant with a replacement face mask immediately she asked for one on 23 July 2021;
8.4.1.4. On 8 October 2021, allow or not prevent a senior operations manager, Mr Steve Salmon to be "in the vicinity" of the claimant causing her to have a panic attack?

8.4.2. If so, was that unwanted conduct?

8.4.3. Did it relate to disability?

8.4.4. 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?

8.4.5. 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.

Findings of fact

9. The relevant facts are as follows, as we have found them on the balance of probabilities. To find facts on the balance of probabilities, we are making an assessment about whether something is more likely than not to have happened. In other words, if considering whether one of two things happened, we are looking for the one that appears to us to have a greater than 50% chance of being the truth of the matter.

10. Where we have had to resolve any conflict of evidence, we indicate how we have done so at the material point. When finding these facts, we have considered the documents we were referred to in the bundle, the written evidence in the witness statements, and the oral evidence heard in cross examination. We noted that the

claimant did not test the respondent's evidence about it or the individuals' knowledge about her disability. The Panel did so in part by asking questions about that, in order to have been able to draw conclusions about the claims for which that issue is relevant.

Background and the claimant's disability

11. The respondent is a logistics solutions company providing services to manufacturers in the pharmaceutical, medical device, consumer product, health and beauty, and veterinary sectors. It has multiple sites and employs over 1300 people. The claimant commenced employment with the respondent on 4 July 2016. The claimant transferred into the role of Inventory Operative from 3 March 2020. She said that a colleague, a supervisor at the time, told her about the vacancy and advised her that it would be easier for her to do the job. The claimant also disclosed that she had told the same colleague, also a friend, about her low mood and depression, but that the colleague dismissed the condition and then left the respondent's employment.

12. The claimant disclosed medical records at pages 61 to 72 of the bundle. On 25 June 2019, the claimant attended her GP with depressive mood and reported feeling *"down, anxious for few months… trigger stress at home and work poor appetite, not sleeping well"* (page 67). On 25 July 2019, the claimant attended a review at the GP following prescription of sertraline and the entry states *"feels better, mood better, and less anxious"* (page 66). On 1 August 2019, the claimant reported a decline in mental health condition (page 66), and was signed off work for two weeks with *"depressive mood"* (page 77). On 24 September 2019, the claimant was issued with a Med 3 for amended duties (avoiding refrigeration) because of *"hyperbilirubinemia"* (page 80) which the claimant considers was caused by Gilbert's syndrome (page 65).

13. On 10 February 2021, the claimant began to take sertraline again following a telephone consultation where she reported *"low mood, poor motivation"* and then her dose was increased on 10 March 2021 (page 64). The claimant told her GP that she would like to increase her dose again on 29 July 2021 (page 64). On 28 September 2021, the claimant had a telephone consultation where there was a discussion about moving on to a non-SSRI medication in the hope of better results (page 63). On 14 October 2021, the claimant attended her GP and reported a panic attack which took place on 8 October 2021 (page 63).

14. An absence record for the claimant is shown at page 76. It shows that the respondent recorded that the claimant was absent for 13 days between 29 July 2019 to 14 August 2019 due to *"depression"*. The corresponding return to work form for this absence is at page 76. It records that the claimant was fit to return to work and that the reason for her absence was *"depression"*. The form records that the claimant was prescribed sertraline and states that the illness was caused by *"depression related to Gilbert's Syndrome"*. In cross examination, the claimant said that she had never been diagnosed with Gilbert's Syndrome, but that she had discovered the condition when searching online and considered that it would provide an explanation to the respondent for her illness as something other than a mental health condition. The claimant expanded on this point to explain that she hid her mental health condition from the respondent as much as possible because of the stigma she felt would be attached to the condition.

15. The claimant was disabled during her employment, according to the definition found at *section 6 Equality Act 2010*. This is a different point to whether, as a matter of fact, the respondent knew that the claimant was so disabled. In terms of the evidence available to the respondent to discern whether or not the claimant was disabled by reason of her depression, we consider that the respondent only had reference to this one period of absence in the summer of 2019. There was no other absence related to depression or mental health until 8 October 2021. Further, we find that the claimant took steps to hide her disability from the respondent, and sought other reasons for having the symptoms which would conceal her having the disability that she did.

16. In our view, the respondent did not as a matter of fact have the material it would require to conclude that the claimant was disabled until the point at which the claimant raised her grievance relying upon the disability on 25 July 2021. At that point, as outlined below, the claimant asserted that Mr Williams and Mr Alford had discriminated against her because she considered herself to be disabled under *section 6 Equality Act 2010*.

The respondent's approach to COVID-19 and face mask policy

17. Like all employers in the country, the respondent's business was affected by the Covid-19 pandemic and it was required to take step to protect its employees who worked on its sites. These steps were implemented in the form of rules and policies which may have changed from time to time. The parties agree that, upon the reopening of the business after the initial lockdown, the respondent issued two re-usable face coverings to its members of staff which they were expected to wear on site. The claimant says, and we accept, that she only took one of those masks. Instead, she opted to wear a face visor when on site, which the respondent allowed.

18. On 2 November 2020, David Guttridge (Director of Sales and Marketing) distributed a notice for the attention of all staff (page 83). This notice (page 84) advises that:-

> *"**Face coverings***
> *To be worn at all times and **in all locations whilst inside Alloga premises.** The only exception is someone alone behind a closed office door. Stocks of new masks are available, and in addition Facilities can offer the option of a protective face visor for those who are uncomfortable wearing a mask type face covering"*

19. David Guttridge sent another update on 24 March 2021 (page 85). This notice (page 86) advises that:-

> *"**Wearing of face coverings***
>
> *Colleague safety is our primary concern. As you know, a comprehensive range of safety measures is in place to accommodate social distancing, face coverings, improved hygiene and workplace cleaning for those who must attend the Alloga UK workplace.*

> *We are closely following UK government guidance on the use of face covering, which at this point remains unchanged…*
>
> *It is therefore important that we do not relax our use of face coverings too soon, which would potentially undo all of the great results achieved by us all over the last few months…*
>
> *Our Health & Safety team have adequate stocks of several type of face coverings available, if you require replacements then please contact Nicole James or one of the Safety Officers".*

20. The respondent considered that the face coverings provided to its staff, required to be worn by a combination of law and policy, were part of the respondent's uniform. We heard that other items of PPE, such as safety shoes, were also part of the respondent's uniform. The respondent's uniform policy, at pages 238 and 239, says that *"appropriate uniform must be worn at all times during working hours. Failure or refusal to wear the correct uniform will result in the employee being sent home without pay and may result in disciplinary action"*. We were shown this document when the respondent justified the managers' positions that the claimant could have been sent home without pay to bring her forgotten face covering to work to wear during her shift.

21. In cross examination, the respondent admitted that 'face covering' was not an item in the uniform list and that the uniform policy was never updated to include face coverings. We are satisfied, despite this, that the respondent did have a policy of sending staff home unpaid to collect PPE if it was forgotten. We also heard of a member of staff who refused to wear a face covering altogether, and they were sent home without pay until they agreed to wear a face covering to work. Although we are concerned about the apparent lack of clarity around the status of the face covering in respect of the uniform policy, we accept the respondent's evidence that it had a practice of informing staff that they would need to go home unpaid to collect a forgotten face covering, and that this was underpinned by the principle that staff who did not wear a face covering to the site, and who for whatever reason did not or were unable to get a replacement, would be required to go home without pay.

22. The claimant was concerned about Covid-19, and wore her visor to work up until the events of 22 and 23 July 2021. She also ordered packs of lateral flow tests on 23 May 2021 (page 83) and 21 July 2021 (pages 90 to 92). The claimant relied on these to combat an apparent assertion from the respondent that the claimant did not believe in the Covid-19 virus or in the response to it. We make clear that, in our view, the claimant was not a *"covid denier"* and that she took steps in line with Government guidance to limit its spread.

Events of 22 and 23 July 2021

23. On 22 July 2021, the claimant attended work without her face shield. In her claim form (page 7), the claimant said that *"on 21st July 2021 my son by accident sat on my face shield and damaged it which was kept on the car seat in the car"*. Her witness statement makes no mention of the shield being damaged. In her witness statement, she asserts that her medication had caused memory problems and that because she

was *"rushing to the work and completely forgot to take face mask"*. Her witness statement then records a conversation she says she had with Mr Alford. In that conversation, she says that she said that her son had broken her face shield and that she no longer had the mask given by the respondent at the outbreak of the pandemic. In our view, the claimant is not consistent about the reasons why she did not have a face covering at the start of her shift on 22 July 2021.

24. It is agreed that the claimant did not have a mask. We find that the claimant did not immediately approach management to obtain a face covering after she left hers at home. The claimant does not say that she did, and Mr Williams' evidence was that a supervisor, Ms Beardmore, reported to him that the claimant was not wearing a face covering and had refused to do so. Ms Beardmore gave an internal statement about this interaction, in un-dated form, and that was shown at page 140. In it, she writes:

> *"I advised her Alloga's policy of wearing a facemask and she said she was not going to wear one as the UK government guidelines said they are not needed…*
>
> *I asked if she had made anyone aware her masks needed replacing and he said no, why do I need to wear one."*

25. We are cautious about accepting written evidence like this where it is undated, not verified by a statement of truth, and where the person making the statement has not attended the hearing for their evidence to be tested. Our starting point when evaluating the weight of this evidence was one of scepticism. However, the claimant does recall that Mr Williams approached her on that shift, and not that she approached management about a replacement face covering. Mr Williams said that he went to seek out the claimant upon being told that she was in the warehouse without a face covering, and that had questioned why she needed to wear one after the UK government rules about face coverings had been relaxed. He said that he would not have gone to seek out the claimant without being alerted about her conduct, and we could detect no reason why Mr Williams would support untruthful testimony from Ms Beardmore.

26. Consequently, we do ultimately accept the respondent's evidence on this point. The claimant did not think that she needed to wear a face covering anymore because the UK government guidelines had been relaxed. When challenged, she relied upon that relaxation to query why she still needed a face covering. Mr Williams challenged the claimant about her missing face covering and the two had a discussion about it. The claimant describes an aggressive confrontation where Mr Williams was forceful about the location of her face covering and where he followed her and threatened to have her removed by security when she moved away from him (and she says she moved away from him because she found the experience overwhelming). Mr Williams agrees with some parts of the claimant's account but disagrees that he was aggressive or bullying.

27. We have considered carefully the evidence we heard about that discussion on 22 July 2021. We found Mr Williams to be an open and transparent witness, who was flexible when giving his answers in acknowledging how the claimant might have felt whilst explaining that his motivations were to preserve the respondent's policies. He

appeared to us to be straight-talking, and we consider that he would have likely presented as a robust manager when pressured, and that that robustness is likely to have caused the claimant some distress as a result of her vulnerability at the time. We also consider that, perhaps because of that vulnerability, the claimant got heated during the exchange and was rude to Mr Williams in response to his requests. We pause here to stress that Mr Williams did not know about the claimant's vulnerability, and is unlikely to have realised the effect his side of the interaction had on the claimant.

28. We find the following relevant facts in relation to the 22 July 2021 discussion:-

    28.1. Mr Williams asked the claimant where her face covering was;

    28.2. The claimant responded that she did not have one;

    28.3. Mr Williams asked the claimant to put a mask on;

    28.4. The claimant said that she did not have one to put on, hers was broken, and that the rules had changed so that face coverings were not required;

    28.5. Mr Williams explained that the respondent's policy had not changed and so she was still required to wear a face covering and referred to the staff briefing;

    28.6. The claimant said that she had not seen the briefing;

    28.7. Mr Williams said that the claimant would need to leave the site and go home unpaid if she did not wear a face covering;

    28.8. Mr Williams then asked the claimant to leave the premises if she was not going to wear a face covering and the claimant refused;

    28.9. Mr Williams asked the claimant to leave again;

    28.10. The claimant was upset by this, and turned around to leave Mr Williams;

    28.11. Mr Williams followed the claimant and explained that he would be required to ask security to escort her from the premises if she continued to refuse to wear a face covering;

    28.12. The claimant asked Mr Williams to provide a face covering because hers was not with her and that it had been a long time since the respondent had issued those initial face masks;

    28.13. Mr Williams found a disposable mask from his office; and

    28.14. The claimant continued with her shift.

29. In finding the facts above, we accept the majority of Mr Williams' evidence about the interaction on that day, and prefer his account over that of the claimant where they conflict. This is because Mr Williams' account makes logical sense to us keeping in mind the respondent's policy and because the claimant was ultimately provided with a face covering and completed her shift. We are not satisfied that an aggressive conversation such as that described by the claimant occurred, although we

acknowledge that a sensitive claimant may have perceived some robustness and implementation of a policy she didn't agree with to be an aggressive action. We were also troubled by elements of exaggeration that crept in from the claimant when describing this interaction. She repeatedly put to Mr Williams that he had sent her home unpaid, when the parties accept that the claimant never left the premises on his instruction and did not suffer any loss in wages for that day.

30. Further support for Mr Williams' position is found in the contemporaneous documentary evidence. Mr Williams was going to be on annual leave on the following day, so he sent an e-mail about his interaction with the claimant so that colleagues were aware that there had been an issue. That e-mail is at page 94 and the relevant parts state:-

> *"Good evening*
>
> *Just for information, I have had to challenge the above inventory operative, with regards to wearing a face mask whilst at work this afternoon, and found her to be difficult, to say the least, and initially unresponsive. She firstly stated that the government guidelines have now changed so she didn't have to wear a mask, so obviously I tried to explain Alloga's stance and the current company policy.*
>
> *…*
>
> *I did ask her to leave the site unpaid on numerous occasions to which she point blank refused, and it even got to the point where I was intending to ask the security team to escort her from the site."*

31. Mr Williams then expanded on this in writing during the claimant's grievance process (page 136). We consider that this further supports the respondent's position about the nature of the meeting and assisted us to find the key facts outlined above.

32. Mr Alford received Mr Williams' e-mail about the incident, and he was performing the shift manager role on the evening of 23 July 2021. He asserts, and we accept, that he did not know the claimant and had not put a face to the name given in Mr Williams' e-mail. He realised that the claimant was the subject of the e-mail the previous e-mail when she went to his office to report that she did not have a face covering. The claimant says that she forgot the face covering given to her the previous day, as a side effect of her medication. In any case, she could not have worn the same face covering again anyway because Mr Williams had given her a disposable mask.

33. The claimant asserts that she was treated in the same unpleasant and bullying manner by Mr Alford as she was by Mr Williams. For the same reasons as given for the previous day, we do not accept that characterisation of Mr Alford's conduct. Mr Alford admits that he did notice Mr Williams' reference to a 'disposable' face mask, and we consider that this mistake contributed to the escalation of the situation on 23 July 2021. Mr Alford thought that the claimant had been given a re-usable face covering which she should have brought with her to work on 23 July 2021. He therefore opened their interaction on the understanding that she should have brought the face covering from the previous day.

34. Ms Beardmore also offered internal witness evidence of the interaction between the claimant and Mr Alford. Mr Alford says that Ms Beardmore was present for part of the discussion and that she ultimately was the person who found the claimant a face covering on this day. We adopt the same caution in respect of Ms Beardmore's evidence as in relation to the previous day but we do consider that her words lend weight to Mr Alford's account of what happened in that interaction. Of relevance, Mr Beardmore wrote (page 141):-

> *"The day after the conversation with myself and then Ryan Williams, Evija Tocinska went down the same route with Lee Alford…*
>
> *Evija Tocinska was being very argumentative with Lee Alford from the beginning and had a very stand-offish attitude towards the situation. Lee explained Alloga's policy of wearing a face mask and she aid she was not going to wear one as the UK government guidelines said they are not needed…*
>
> *She repeated the new government guidelines again, holding her phone up to Lee, and she said at that point "I don't even know you" and went on to say the company cannot make her wear them.*
>
> *Lee and I advised her she needed to wear a facemask or she would be escorted off site by security as this was a breach of Alloga's health and safety department…*
>
> *I advised her we were going around in circles and I will be fetching her a disposable mask from the health and safety department.*
>
> *On my return to Evija, she took the mask and wore it…"*

35. Mr Alford was asked to expand on this interaction in cross examination. He agreed with what Ms Beardmore had written. He also described that he recalls feeling uncomfortable with how close the claimant got to him when showing him how the government guidelines were relaxed. He said that he remembers her proximity because it was unusual to be within a metre or so of someone who is not a family member at that time. The claimant did not describe getting close

36. Having considered the evidence available to us, we find the following facts in relation to the 23 July 2021 discussion:-

    36.1. The claimant went to the office Mr Alford was in to ask for a face covering;

    36.2. Mr Alford asked the claimant where the face covering was from the previous day;

    36.3. The claimant said he did not have any;

    36.4. Mr Alford said that she should have a face covering and looked in the office drawer but could not see one, and he told her that she needed a face covering or she would have to go home unpaid to get one;

36.5. The claimant perceived that she was being treated the same way as the previous day, and said that the rules had changed nationally and so she did not need to wear one;

36.6. The claimant took out her phone and showed Mr Alford the relaxation of face covering rules;

36.7. The claimant asked Mr Alford who he was to tell her she would need to go home;

36.8. Mr Alford said that it did not matter who he was, but he was a manager seeking to enforce the respondent's policy;

36.9. Ms Beardmore entered after hearing the tone of the conversation;

36.10. Ms Beardmore said she could try to get a face covering from the health and safety office and did so; and

36.11. The claimant wore the face covering for the rest of her shift.

37. Support for the respondent's account, which we have accepted in finding the facts above, is found from the contemporaneous e-mail that Mr Alford sent after the exchange (page 93):-

> *"Evening*
>
> *Had the same issue with her this afternoon. I even had her sit next to me and pull her phone out to show me Government a* [sic]
>
> *Only a willing to wear a mask if it was provided, and eventually she was only given a disposable one, so I imagine it'll be the same again Monday…*
>
> *She isn't refusing to wear one, she's just refusing to supply her own. But she's making an issue when there really shouldn't be one."*

38. Mr Alford then expanded on this in writing during the claimant's grievance process (page 138). We consider that this further supports the respondent's position about the nature of the meeting and assisted us to find the key facts outlined above.

The claimant's grievance processes

39. The respondent's grievance policy and procedure was provided at pages 56 and 57. The relevant parts for the purposes of this dispute are:-

39.1. *"… the Company's policy is to encourage free communication between employees and their line mangers to ensure that queries arising during the course of employment may aired and, wherever possible, resolved quickly, efficiently and to the satisfaction of all concerned, thereby enhancing employee relations"* [page 56];

39.2. *"The manager handling the grievance will invite you to a meeting within 5 working days of receipt of the written grievance. The grievance will be discussed*

in detail, and the manager responsible may also carry out separate investigations into the matter" [page 56];

39.3. *"Employees are entitled to be accompanied by a work colleague or a trade union representative, during any such meetings"* [page 56];

39.4. *"The manager responsible will advise the employee concerned how they intend to resolve the grievance within 7 working days of the hearing"* [page 56];

39.5. *"If the employee is dissatisfied with the decision they may appeal in writing to the manager above that which made the decision, within 5 working days of receiving written notification of the outcome"* [page 57];

39.6. *"Appeals will normally be heard by the manager above that which made the decision at Stage 2, within 7 working days of receipt of the written appeal. You have the write to be accompanied to the appeal hearing by a colleague or trade union official";* [page 57] *and*

39.7. *"The outcome of the appeal will be notified to you within 7 working days, and the decision will be final"* [page 57].

40. The claimant raised a grievance against Mr Williams and Mr Alford by a letter dated 25 July 2021, although we note it was sent on 26 July 2021 (page 99). Her grievance letter is at pages 95 to 98. The heading of the grievance is: *"Formal grievance against Ryan Williams and afternoon of 23rd July 2021 cover manager. Both individuals separate days (22nd and 23rd July 2021) have harassed/bullied and discriminated me under Equality Act 2010, section 6 when I approached one of them and was approached by Ryan Williams"*. It goes on to outline that: *"Both of them were trying to send me home on 22nd and 23rd July 2021 on unpaid basis, because they refused to provide me with a face mask on my request"*. The claimant further explains that *"as we all know from 19th July 2021 masks in England are not anymore mandatory to wear – that's why I mistakenly thought it shouldn't be a problem if I don't wear a mask on 21st July as my mask was damaged and I didn't have a replacement one"*.

41. On page 97, the claimant expands on her disability and the impact of the events upon her:-

41.1. *"I felt too stressed after 22 July 2021 situation and I cried. I cannot be in a stressed environment, because I am already 6 months on antidepressants 100mg Sertraline – this month should be last on 100mg – but after all these situations I might need to carry on and I will need extra medications to calm my body down."*

41.2. *"I believe I have been bullied/harassed and discriminated by both managers (not sure if Friday person was a manager). I consider myself to be disabled under Equality Act 2010 section 6. If I forget a mask, it is then part of my disability and any attempts to unlawfully send me home constitute to disability discrimination."*

42. The claimant suggest that *"both managers should be disciplined for unprofessional conduct and notes placed on their personal files"*. On page 98, the claimant

introduces her representative Mr Prikulis-Pastars and requested a remote grievance meeting so that he could attend it with her:-

> *"On Monday 26th July 2021 on my behalf Vadims Pikulis-Pastars will make contact with HR Department to discuss when we can schedule a meeting. I really hope it will happen this week and this matter will be taken seriously. I kindly ask company for permission for Vadims to accompany me in the grievance meeting. If possible could we please have this meeting as Zoom or conference call type, so Vadims can participate remotely."*

43. Ms Donald confirmed receipt on 26 July 2021 (page 99). On the same day, the claimant was invited to a grievance meeting to take place at 9:00am on 29 July 2021 (page 100), and this was altered to midday at the claimant's request so her 'witness' could attend (page 101). Mr Prikulis-Pastars also made contact with the respondent's human resources team on 26 July 2021 (page 106). His initial e-mail does not mention the claimant's disability or any need for his attendance as a reasonable adjustment. Ms Donald asked him to confirm whether he was a union representative or an employee of the respondent. His reply (page 105), again, does not reference his presence as being required by a disability or as a reasonable adjustment. Instead, we consider that his reply is quite aggressive and threatening in tone:-

> *"I am neither, however, I am a friend of Evija's and she trusts me to help her with this matter. It would be great if you as Evija's employer would accept my help to support her through this process.*
>
> *Of course you may reserve the right not to allow this and only at ACAS, Employment Tribunal stage Evija would decide who is her representative. I am quite sure she would most likely choose me. I am currently representing several employees in the Employment Tribunal in exactly the same cases.*
>
> *I am pretty sure there won't be a need for Evija to take it so far and your department will be able to professionally resolve the matter…"*

44. The claimant says she did not see this unhelpful e-mail until the disclosure process, and did not authorise an e-mail to be sent in these terms. We accept that she did not see the e-mail. Ms Donald declined to allow Mr Prikulis-Pastars to attend the grievance meeting, explaining that the claimant was entitled to be accompanied by a trade union representative or a colleague during the meeting. At this point, Mr Prikulis-Pastars does raise the claimant's help and requirement for support (page 104):

> *"It would help if you wouldn't follow on this occasion Employee Relations Act, especially because Evija is taking 100mg of Sertraline, which is the highest possible dosage. Evija's wellbeing should be prioritised…"*

45. He does not, though, press the point, and accepts the decision on the claimant's behalf: *"It is still okay as I believe Evija will be ready for the meeting and I am very*

please to see that you organised it on the same day you received the grievance letter, I find it very professional!".

46. Mr Trowhill was appointed to conduct the grievance meeting with Ms Donald present as a witness for Mr Trowhill. Mr Trowhill is of the same grade as Mr Williams and Mr Alford, although they are not friends and all usually work in separate units. Mr Trowhill said that this was the first grievance process he had conducted. The grievance meeting convened on 30 July 2021. The claimant was accompanied by her union representative Mr Baptiste. Notes of the initial meeting, which the claimant does not challenge, were at pages 112 to 119. The claimant was told that the purpose of the first meeting was to record the claimant's *"version of events"* and then for Mr Trowhill to go and investigate the grievance.

47. The claimant relayed to Mr Trowhill her recollection of what happened between pages 112 and 117. When asked, on page 117, if there was anything else she wanted to add, the claimant said: *"so stressed now need to go on higher dose of antidepressants. So high stress level"*. Mr Trowhill then asked a series of questions about the claimant's views about wearing face coverings and the respondent's policy about face coverings. Mr Baptiste opined (page 119) that the situation could have been easily avoided and that there had been needless escalation of a situation where a face covering had been broken and then forgotten.

48. The meeting was adjourned at 12:45pm so that Mr Trowhill could gather evidence. He then gathered the written evidence of witnesses from page 136 to 141. Those were all of the witnesses mentioned apart from Craig Robinson, who when asked said that he did not hear any discussion. That evidence all painted a picture of the claimant not wearing a mask, of refusing to wear a mask and being difficult about it, and being argumentative with supervisors or management about the respondent's face covering policy. During this time, Mr Trowhill, Ms Donald and witnesses to the incidents all had periods of annual leave. The respondent's evidence is that this is usual in the school holiday, where managers will take leave, ideally sequentially, in the holiday season. We accept this evidence about absence and the reason for it – it is a common occurrence across all sectors and we as a Panel are all familiar with the summer holiday annual leave impact.

49. The grievance meeting reconvened at 1:00pm on 27 August 2021, with Mr Baptiste again present as the claimant's union representative. The meeting notes continue from page 120 and finish on page 135. The statements from colleagues were not sent to the claimant ahead of the meeting but she was provided with copies to read and process during the meeting. The claimant disagreed with the contents of the statements from colleagues. The claimant said that there were others who witnessed the incidents, and the meeting was adjourned again for investigation and a further statement was obtained from Ms Mrozek (page 144). This statement describes how Ms Mrozek challenged the claimant about not wearing a face covering and that the claimant was not keen to wear one.

50. To allow time for the gathering of witness evidence that the claimant had raised, and being impacted again by holiday, the grievance outcome was not held until 20 September 2021. We consider that Mr Trowhill was in a difficult position in this process because he had carried out the investigation suggested and all of that investigation yielded results which conflicted with the claimant's account of the

incidents. We find that the tone of the grievance meeting was more confrontational than would be expected, and note Mr Baptiste's intervention in page 132 where he is recorded as saying *"grievance not disciplinary, hung up on mask situation"*. Mr Trowhill told us that he considered the grievance as openly and fairly as he could, but that even with that mindset he was faced with four accounts against one in terms of whether or not the claimant's grievance was founded on accurate facts. He dismissed the grievance, although considered that Mr Alford should have reacted more quickly to replace the face covering and this may have stopped the escalation on 23 July 2021. The claimant was informed of the outcome by letter dated 23 September 2021 (page 148).

51. On 24 September 2021, the claimant raised a subject access request.

52. The claimant mounted an appeal of the grievance outcome on 29 September 2021 and followed this with a written letter on 1 October 2021 (pages 164 to 165). Ms Marshall had made contact with the claimant following the grievance process to suggest that she and the claimant sit down to discuss her health condition and potential reasonable adjustments. The claimant's appeal (pages 157 and 158) includes reference to her disability:-

> *"I am very appreciative to receive your sympathies in regards to my situation as you can appreciate how it affects me being in constant state of stress and reaching a point where Sertraline 150mg of antidepressants is not helping due to situation at work. I raised this with my GP who will make further arrangements for me. Also, please note you are the first colleague to understand that I have a disability in two months' time, despite me clearly outlining it in the grievance letter!"*

53. In the appeal, the claimant asks for reasonable adjustments because of her health condition in the same terms as previously: representation by Mr Prikulis-Pastars and for the meetings to take place remotely. The claimant accepts an offer to meet with Occupational Health.

54. On 20 September 2021, the claimant raised a grievance against Mr Trowhill and Ms Donald (pages 160 to 162), the individuals who had conducted the first grievance process. The complaints relate to the delays to the grievance process, that Ms Donald took part rather than just took notes, that the grievance meeting felt more like a disciplinary meeting, that there was no account taken of the claimant's disability, the conclusion of the grievance itself, and that overall they had discriminated against the claimant on the grounds of her disability. The expected outcome of the grievance was a request that *"these two individuals be dismissed from employment by Alloga UK as soon as possible"*.

55. The new grievance also made a request for reasonable adjustments due to the claimant's disability. Page 162 records:-

> *"Due to my disability, I can only attend meetings in relation to the grievance process off site via Zoom from home and whilst represented by Vadims Prikulis-Pastars and potentially Brian Baptiste. I have applied for reasonable adjustments and appealed rejection. If rejection won't be lifted and these adjustments can't be provided, I won't be able to find myself in*

> *a position to attend these meetings. I will also consider that as a further act of discrimination under Equality Act 2010 section 6 and further action will be considered."*

56. Ms Marshall replied to this letter on 1 October 2021 (page 166) and advised that she would deal with the grievance and the request for reasonable adjustments. Ms Marshall considered that occupational health advice was necessary before dealing with the grievance or the adjustments:-

> *"I acknowledge your reluctance to sit down with me for a meeting and I also recognise your disability, therefore, I would very much like to arrange for an occupational health visit for you as soon as possible so that we can consider their professional advice on any workplace adjustments prior to us having any further meetings."*

57. The claimant replied on 2 October 2021 (page 168) to express hope for a way forward and to reaffirm her request for reasonable adjustments. She also expressed disappointment that Ms Marshall was *"solely now want[ing] to rely on Occupational Health Practitioners advice"* before dealing with the grievance or the reasonable adjustments. We pause here to consider that this is an unnatural reading of Ms Marshall's correspondence. Ms Marshall correctly identifies occupational health as the best resource available to the parties to advise on reasonable adjustments. In our view, it would be unreasonable to move forward without that advice.

58. The claimant uses that perceived issue and the treatment she says she was subjected to inform Ms Marshall that she has already contacted ACAS about the discrimination she says she suffered. The e-mail on page 168 ends with an overt threat to bring this litigation:-

> *"I hope you will change your mind and allow Vadims to represent me and will go ahead with running all necessary meetings remotely in regards to the Grievance and Grievance Appeal raised. If you won't please let me know as soon as possible so I can progress this matter to Employment Tribunal"*.

59. Ms Marshall replied on 4 October 2021 (page 170) to advise that the processes will therefore continue and *"in addition to this we have requested an occupational health appointment for you to attend to help us better understand your request for 'reasonable adjustments'.*

60. On 5 October 2021, the claimant was invited to a grievance appeal hearing to take place on 11 October 2021 (pages 172 and 173).

61. The claimant replied to Ms Marshall on 7 October 2021 (page 178) to report that she had attended the occupational health meeting on the previous day. She asked what was meant by 'better understand' the reasonable adjustments. She said that the delay to reasonable adjustments to wait for occupational health was further discrimination. The claimant also wrote:-

> *"May I please reiterate due to my disability I do not want any direct contact with management representatives unless it's absolutely necessary."*

62. Mr Salmon was appointed to hear the claimant's grievance appeal. We accept his evidence about his appointment in full. He had a meeting with the HR department on 7 October 2021 and was printed a letter for the claimant to attend the meeting. He sought her out on 7 October 2021 and handed her the meeting invite. He says that he detected no upset in the claimant. The claimant said that she was very upset by being handed the letter in person, and spent time upset at work following this exchange.

63. Later on 7 October 2021, the claimant wrote (page 180) to advise that she was unable to attend the grievance appeal meeting because the respondent, in her words, denied *"reasonable adjustments based on you not 'fully understanding' them".* The claimant ended the e-mail with *"I am extremely disappointed to see my employer directly discriminating me now, I really hope you will stop as soon as possible as you are damaging my health"*.

64. The occupational health report was completed on 8 October 2021 (pages 174 to 176). The report includes a summary of the claimant's medical history and her account of the events of 22 and 23 July 2021. The claimant also discusses her fitness for meetings and the requests for Mr Prikulis-Pastars to attend them and also for meetings to be held remotely. Relevant extracts are:-

    64.1. *"She went on to tell me that English is not her first language and when she is under pressure, she becomes agitated and distressed, finding it difficult to vocalise her thoughts clearly which is why she has requested the assistance of a friend who can translate from Latvian more accurately than her…"*

    64.2. *"In my clinical opinion, Ms Tocinska is fir for work and fit to attend meetings with support".*

    64.3. *"Ms Tocinska tells me that she is requesting additional support to help her with the language… It would be a business decision who attends such meetings.*"

    64.4. *"I advise that any meetings take place in a neutral environment at a pace that is comfortable for Ms Tocinska with frequent pauses…"*

    64.5. *"In my clinical opinion it is likely that Ms Tocinska's symptoms of depression would be considered a disability as described by the Equality Act 2010."*

65. From this report, and the witness evidence, we find as a fact that the claimant did not describe the request for Mr Prikulis-Pastars to be present as a reasonable adjustment on account of her *disability*. Instead, it was a request to do with *language*. Indeed, we find that at no point is Mr Prikulis-Pastars identified as a specific person required for support due to her disability. As a matter of fact, the claimant was accompanied for support by her union representative and that union representative did advocate for her in those meetings.

8 October 2021

66. Mr Salmon was unaware of the claimant's request for management to be kept away from her. We accept his evidence on this point as it is supported by Ms Marshall. In any case, Mr Salmon considers that the request was unworkable because management are always likely to be in the vicinity of staff at some point during the day.

67. There is a conflict in the evidence about what happened on this day. The claimant says she was talking to her supervisor when Mr Salmon approached them and stared at her. She asked the supervisor to stay with her, and then they walked on. She says that Mr Salmon followed her closely (the distance she said he followed her lengthened during cross examination). This, she says, caused a panic attack and she went home.

68. Mr Salmon accepts that he may have been in the vicinity of the claimant but denies any deliberate action which could have been found intimidating. He says that his role requires him to walk the site, and he does so at least once a day. He said that he might interact with staff or pause to check if they are working when they appear to be idle or chatting, but that he does not remember being around the claimant on this day. He said he would not follow someone closely but it might be that he was walking the same way as the claimant at a similar time because they were working in the same space.

69. We prefer Mr Salmon's evidence on this point. We consider that the claimant has a tendency, highlighted during the hearing, to perceive herself to be a victim in situations where there are more innocent explanations, and to also exaggerate the evidence. We find that the pair were in the vicinity of each other on 8 October, which the claimant perceived to be intimidating, but that the objective facts are as Mr Salmon described them. He did not stare at the claimant or intend any malice or intimidation. He likely did walk the same way as her, but not deliberately.

70. We are satisfied that the claimant had a panic attack as a result of the interaction with Mr Salmon and it is agreed that she went home unwell from this date. She e-mailed the respondent on the same evening and said: *"please be advised that Steve Salmon has caused my panic attack today by being present in my vicinity at work. Immediately after this happened, I had to leave home earlier escorted by Peter Jaros"* (page 185).

71. Ms Marshall wrote to the claimant on 11 October 2021 (page 186) to acknowledge the claimant's distress but to also outline the reasons why the respondent declined her request to let Mr Prikulis-Pastars represent her at respondent meetings:-

> *"As stated previously, we decline your request for reasonable adjustment in this meeting to be represented by a third party. This is detailed in the letter presented to you.*
>
> *The decision to decline your request is on the basis that we have not yet received the report from Occupational Health with their professional advice on adjustments to be made.*
>
> *You stated in a previous email that you did not see any reason why the grievance process should be delayed, and it was your wish that it was*

heard at the earliest opportunity due to the stress that it was causing you, hence inviting you prior to receiving the occupational health report."

The claimant's resignation

72. The claimant did not attend work after 8 October 2021 and was signed off work by her GP.

73. On 23 October 2021, the claimant received the outcome of her subject access request. She says that she read the statements written by Mr Williams and Mr Alford on the evenings of 22 and 23 July 2021, and saw their acknowledgements that she was not refusing to wear a mask on those dates. She also says that the flippant tone of Mr Alford's e-mail was upsetting, and that the statements contradict, in her view, the information given to Mr Trowhill in the grievance process. The claimant says this opened her eyes to how badly handled the grievance process was, and as a consequence she sent in her resignation on the following day (page 189), citing being *"badly treated, discriminated, bullied and harassed"*.

74. Whilst we have little doubt that the claimant felt that way, we do not consider that the two versions of statements given by Mr Williams and Mr Alford are contradictory. The later statements do acknowledge that the claimant wore a face covering at the end of the conversation. None of them say that he claimant refused to wear a mask and was intransigent about it, merely that she needed one to be supplied to her before she would wear one. That is the truth on the facts we have found. In our view, the claimant has misread the situation.

75. The respondent paid the claimant for her notice period even though the claimant considered that she had resigned without notice and did not expect to get paid.

Relevant law

Constructive dismissal

76. An employee is entitled to treat themselves as constructively dismissed where they terminate their employment contract following the employer seriously breaching that contract in a way which goes to the root of the employment contract (*Western Excavating (ECC) Ltd v Sharp [1978] QB 761*).

77. The serious, or repudiatory, breach of contract may be to express provisions of the employment contract or to provisions which are implied into the contract by case law. All employment contracts contain a term that *"the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (*Malik v BCCI SA (in Liquidation) [1998] AC 20*, as amended by *Varma v North Cheshire Hospitals NHS Trust [2007] 7 WLUK 116*).

78. Whether or not there has been a breach to the implied term of trust and confidence is an objective question and the employer's intentions are irrelevant. If the employer commits conduct which is likely to destroy or seriously damage mutual trust or confidence, then it will be deemed to possess the subjective intention (*Leeds Dental Team Ltd v Rose [2014] ICR 94*) and the employee is likely to be able to accept that

repudiatory breach and terminate the employment contract (*Morrow v Safeway Stores Plc [2002] IRLR 9*).

79. The determination as to whether a breach is sufficiently serious as to constitute a repudiatory breach is an objective test, and it does not matter that the employer might genuinely believe a breach to not be repudiatory (*Tullett Prebon Plc v BCG Brokers LP [2011] EWCA Civ 131*). The overall repudiatory breach may be a single act or a collection of smaller breaches or a series of events which are not individually breaches but which amount to a breach when put together (*Garner v Grange Furnishing [1977] IRLR 206*.

Direct disability discrimination

80. *Section 13(1) Equality Act 2010* provides:-

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

81. The claimant must establish that she was objectively treated in a 'less favourable' way. It is not sufficient for the treatment to simply be 'different' *(Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 HL*). The person(s) with whom the comparison is made must have *"no material difference in circumstances relating to each case"* to the person bringing the claim (*section 23(1) Equality Act 2010*). The comparator should, other than in respect of the protected characteristic, *"be a comparator in the same position in all material respects as the victim" (Shannon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL)*. If there is no such comparator in reality, then the Tribunal should define and consider how a hypothetical comparator would have been treated if in the same position as the claimant save for the fact that they would not have the protected characteristic relied upon *(Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646, CA)*.

82. The phrase 'because of' is a key element of a direct discrimination claim. In *Gould v St John's Downshire Hill [2021] ICR 1 EAT*, Mr Justice Linden said, in respect of determining 'because of':-

> *"It has therefore been coined the 'reason why' question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of. In need not be the sole ground for the decision… the influence of the protected characteristic may be conscious or subconscious."*

83. It is a defence for a respondent to show that it had no knowledge of the protected characteristic relied upon, on the basis that the protected characteristic it did not know about could not have caused the treatment complained of (*McClintock v Department for Constitutional Affairs [2008] IRLR 29 EAT*. However, this defence does not apply where the act itself is inherently discriminatory (such as differentiation on the grounds of a protected characteristic), and in such cases whatever is in the mind of the alleged perpetrator of the discrimination will be irrelevant (*Amnesty International v Ahmed [209] ICR 1450 EAT*).

84. Under *section 136(2) Equality Act 2010*, the claimant needs to show on the balance of probabilities that there are facts from which the Tribunal can decide that direct disability discrimination has occurred. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (*section 136(3) Equality Act 2010*).

Harassment related to disability

85. *Section 26 Equality Act 2010* provides:-

> *"(1) A person (A) harasses another (b) if –*
>
> *(a) A engages with unwanted conduct related to a 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; and*
>
> *(c) Whether it is reasonable for the conduct to have that effect."*

86. 'Disability' is a protected characteristic because it appears in the list of protected characteristics at *section 4 Equality Act 2010*.

87. Under *section 136(2) Equality Act 2010*, the claimant needs to show on the balance of probabilities that there are facts from which the Tribunal can decide that harassment related to disability has occurred. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (*section 136(3) Equality Act 2010*). This means that the claimant will need to show more than simply she was disabled at the time any unwanted conduct occurs (*Private Medicine Intermediaries Ltd v Hodkinson EAT 134/15*.

88. Harassment claims must be determined by considering evidence in the round, looking at the overall picture. Although the knowledge and perception of the characteristic on the part of the alleged perpetrator is relevant, it is not necessarily determinative *(Hartley v Foreign and Commonwealth Office Services [2016] ICR D17)*. This means that the determination of the words 'related to' is a finding the Tribunal should make drawing on all of the evidence before it to account of the possibility, for example, that the alleged perpetrator may be displaying a sub-

conscious bias which affects the recipient even if they do not know of the protected characteristic (*Tees Esk and Wear Valleys NHS Foundation Trust v Aslan and another [2020] IRLR 495 EAT*).

Failure to make reasonable adjustments

89. *Section 20 Equality Act 2010* provides:-

> *"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply, and for those purposes, a person on whom the duty is imposed is referred to as (A).*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *…."*

90. *Section 21 Equality Act 2010* provides that a failure to comply with the three parts of *s20* is a failure to comply with a duty to make reasonable adjustments, which is an act of discrimination. In other words, the employer must take reasonable steps to alleviate the substantial disadvantage where 'substantial' means *"more than minor or trivial"* (*section 212(1) Equality Act 2010*).

91. An employer is not liable in respect of a failure to make reasonable adjustments unless it knows or is reasonably expected to know that a PCP will place the employee at a substantial disadvantage. *Schedule 8 Equality Act 2010* deals with in work reasonable adjustments. *Paragraph 20(1)(b)* includes employees by virtue of the definition of an 'interested disabled person' in *Part 2 of Schedule 8*. *Paragraph 20(1)(b)* reads (together with *20(1)*):-

> *"A (employer) is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement"*.

92. A holistic approach should be adopted when considering the reasonableness of the adjustments, and may include factors such as the effectiveness of the steps, the cost, the practicability, and the nature and size of the employer's undertaking *(Burke v The College of Law and another [2012] EWCA Civ 87 CA*.

Discussion and conclusions

Direct disability discrimination

93. The claimant relies on five instances of what she says is less favourable treatment, as outlined in the list of issues above. We have found as facts that four of five of those instances did occur. The respondent, through the individuals involved, did

subject the claimant to the treatment complained of. However, to succeed in this claim, the claimant must show that the treatment is less favourable treatment than that which would have been given to those without the claimant's disability. In other words, if the respondent would have treated those who did not have depression in the same way, then the direct disability claim cannot succeed.

94. During the hearing, we heard evidence about the respondent's policies generally in respect of its Covid-19 response. We have found that the respondent was concerned about the stocks of masks it had on site, and so put in place policies and practices which were designed to instil some sense of responsibility in its staff to consistently bring their masks to the workplace to avoid depleting PPE. We have also found that the policy extended to other items of protection such as safety shoes, and have accepted the respondent's account of another member of staff who was not allowed to work on site during a refusal to wear a face mask. In terms of the policy about safety shoes, we consider that Ms Donald's question about what the claimant would have done if she had forgotten her safety shoes was designed to prompt the claimant to realise the similarity of the situation she was in with a more widely acknowledged policy about safety shoes. It is a point that we consider she might have, and could legitimately, put to any employee whom had been involved in the same issue as the claimant.

95. Consequently, we consider that the claimant was not treated less favourably than other employees would have been treated in relation to her forgetting her face mask on 22 or 23 July 2021, or Ms Donald's questioning in a later meeting. On both occasions, she was eventually provided with a face mask. On both occasions, the managers involved tested her to discover the reasons for not having a face mask in order to further the respondent's goal of protecting its potentially limited PPE stock. Where it appeared that the claimant was resistant to wearing a face mask, such as when she began to argue that the rules about face coverings had been relaxed nationally, the respondent's managers reached for the other tool in their arsenal – the possibility that a member of staff refusing to wear a mask would be asked to leave the site and be considered as if they were refusing to work. Whatever we may make about the reasonableness of those practices, if the treatment was the same across all employees, which we consider it was, there can be no direct disability claim mounted about these particular complaints.

96. Having found that there is no less favourable treatment, there is no need to consider whether or not the treatment was done because of the claimant's disability. It follows that the claimant has not established any facts from which an inference may be drawn that there was any disability discrimination. Consequently, there is no need for the respondent to justify the treatment on the grounds of something other than discrimination. In any event, we consider that the claimant was treated the same as everyone else without any different treatment for the claimant.

97. This aspect of the claimant's overall claim fails and is dismissed.

Harassment related to disability

98. When considering this aspect of the claimant's claims, we split the matters pleaded in support of this claim into two parts: (1) the events of 22 and 23 July 2021, and (2) Mr Salmon's proximity to the claimant on 8 October 2021. These were split in this

way because there is a clear distinction between the two parts in the chronology. We found the facts which the claimant relied upon to support her claim in relation to the first part of her harassment claim. For each of them, we accept that the conduct of the managers in question was conduct which the claimant did not want and we do accept that the claimant was very upset by what happened on 22 and 23 July 2021 and we understand why she would be upset.

99. However, to succeed in her claim for harassment *related to disability*, the unwanted conduct has to relate to the claimant's disability. This means that the conduct should be about the disability, or if not then the reason behind the conduct should be because of disability. In our judgment, none of the individuals in contact with the claimant on 22 or 23 July 2021, who committed the unwanted conduct, knew that the claimant was disabled. The question then is whether there is any other evidence that will allow us to conclude that the harassment related to disability on a prima facie basis (ie. that there are the facts from which we could draw the inference that the harassment occurred). In her evidence, the claimant said it was her perception that the treatment from the respondent here was related to her disability. We do not accept that.

100. In our judgment, this is a situation analogous to *Hodkinson*. The claimant had the disability and unwanted conduct occurred. We do not consider that the two are linked, and indeed we consider that the reason why the claimant was aggrieved on the days in question was because the respondent's reaction ran counter to her understanding about the face covering rules nationally. She only relied on her disability later when she raised her grievance.

101. In those circumstances, we do not consider that the claimant has established facts that would shift the burden on to the respondent to show that the conduct complained of was not harassment related to disability. In any event, we consider that those managers were only seeking to enforce the respondent's policies, and they reacted to the claimant's forceful views of the situation at hand. Their actions were not related to the claimant's disability, or to the protected characteristic of disability generally. Consequently, we conclude that the events of 22 and 23 July 2021 are not harassment related to disability.

102. We found that Mr Salmon was 'in the vicinity' of the claimant on 8 October 2021, although we did not consider it more likely than not that Mr Salmon followed the claimant deliberately or was any closer to the claimant than necessary to carry out his normal working practice. We have accepted that Mr Salmon's proximity caused the claimant to have a panic attack and then leave the respondent's site. We therefore agree with the claimant that Mr Salmon's presence was unwanted conduct. By this point, the claimant had had her grievance meeting and had told the respondent that she felt discriminated against because she is disabled. Mr Salmon said that he had not read the documents relating to the claimant's grievance, and we accepted that evidence. We conclude that Mr Salmon did not know about the claimant's disability and that he did nothing on 8 October 2021 which could lead him to be criticised. He also did not know that the claimant had asked not to be approached by management and, although he thought that position was unworkable, he did not deliberately disregard the claimant's request. We have found that he was going about his usual day to day activities and did not seek to target the claimant. In those circumstances, whilst accepting that his presence tipped the claimant into

having a panic attack, we do not consider that it was reasonable for the claimant to reasonably consider his presence created an intimidating, hostile, degrading, humiliating or offensive environment.

103. However, the claimant's complaint is wider than Mr Salmon's conduct alone. The complaint is about the respondent allowing Mr Salmon to be in the claimant's proximity. In our view, it is unusual that the claimant's e-mail about keeping managers away from her was left not dealt with for as long as it was. We consider that the respondent allowing Mr Salmon into the claimant's vicinity was conduct which was unwanted by the claimant. But was that related to the claimant's disability? We ultimately concluded that it was not related to disability. In our view, the delay in dealing with the claimant's request was for operational reasons and the respondent was not challenged about that point. It was not put to the respondent witnesses that the delay in dealing with the request was in any way related to the claimant's disability. We conclude that none of the respondent's conduct on 8 October 2021 indicate facts from which we could draw an inference that there was harassment related to disability. In any case, Mr Salmon decided to go and speak to the claimant in person because he did not wish the first time the claimant to see and meet him to be in a formal setting which might be intimidating. His approaching the claimant was his own practice. The respondent did not deviate from its usual procedures in allowing that to happen, and so we consider that it has shown that its conduct was not related to disability when answering this claim. There is no harassment related to disability in this part of the complaint either.

104. Consequently, this aspect of the claimant's overall claim fails and is dismissed.

Failure to make reasonable adjustments

105. This claim is founded on the alleged substantial disadvantage caused by two alleged PCPs of the respondent: (1) that only union representatives or employees can accompany staff to grievance meetings, and (2) those meeting cannot be held remotely. A PCP is a policy, criterion or practice which applies to all staff. The respondent accepts that PCP1 is a policy of the respondent. It does not accept that PCP2 is a policy, criterion or practice and so we must decide whether or not this is a PCP. In our view, the respondent did have a policy that grievance meetings should, as a starting position, be arranged to take place in person and not remotely. This is evidenced by the fact that the first three meetings relating to the claimant's grievances took place in person, and also by the fact that occupational health were asked to give an opinion about the location of meetings 'as an adjustment'. If the respondent had a flexible approach to the first instance arrangement of a meeting, then it would not have needed to seek justification for moving away from that position.

106. In our judgment, PCP1 did not put the claimant at a substantial disadvantage. Whilst the claimant did set out that she would like Mr Prikulis-Pastars to provide representation, and he pointed to her needing accompaniment due to her disability, we do not consider that the claimant needed to have him specifically present to avoid suffering a substantial disadvantage. The claimant was allowed to have a trade union member present, and Mr Baptiste accompanied her to the grievance meetings. We consider that he was able to provide appropriate support and representation, and did speak up for the claimant in meetings when required to do so. We accept that the

claimant was upset in those meetings, but we do not consider that the presence of Mr Prikulis-Pastars would have lessened that upset. When the claimant had the chance to justify why his presence would have helped her in terms of reasonable adjustments for disability (at the occupational health meeting), she relied on his language abilities instead of what he could do to assist with her condition. Where we do not consider that the claimant was at a substantial disadvantage as a result of PCP1, there was no duty on the respondent to make any adjustments, and so the claim in respect of PCP1 is dismissed.

107. In our judgment, PCP2 did not put the claimant at a substantial disadvantage either. She attended those meetings during the work day when at work. The claimant was able to attend those grievance meetings in person and indeed it was most convenient for her to do so because she was in work. Her request for the meetings to be remote were not couched as reasonable adjustments related to disability, in our view, and were motivated at all times by her desire to provide the opportunity for Mr Prikulis-Pastars to attend those meetings remotely. The claimant was able to discuss this issue with occupational health, which the respondent considered necessary before making a decision on the reasonable adjustment requests. The occupational health opinion did not recommend remote meetings specifically – it recommended a 'neutral venue'. The respondent did not ultimately have the opportunity to respond to this recommendation because the claimant resigned. In our judgment, we see no reason to disbelieve the respondent's contention that it would have facilitated a remote meeting to assist the claimant upon receiving appropriate advice on the point from occupational health. Consequently, there was no duty on the respondent to make any adjustments and so the claim in respect of PCP2 is dismissed.

Constructive dismissal

108. We understand that the claimant was distressed by the time she made a grievance. She would not have raised a grievance if not distressed. It follows that she is more likely than not to be unhappy with a grievance process if it is not resolved to her satisfaction. In our view, the claimant was particularly unhappy that the managers involved with her on 22 and 23 July 2021 were not dismissed or made subject to a serious sanction. However, as explained to the claimant during the course of the hearing, the test for constructive dismissal involves a much higher bar than the claimant being unhappy with events and work and then choosing to resign because of the grievance/upset. The claimant needs to show us that the respondent has acted in a manner which is calculated or likely to destroy or seriously damage the implied term of mutual trust and confidence, without having had the proper cause to have done so.

109. For this part of the claim, the claimant relies on six allegations which she says individually or collectively amounted to a breach of the implied term of mutual trust and confidence. We have found facts about each of the six allegations, and have made the following conclusions about each of them in terms of whether or not the respondent breached the implied term at each point:-

109.1. *"Fail to obtain an occupational health report on the claimant in July 2021"*

We have not found that the respondent did obtain an occupational health report on the claimant prior to the one in the bundle in October 2021. In our view, the only indication that the claimant had any difficulty in July 2021 was at the point she submitted her grievance and mentioned her disability. That grievance was about a specific pair of incidents in the workplace and not about the claimant struggling to work in her role. We note that the claimant did not request an occupational health report at this time, and that the claimant would need to give consent for such a process to take place.

In our judgment, there is not enough evidence that an occupational health was required to place an obligation on the respondent to procure one. Consequently, we do not consider that there was a breach to the implied term of mutual trust and confidence in relation to this issue.

109.2. *"Fail to undertake remote meetings with the claimant in respect of her grievance"*

We have found that this issue did not constitute a failure to make a reasonable adjustment and that the respondent was justified in acting as it did in arranging to hold the meetings in person until the occupational health report advised on a different approach. In those circumstances, it cannot reasonably be argued that the failure to convert a meeting to a remote one, as a stand alone issue, can breach the implied term of mutual trust and confidence. It follows that we fine none.

109.3. *"Fail to allow the claimant to be represented at her grievance meeting by Mr Prikulis-Pastars"*

We have found that this issue did not constitute a failure to make a reasonable adjustment and that the respondent was justified in acting as it did in following its own policy and not allowing a third party to accompany her in the grievance process. We do not consider that the respondent can be criticised for following its policy where that decision has not resulted in any discrimination to the claimant. It follows that we do not consider this issue to represent a breach of the claimant's employment contract.

109.4. *"Fail to allow the claimant to have an interpreter at her grievance meetings"*

We note that the only time that the claimant relies on Mr Prikulis-Pastars for his language ability was when speaking to occupational health. None of the correspondence about him or from him references that he could or would provide language translation services. Further, we note that the claimant did not ask the respondent directly for another interpreter for these meetings. She only ever asked for Mr Prikulis-Pastars to represent her. It is clear to us that the claimant was able to do her role without translation, and that her emails display strong written English. Although we encountered the claimant almost two years after these events, and allow for that, we also witnessed the claimant ably able to represent herself over these four days.

We do not consider that the respondent was under a duty to secure an interpreter for the claimant unless she asked them to and it was necessary for her to have an interpreter. In those circumstances, there cannot be a breach of the employment contract through a failure to secure an interpreter.

109.5. *"Mishandle the claimant's grievance"*

We have found a series of facts about the grievance process and none of those facts are at striking odds with the respondent's policy. We also cannot detect any breaches of standards or codes such as the ACAS code for grievance (which we were not in any case referred to). We have found that the claimant had misread key correspondence which led her to conclude that the process was mishandled. We have found that Mr Trowhill was in a delicate position where he needed to understand the claimant's views about how or why all of the other witnesses case her as a person who was refusing to wear a face covering.

We have found, in terms of the claimant's evidence, that she has a tendency to perceive the worst from the person she is speaking to and that this leads her to exaggerate evidence. We consider that this tendency has led her to characterise the grievance as being 'mishandled' when in reality it was not.

The claimant also complained about the delay to the process. We consider that this is not unsurprising given that the grievance was brought during the summer holiday, and that the claimant mentioned further witnesses in both parts of the main meeting which led to adjournments. Frankly, we consider that the grievance is far more likely to have been mishandled if the respondent had not paused those meetings to investigate additional witnesses.

Finally, we do not consider it fair for the claimant to criticise the respondent's managers for them taking annual leave during the grievance processes. They would not have expected to adjourn and reconvene meetings and so, at the point of their appointment, they may not have known that that leave would impact upon the process.

We do not consider that the claimant's grievance was mishandled. We do not consider that the process run by the respondent was so poor that it breached the implied term of mutual trust and confidence. To the extent that the claimant still relied on this as a 'final straw', as it appears in her evidence, it also follows that we do not consider that this issue when added to anything else in this list would combine to constitute a breach of the implied term of mutual trust and confidence.

109.6. *"On 8 October 2021, allow or not prevent a senior operations manager, Mr Steve Salmon to be "in the vicinity" of the claimant causing her to have a panic attack"*

> We have found that this issue did not constitute harassment. Absent of that, we do not consider that Mr Salmon going about his usual duties could constitute a breach of the implied term of mutual trust and confidence. It is not reasonable of the claimant to expect that she can work in an area where no management may approach her. In our judgment, such a position would lead to the claimant being unable to attend work. In those circumstances, it follows that we do not consider that this issue was a breach of the implied term of mutual trust and confidence.

110. In our judgment, none of the above issues breached the implied term of trust and confidence individually. The respondent did not run a perfect grievance process, and the claimant is unhappy about that and about the outcome of the process. But the respondent is not required to run a perfect grievance process. It is only required to run a process which is not so poor that the Tribunal considers, on an objective basis, that the implied term of mutual trust and confidence was destroyed or likely to have been seriously damaged. We do not consider that the respondent acted in such a way. The respondent considered the relevant evidence and came to a conclusion on the grievance which was not, in our view, at odds with the evidence available.

111. We also do not consider the way in which the process was run to be unreasonable in any way. The respondent was entitled to exclude a representative who was not an employee or trade union member. In our judgment, the respondent had reasonable cause to do so in order to protect potentially sensitive material about the respondent's processes and business. Similarly, the respondent was able to choose to conduct the process in person if it wished to. We have found that not converting the meeting to a remote forum was not a failure to make a reasonable adjustment. Additionally, we consider that the respondent had reasonable cause for requiring the meeting to take place in person – it wished to consider the matter in a more personable and interactive setting, and also a face to face setting increases the chances that a significant mental health impact of the meeting can be identified with the claimant who would then be able to access support rather than potentially sitting at home alone.

112. Having made the conclusions in respect of each aspect above, it follows that we do not consider, objectively on these facts, that there was a repudiatory breach of contract which would have allowed the claimant to terminate the contract either as an individual incident or as a collection of matters taken as a whole. This aspect of the claimant's overall claim fails and is dismissed. The test for constructive dismissal is rightly a difficult one to succeed with. Repudiatory breaches are by their nature serious and should be starkly apparent to the Tribunal. Nothing that the respondent did can be said to have been calculated or likely to damage the implied term of mutual trust and confidence in an objective sense, as we look at it as a Panel in the Tribunal. It is not enough for the claimant to merely be unhappy with a series of things that happened to her in this employment.

Disposal

113. None of the claimant's claims are well founded and so all are dismissed as a result of our unanimous judgment. We have sympathy for the challenges that the claimant described as a result of her disability, but those challenges have not led to any liability being fixed upon the respondent. We wish the claimant well with

managing her disability and ultimate recovery, and hope that this judgment now allows these particular matters to rest.

Employment Judge Fredericks

Dated: 28 May 2023