EMPLOYMENT TRIBUNALS

Claimant: Ms P Hargreaves

Respondent: Reactive Solutions FM Limited

HELD AT: Liverpool **ON:** 30 & 31 May and 1 June 2023

BEFORE: Employment Judge Johnson

MEMBERS: Mr R Cunningham
Ms A Eyre

REPRESENTATION:

Claimant: In person
Respondent: Mr M Ramsbottom (Peninsula advocate)

JUDGMENT

The judgment of the Tribunal is that:

(1) The claimant did not make protected disclosures in accordance with section 43B Employment Rights Act 1996.

(2) The claimant's dismissal was not for the reason or principal reason that the claimant made a protected disclosure contrary to section 103A Employment Rights Act 1996. Accordingly, this complaint fails.

(3) The complaint of harassment relating to the protected characteristic of disability contrary to section 26 Equality Act 2010 is not well founded and is unsuccessful.

(4) The complaint of direct disability discrimination contrary to section 13 Equality Act 2010 is not well founded and is unsuccessful.

(5) The complaint of harassment relating to the protected characteristic of sex contrary to section 26 Equality Act 2010 is not well founded and is unsuccessful.

(6) The complaint of a failure to make reasonable adjustments contrary to sections 20 & 21 Equality Act 2010 is well founded and succeeds in relation to the failure of the respondent to purchase equipment recommended by Access to Work without delay and to attend/undertake training recommended by Access to Work.

(7) The question of quantification of the claimant's losses arising from the respondent's failure in its duty to make reasonable adjustments will now be determined at a remedy hearing on a date to be confirmed. The remedy hearing will take place before the same Tribunal which heard the final hearing on liability whose decision is given in this judgment, and it will be listed for 1 day in the Liverpool Employment Tribunal.

REASONS

Introduction

1. These proceedings arose from the claimant's employment as an office manager from 1 June 2020 (the respondent says 15 July 2020 in its response) until 4 March 2022 (the respondent says that it paid the claimant in lieu of notice until 31 March 2022). The Tribunal noted that whichever dates are correct, the claimant had less than 2 years continuous service.

2. The claimant presented a claim form to the Tribunal on 26 April 2022 following a period of early conciliation from 9 March 2022 to 6 April 2022. She brought complaints of unfair dismissal, disability discrimination, sex discrimination, notice pay, holiday pay and unlawful deduction from wages.

3. The response was presented resisting the claim and the case was the subject of case management initially before Employment Judge (EJ) Doyle on 5 September 2022, when extended the final hearing to 4 days. Further case management took place before EJ Buchanan on 14 April 2023 when the claimant was permitted to amend her claim to bring a complaint of automatic unfair dismissal arising from the making of a protected disclosure, (commonly known as a whistleblowing dismissal).

4. EJ Buchanan concluded the list of issues, revised the case management orders in order that the case would be ready for the final hearing, and it was confirmed that the complaints of ordinary unfair dismissal, notice pay, unlawful deduction of wages and holiday pay were no longer being considered, either because of jurisdictional issues or because the money claimed had been paid.

Issues

<u>Time limits</u>

5. Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 10

December 2021 may not have been brought in time.

6. Were the discrimination complaints made within the time limit in section 123 Equality 2010 Act? The Tribunal will decide:

   a) Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?)

   b) If not, was there conduct extending over a period?

   c) If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?)

   d) If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

      i) Why were the complaints not made to the Tribunal in time?
      ii) In any event, is it just and equitable in all the circumstances to extend time?

7. It is **noted and recorded** that there do not appear to be time issues in relation to the complaint of automatic unfair dismissal.

Unfair dismissal: section 103A of the 1996 Act

8. Has the claimant shown the reason or principal reason for dismissal?

9. Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

10. If so, the claimant will be regarded as unfairly dismissed. The claimant will say that after raising protected disclosures at various times and on her last day in the office on 9 February 2022, she was sent a letter terminating her contract on 4 March 2022 for alleged gross misconduct namely that she had stolen her contract of employment and that she was to be reported to the police for theft. This letter was withdrawn on 6 March 2022 and the reason for dismissal altered to breach of trust. The claimant will say the respondent failed to engage with her request to appeal the decision to dismiss her.

Remedy for unfair dismissal

11. Does the claimant wish to be reinstated to their previous employment?

12. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

13. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant

caused or contributed to dismissal, whether it would be just.

14. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

15. What should the terms of the re-engagement order be?

16. What basic award is payable to the claimant, if any?

17. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

18. If there is a compensatory award, how much should it be? The Tribunal will decide:

    a) What financial losses has the dismissal caused the claimant?
    b) Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    c) If not, for what period of loss should the claimant be compensated?
    d) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
    e) If so, should the claimant's compensation be reduced? By how much?

19. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

20. Did the respondent or the claimant unreasonably fail to comply with it?

21. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

22. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

23. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

24. Does the statutory cap of fifty-two weeks' pay or £89,493 apply?

<u>Protected disclosures</u>

25. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

    a) What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:

PD1 In June 2021 and again on 9 February 2022 to Gary Jones and Kevin Brown when she questioned the decision to claim furlough payments for employees who were working in their business full time.

PD2 In August 2021 and again on 9 February 2022 when she questioned/raised with Gary Jones and Kevin Brown the use of a former employee's electrical 18th edition certificate to dishonestly gain safe contractor status.

26. Did she disclose information?

27. Did she believe the disclosure of information was made in the public interest?

28. Was that belief reasonable?

29. Did she believe it tended to show that:

    a) a criminal offence had been, was being or was likely to be committed. The claimant will say she believed the act of claiming furlough for employees who were in the workplace was an offence.
    b) a person had failed, was failing or was likely to fail to comply with any legal obligation;
    c) the health or safety of any individual had been, was being or was likely to be endangered. The claimant will say that she believed the use by Gary Jones of a former employees electrical 18th edition certificate to gain safe contractor status was dishonest and could affect the health and safety of others.
    d) information tending to show any of these things had been, was being or was likely to be deliberately concealed.

30. Was that belief reasonable?

31. If the claimant made a qualifying disclosure, was it made:

    a) to the claimant's employer?

32. If so, it was a protected disclosure.

Disability

33. The respondent concedes that the claimant was a disabled person for the purposes of section 6 of the 2010 Act by reason of macular dystrophy and being diagnosed as sight impaired from December 2020 and registered as partially sighted on 28 January 2021.

Harassment related to disability: section 26 of the 2010 Act

34. Did the respondent do the following alleged things:

    a) On, or around, May 2021, did Mr Jones say the following to the Claimant:

i) ‘You don’t need a white stick, do you?’
ii) ‘Why would you need to do that, do you have to pretend and shut your eyes?’
iii) ‘Why are you applying for a guide dog you are fine don’t be silly?’

34. The remaining matters referred to below at paragraph [44].

35. If so, was that unwanted conduct?

36. Was it related to disability?

37. 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?

38. 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.

<u>Harassment related to sex alternatively of a sexual nature: section 26(1) (2) of the 2010 Act</u>

38. Did the Respondent do the following things:

a) Did Mr Jones regularly stand over behind the Claimant in close proximity when she was seated at her desk?
b) Did Mr Jones make crude comments about women by way of the following?

i) Refer to Mr Brown’s wife as a ‘slag’?
ii) Say ‘is it the fit one or the fat one,’ when referring to females at the client call centre?
iii) Describe a potential buyer of his wife’s vehicle by saying “she’s fit isn’t she?”
iv) On or around October 2021, when referring to young females due to attend a party for his son at his home, say: ‘If there is grass on the wicket – they are old enough.’
v) On, or around October 2021, say there would be ‘young fit birds attending at his house.'
vi) On, or around 10th December 2021, talk about rape and suicide in the office.
vii) On, or around January 2022, say he did not ‘like her face’ when talking about a colleague.

39. In so far as the above allegations are not dated, the claimant will confirm that detail in her witness statement.

40. If so, was that unwanted conduct?

41. Was it related to sex? Alternatively, was it of a sexual nature?

42. Did the conduct have the purpose of effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

43. 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.

Direct disability discrimination: Section 13 of the 2010 Act

44. What are the facts in relation to the following allegations. Did the Respondent do the following things:
    a) Fail to make reasonable adjustments.
    b) Advise the Claimant that there were no funds to purchase the equipment recommended by Access to Work despite funding being available.
    c) Delay purchasing the equipment the Claimant needed, and failing to follow all of the recommendations from Access to Work.
    d) Did Mr Jones say to the Claimant 'so what's up with your eyes then?'
    e) Did Mr Jones say, 'they are not that bad – you can see really can't you, so what's actually up with them?'
    f) Did Mr Jones say, 'your eyes aren't that bad come on, just do it, get it done. You can do this for me you are fine. You can see really, it's not like you're blind get on with it.'
    g) Did Mr Jones act in a manner which made the Claimant feel as though he did not believe her diagnosis?
    h) Did Mr Jones quiz the Claimant after each hospital appointment and ask 'what did they say was wrong with you today? But you can see really so what's the problem?'
    i) On, or around, May 2021, did Mr Jones say the following to the Claimant:

        i) 'You don't need a white stick, do you?'
        ii) 'Why would you need to do that, do you have to pretend and shut your eyes?'
        iii) Why are you applying for a guide dog you are fine don't be silly?'

    j) On or around, 5th July 2021, did Mr Brown tell the Claimant the Access to Work documents had been removed from his desk without his authorisation?
    k) On or around, August 2021, did Mr Jones say the Claimant 'wouldn't get a job anywhere else now [she] was going blind so [she] should be grateful to him and get on board with how he ran things?'
    l) Fail to support the Claimant.
    m) Did the Respondent recruit a new member of office staff without the Claimant's knowledge in or around 4 January 2022?
    n) Remove the Claimant's access to emails and accounts.
    o) Tell the Claimant she could not have support in relation to her disability during the grievance process.
    p) Fail to implement recommendations suggested during the grievance process.
    q) Dismiss the Claimant on 6th March 2022.
    r) Accuse the Claimant of theft and gross misconduct.

s) Fail to hear the Claimant's appeal.

45. In so far as any of the above allegations are not dated, the claimant will provide that detail in her witness statement.

46. Did the claimant reasonably see the treatment as a detriment?

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

48. The claimant says she was treated worse than an employee Matt in respect of the purchase of office equipment and members of staff who were engineers in respect of the purchase of office equipment. In respect of other allegations, the claimant relies on a hypothetical comparison.

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

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

Failure to make Reasonable Adjustments: Sections 20 & 21 and schedule 8 of the 2010 Act

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

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

a) A policy of not complying in full or at all with recommendations made by Access to Work in relation to the Claimant.

53. The claimant is to confirm in evidence if any other PCP is relied on.

54. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the absence of the recommended equipment caused the claimant to become ill with stress and made the carrying out of her duties in the workplace more difficult?

55. Did the lack of an auxiliary namely the items recommended by Access to Work for the use of the claimant put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the absence of the recommended equipment caused the claimant to suffer eye strain and become ill with stress and made the carrying out of her duties in the workplace more difficult?

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

57. Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

    a) To purchase the equipment recommended by Access to Work without delay.
    b) To attend/undertake the training recommended by Access to Work.
    c) To have supported the claimant in the workplace

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

Remedy for discrimination

59. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

60. What financial losses has the discrimination caused the claimant?

61. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

62. If not, for what period of loss should the claimant be compensated?

63. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

64. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

65. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

66. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

67. Did the respondent or the claimant unreasonably fail to comply with it?

68. If so, is it just and equitable to increase or decrease any award payable to the claimant?

69. By what proportion, up to 25%?

70. Should interest be awarded? How much?

Remedy - General

71. How much should the claimant be awarded?

72. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

73. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

74. Would it be just and equitable to award four weeks' pay?

Evidence used

75. The claimant gave witness evidence and also relied upon the witness evidence of her mother Joan Hargreaves and her partner John Murray. Joan Hargreaves was not challenged in cross examination by the respondent and the Tribunal felt she was both a credible and reliable witness.

76. The claimant is visually impaired and was using a white stick (which she was still in the process of learning to use) and dark glasses as appropriate. She received help from Mrs P Bentley, a friend who supported her by guiding her around the room and she also assisted her with locating documents. She was of great assistance to not only the claimant but also the Tribunal and she should be thanked for the support that she provided throughout the hearing as it helped with the smooth running of the final hearing.

77. The claimant explained that although her vision was much reduced and she was now registered blind, she was able to read some of the documents using a magnifying glass which she brought with her to the hearing as an aid. EJ Johnson frequently reminded the claimant that all reasonable adjustments would be accommodated and that she should let him know if at any stage she required a break or assistance to enable her to participate in the hearing effectively. This offer was also made to the respondent witnesses, although neither of them identified any impairments which the Tribunal might need to take into account.

78. The respondent relied upon the witness evidence of its two directors, Gary Jones and Kevin Brown

79. Documents were provided in a joint bundle of almost 500 pages. It had been revised shortly before the hearing and the claimant made an application for the disclosure of additional documents relating to financial statements relating to furlough payments and for the purpose of considering the financial solvency of the respondent in meeting reasonable adjustments proposed by Access to Work and also payments obtained from the government relating to furlough during the Covid pandemic. She also requested evidence of submission of contractor certification relating to certificates of accreditation for the respondent to carry out electrical work.

80. We agreed that the relevant certification should be provided once we had completed our reading on the morning of day 1 of the hearing as it was

relevant and necessary for the consideration of one of the alleged protected disclosures.

81. In relation to the financial documents sought, it was not clear that these documents would provide any additional relevant evidence as the respondents accepted that they claimed furlough in 2020 and that the provision of reasonable adjustments were not delayed by reason of cash flow issues but alleged delays with Access to Work. These were matters which could be dealt with in cross examination and consideration of existing documents within the bundle.

82. Some additional documents relating to accreditation to carry out electrical work was provided at the beginning of day 2 (and while the claimant was still giving evidence) and it was agreed that the 13 pages would be added to the bundle at document 'R1'.

Findings of fact

The respondent

83. The respondent ('Reactive') is a facilities management limited company providing services to businesses involving repairs and maintenance of commercial buildings. They are a relatively new business which was formed a few years ago when Mr Jones' employer became insolvent, and he acquired maintenance contracts from the former customers.

84. He was joined by Mr Brown who was a friend and who was working for another employer, and they became co-directors with a 50/50 share of the business.

85. The business now only has 3 employees, but at the relevant time of this case, they had 11 employees including the claimant.

The claimant

86. The claimant (Ms Hargreaves) was a work colleague of Mr Brown's previous employer, and he was so impressed with her office management skills, he persuaded her to become the office manager with Reactive and her employment began on 13 July 2020.

87. It was accepted by Mr Jones and Mr Brown that neither of them had any previous experience of running their own companies and were very much focused on the practical and operational side of the business. They acknowledged that they struggled to deal with the necessary administrative duties involved with the running the business and managing employees and it was clear that Ms Hargreaves' skills were considered invaluable and indeed, they both gave evidence at the hearing that she was still sorely missed as an employee.

88. An example of the reliance which they placed upon Ms Hargreaves was the creation of a proper filing system with individual personnel files being produced for each employee and a file for each company vehicle. She was clearly very organised, and Mr Brown convincingly described the business as suffering following her departure, saying that *"it had never been the same since she left".*

Disability

89. The claimant (Ms Hargreaves) began to experience a deterioration in her vision before she started working for Reactive. It appeared to improve when she began her new employment with Reactive, which she attributed to the better lighting available in the office. However, this did not last for long and following a referral to St Paul's Eye Hospital in Liverpool, she was diagnosed as suffering from a rare condition of retinal dystrophy which caused her to suffer sight loss from the centre of her macula in each eye and at the time of the hearing, she described her vision as being a total loss of central vision in one eye and limited vision in the other eye.

90. She was registered blind from 28 January 2021 and a Certificate of Visual Impairment was included in the hearing bundle, (at p.169). She currently uses a white cane to assist with mobility and is planning to have a guide dog. She requires a number of aids to allow her to read such as using large text, magnifying glasses and appropriate IT software.

91. She had only worked for Reactive since 15 July 2020 when she was invited to join Mr Brown at his new company and was employed as an office manager. She accepted that as this offer arose during the Covid pandemic, it may have been a risk but she nonetheless trusted Mr Brown.

92. Her evidence was that initially she had not required many hospital appointments and would use holiday entitlement to attend them. On balance of probabilities, the Tribunal accepted that she was never refused permission to attend these appointments by Mr Jones or Mr Brown and they appeared to be genuinely concerned about her deteriorating vision.

93. Indeed, there was no dispute that Ms Hargreaves informed Mr Jones and Mr Brown of her disability in December 2020 and Reactive as respondent do not dispute that she was disabled during the relevant time of this claim.

94. The Tribunal were impressed by Ms Hargreaves' explanation of the mental anguish she faced as she began to realise that she was going to suffer permanent sight loss as her condition progressed. It must have been a considerable shock for her as health professionals at St Pauls and other hospitals/surgeries prepared her for the changes she would need to make to her life. Even without direct experience of what it is like to suffer from progressive conditions of this nature, it does not take a great of empathy to appreciate the mental, emotional and of course physical challenges that she would have been going through at the time.

Allegations of adjustments

95. Ms Hargreaves made a number of allegations relating to discrimination involving her disability and her sex.

96. In terms of disability, Ms Hargreaves made an application to the DWP's Access to Work scheme for a disability assessment by an occupational specialist in order that recommendations could be made to Reactive. These recommendations would involve adjustments to the workplace and training which if carried out, would enable her to continue in her role with the least possible disadvantage.

97. She was provided with an Access to Work grant approval by letter dated 24 March 2021 (pp.177 to 182) and starting with immediate effect. the letter included a schedule of items (p.178), and which involved a combination of physical aids and training with the cost of each item:

    VI Disability Awareness £498.00
    Dyslexia Disability Awareness £498.00
    2 x 27" Monitors £294.54
    1 x Dual Monitor Arm £98.48
    1 x Zoom Text Reader/Magnifier £690.00
    1 x Zoom Text Keyboard £118.80
    1 x 3 Hours Training for Zoom Text £284.40
    6 x 3 Hours of Coping Strategy £1584.00
    1 x Dragon Professional Individual £426.00
    C3220 USB Headset £44.18
    2 x 3 hours of Training for Dragon £492.00

98. The total costs were assessed as being £5028.40 and she was informed that she should discuss the award of the grant with her manager so that the necessary support could be procured, and they should return a declaration, which we understood was returned.

99. Ms Hargreaves raised the grant award to Mr Jones and Mr Brown and all 3 individuals gave evidence which confirmed that she explained to them what adjustments were required, stressing that they were necessary and urgent in order that she could carry out her job effectively. Mr Jones gave a credible description of her telling them that they all needed to go on a course together and she was clearly trying to manage both directors through the process given their limited experience of this matter and her universally acknowledged administration skills.

100. Unfortunately, on this occasion, this dynamic became a problem. Ms Hargreaves was the person who would normally be best equipped to deal with processes such as to Access to Work. However, on this occasion it was she who was vulnerable, and it was she who needed the support of Mr Jones and Mr Brown. It was evident that although they both wanted to help her, they lacked basic administrative skills, (and which they freely acknowledged). Mr Jones described Ms Hargreaves health issues as being a *'journey'* that they were all going on together and it appeared to at times, he was overwhelmed by personnel issues involved as a consequence. Accordingly, in this

situation, Ms Hargreaves could only continue to encourage them to engage with Access to Work. However, although they sent a number of emails to Access to Work during the first half of 2021, by the summer, nothing had been put in place.

101. An initial difficulty related to Reactive's short term cash flow issues which meant that the company could not simply go out and buy the equipment itself. This led to the initial approaches made to Access to Work seeking permission for this organisation to procure the recommended items and training on behalf of the company, which they thought would be possible given that the DWP provided the grant figure identified. The Tribunal heard confusing evidence from Mr Jones about delays in obtaining pro forma invoices from Access to Work. The Tribunal understood that while the suppliers of the listed items would normally expect employers to purchase the items in question and then seek reimbursement from DWP, some would be willing to rely upon confirmation that DWP would pay the supplier directly if these necessary pro from invoices were provided by the DWP.

102. The Tribunal acknowledges that these transactions were taking place while the Covid pandemic remained a significant issue and there was undoubtedly supply chain issues with suppliers. Moreover, Access to Work would in all likelihood have been inundated with requests for additional support from disabled employees who were having to work from home.

103. However, even taking into account these probable circumstances, Mr Brown and Mr Jones placed too great a reliance upon Ms Diane Ackroyd at the DWP (as their point of contact) and failed to consider their ongoing duties to a disabled employee. It was fair to say that items such as training courses may have required some assistance from Access to Work, but they nonetheless failed to recognise the progressive nature of Ms Hargreaves' condition and the ways in which it would affect her both physically and mentally in the workplace.

104. While she was the Office Manager, she needed the necessary adjustments to be secured by the directors and they should have either done this themselves or considered instructing an external person to assist them. Ms Hargreaves gave very credible evidence of the anxieties she was experiencing at this time and she was finding it harder and harder to do her job and felt vulnerable in terms of her ability to continue working.

105. Eventually, Mr Jones took matters into his own hands 6 months later in September 2021 and purchased bigger screens and installed them the same day. It appeared by this point that cash flow was no longer an issue and during that time, new office chairs had been bought for everyone. A large text keyboard was obtained in December 2021. Unfortunately, it was not compatible with Ms Hargreaves' computer and could not be used.

106. While these adjustments appeared to ameliorate the difficulties faced by Ms Hargreaves, they were the only items on the Access to Work recommendations list which were provided by Reactive before her employment terminated. The whole process appeared to run out of steam by

the second half of 2021. Ms Hargreaves was perceived by Reactive as coping with the limited adjustments and Mr Brown admitted that the whole process fell by the wayside.

107. It may well have been the case that business was improving, and consequently the directors had become incredibly busy. But this did not mitigate against their duty to support Ms Hargreaves by procuring the items which Access to Work identified. Indeed, it appeared to be the case that by failing to properly support her in this way, they actually undermined their business as this invaluable employee was not able to operate to the best of her abilities and thereby support them.

108. Mr Jones and Mr Brown did say that in early 2022 they recruited Caitlin Brown as an administrative assistant with the intention of her helping Ms Hargreaves. While they argued that this was a supportive measure to assist with her disability, their evidence was not convincing as on balance of probabilities they did not effectively involve Ms Hargreaves in the recruitment process.

109. Ms Hargreaves was understandably feeling vulnerable, and her anxieties were heightened by the way in which Ms Brown was recruited, leaving her with a suspicion that she was training up her eventual replacement. Ms Hargreaves had suffered a bereavement over the Christmas 2021 period and was feeling very vulnerable, although unfortunately Mr Jones and Mr Brown did not appear to recognise her vulnerability. She said, *"this undermined me in my position of office manager, and I felt humiliated and felt that I was being replaced and excluded and this seriously affected my mental health and esteem and felt I wasn't wanted in the company."*

110. Mr Jones and Mr Brown asserted that they actual relocated the business premises closer to Ms Hargreaves' home during this period, despite it being located farther from their homes. It is true that the premises did move in 2021 to Anderton, which is close to her home and the directors took Ms Hargreaves with them when looking for alternative premises. However, it was also noted that the premises selected had the best configuration for the business activities being undertaken and also allowed Mr Jones to have space for his other interest which involved refurbishing camper vans and mobile homes. The Tribunal found that at its highest, this amounted to a *'happy accident'* rather than a deliberation adjustment aimed to support Ms Hargreaves.

111. It was also the case that Ms Hargreaves could work from home on several days each week. However, this was a practice which she had adopted in her previous employment and which was already present and unaffected by her diagnosis with retinal dystrophy. As she was a trusted employee who got the job done and could happily work at home and in the office, she was afforded a great deal of flexibility by Reactive, but this did not feature in the recommendations made by Access to Work. Ms Hargreaves was given lifts to work once she had to surrender her driving licence, but again this was not a specific adjustment recommended by Access to Work either.

Allegations of disability discrimination – direct/harassment

112. Ms Hargreaves made a number of allegations against Mr Jones, complaining that he said discriminatory things relating to her disability and these included:

a) *"you don't need a white stick, do you?"*
b) *"You're fine really"* which she says was followed by a laugh as if he was making a joke.
c) *"why do you need to train to do that? Do you have to pretend to shut your eyes?"* This was in relation to occupational support provided to assist her with the loss of vision as her condition progressed.
d) "*why are you applying for a guide dog? You are fine, don't be silly!".*

113. She also made other allegations of a similar nature and in general terms described a belief on her part that Mr Jones was sceptical about the seriousness of her visual impairment. All of these allegations took place in May 2021. She gave convincing evidence of how these comments made her feel and she described them as being humiliating and degrading, both at the time they took place and when she was recalling the incidents in the preparation for the case.

114. Mr Jones disputed that he said those things as alleged and Mr Brown who was often in the same office, denied hearing any of the comments being made. Mr Jones gave credible evidence about being concerned and upset about Ms Hargreaves' disability. He tended to ramble when giving evidence during the hearing. However, he was clearly aware of this behaviour, telling himself under his breath to get back on track and focusing upon answering the questions. While by his own admission he described himself as struggling to say right thing and he had a tendency to be clumsy with words, he nonetheless appeared genuinely concerned with Ms Hargreaves circumstances. Indeed, he too appeared to be overwhelmed by Ms Hargreaves' developing eye condition and displayed a mixture of curiosity and nervousness in his dealings with her. On balance while we accepted that conversations would have taken place between Mr Jones and Ms Hargreaves concerning her developing impairment, they were meant with curiosity and concern and were not dismissive or suspicious in nature. There was no convincing evidence heard from Ms Hargreaves that she told Mr Jones (or Mr Brown), that his comments were unwelcome.

Allegations of sex discrimination

115. She also described treatment which she ascribed to her sex and in particular the behaviour of Mr Jones whom she said did the following things:

a) *Standing too close and over her when going to the printer.*
b) Calling Mr Brown's wife *"a slag"* in her presence.

c) When holding a telephone conversation in the office concerning a client call, she said he would say things like *"is she the fit one or the fat one? Show me a picture of her on Facebook?"*
d) When Mr Jones was selling his wife's car, he was described as placing his mobile phone in Ms Hargreaves' face and showing the picture of a potential buyer saying, *"she's fit isn't she".*
e) She recalled another incident where shortly before Halloween 2021 he described a party he was hosting for his stepson and said to Mr Brown in front of Ms Hargreaves, that *"there would be loads of fit birds attending"* and when Mr Brown suggested that that *"are they not a bit young for you mate?".* She said he replied with the bizarre metaphor *"if there is grass on the wicket – they are old enough".*
f) She also referred to Mr Jones referring in quite lurid terms to rape and suicide and programmes relating to this subject on television. There were text messages between Ms Hargreaves and Mr Brown concerning her dismay at these discussions and that she did not want to be in the office alone with him.
g) When Ms Caitlin Brown was recruited in January 2022, Mr Jones was alleged to have said *'I don't like her face'.*

116. Ms Hargreaves said that these comments made her feel quite ill and she felt violated by them. When questioned by Mr Ramsbottom, she agreed with his suggestion that she found the comments to be unprofessional, violating and derogatory.

117. Mr Jones denied categorically that he made any of the alleged comments. He said that these were not the sort of things that he would say and replied in cross examination that *'it was just not me'.* He gave credible evidence of surprise at some of the terms that he was alleged to have said asserting that he did not even know what some of the metaphors were and how they could amount to sexual comments. Mr Brown supported Mr Jones concerning these allegations and although he was supportive of Ms Hargreaves in the text exchange regarding the rape/suicide comments, he gave credible evidence about the falling out between them for a period and said that *'he hated him at that time'.* Additionally, he acknowledged that he was in difficult position of being a co-owner of the business and having Ms Hargreaves as a friend whom he confided in.

118. Moreover, both Mr Jones and Mr Brown observed that Ms Hargreaves would join in some of the discussions at work and while it was accepted that *'is she the fit one or the fat one?'* comment would have been made there was a context behind these comments. They both said that they related to two women who worked for a customer services desk who both had the same name and one of them referred to herself that way. While there may be many reasons why these words would have been used, we accepted Mr Brown's and Mr Jones' evidence that Ms Hargreaves was engaged in these discussions and did not seek to discourage them. Indeed, they gave credible evidence of her cutting out photographs of the two women in question and sticking them on the wall and describing one of the women as having *'lovely lips'* with reference to her perceived use of lip fillers.

119. In relation to the rape/suicide allegations, on balance there was credible and reliable evidence given by Mr Jones and Mr Brown about the context of this allegation and how it related to a series of discussions over a period of time involving this issue. Mr Jones conceded that he did then refer to programmes on Channel 5 involving stalking and that upon reflection he was digressing unnecessarily.

120. In relation to the printer, while it was accepted that it was located close to Ms Hargreaves desk and in a place where space was limited, Mr Jones and Mr Brown were credible (and it did not appear to be disputed by Ms Hargreaves), in saying that she asked for it to be moved there because she was the person who used the printer the most. When anyone else had to retrieve printing, it was necessary for them to stand behind her and we were not persuaded that on balance, Mr Jones would behave inappropriately when doing so.

121. Ms Hargreaves put to Mr Jones in cross examination that *"You might not mean to be offensive, but sometimes it comes across as being offensive?"* The Tribunal noted that Mr Jones struggled to answer this question before saying *"I hold back, I have never been rude or derogatory to do with what's wrong with your eyes".* While not accepting that he made the alleged comments, the way Mr Jones' replied to this question appeared to show that he had only just realised that things could be said to someone which could result in offence, even though that was not his intention.

122. However, while Mr Jones may well have had a tendency to *'put his foot in it'* when dealing with people, on balance of probabilities, we do not accept that the allegations made against him happened as alleged or if they did, they needed to be measured against a wider context of what was happening in the surrounding discussions.

123. We are not critical of Ms Hargreaves for making these allegations as there were clearly frank discussions taking place in the office and at that time, she was a stronger person in the workplace than she is now. As her condition has progressed her confidence has declined causing her to reflect upon conversations that happened in the past. The messages available within the bundle do not reveal any power imbalance within the office relationship at the time. While we acknowledge that Ms Hargreaves may have been feeling increasingly vulnerable, we were on balance of probabilities unable to find that she was being submissive to either Mr Jones or Mr Brown. Accordingly, we accept Mr Ramsbottom's submission that the comments did not happen as alleged, or that when considered as part of the overall context that existed at the time, it was not a case of Ms Hargreaves being a victim of unfavourable comments from either Mr Jones or Mr Brown. While some of the comments forming her allegations in this complaint were quite 'singular' in nature, if they were said, we can only conclude that they were used by other persons whom she encountered at the time when she was working for Reactive.

Grievance and Dismissal

124. On 9 February 2022, Ms Hargreaves was in the office with Ms Brown when Mr Jones arrived having been out on site. There was some discussion regarding DBS checks and the use of a DBS provider which had resulted in an engineer becoming confused by emails which he was receiving.

125. He had been to one of the files to access documents relating to a van, when he described Ms Hargreaves as saying without any warning, *"I can't take this anymore".* Mr Jones said in reply, *"What I have done?"* and she replied, *"it's you, it's not what you said, it's the way you said it!".* She then left the office and Mr Jones recalled saying *"bye, bye!",* which upon reflection when giving evidence, accepted was unnecessarily flippant. He said, *"I felt a bit daft and thought it was going to be one of those days".*

126. Mr Brown was on the phone in the next office and heard raised voices but could not tell exactly what was happening, but Ms Hargreaves left the office and then came back (both Mr Jones and Mr Brown said *"stormed back into the office"*). Mr Jones said she came straight over to her desk, was swearing at her and said, *"I am going to report you for that camera".* He added that she was looking up at a camera at this desk and was almost touching it, accusing him of breaching her human rights. Mr Jones added that he had never heard Ms Hargreaves swear before and described himself as being *"a sensitive person who didn't like confrontation".* He went home himself shortly after this incident which had resulted in Ms Hargreaves leaving the office.

127. There was a camera by Mr Jones' desk, which he said was an Apple web cam for his motor home which had a motion sensor which he was struggling to get working. He had brought it into the office with the idea of using it as a security measure when the office was shut in case of a break in to steal the IT equipment. He confirmed he was not able to get it to work, but it remained located by his desk. This became a source of anxiety for Ms Hargreaves, and we accepted that she became concerned that it was an attempt to subject her to surveillance. She did not raise this with Mr Jones before the incident on 9 February 2022. She did not return to the office following this incident. Ms Hargreaves said she had *'mentally had enough by that point and went off sick'.* She described herself as being *'overwhelmed'.* It was also at this point that Caitlin Brown had been recruited without any involvement by Ms Hargreaves and while Reactive argued that she was recruited with the purpose of assisting her, the way in which she was recruited did not help allay Ms Hargreaves' fears that she would eventually be replaced.

128. Ms Hargreaves was then signed off sick by her GP and raised a grievance on 9 February 2022 by email (pp246-7), which was acknowledged on 11 February 2022 by Mr Brown, (p.249). The grievance referred to Ms Hargreaves feeling *"violated my human rights somewhat".* She referred to some of the incidents contained in the list of issues such as *"talking about rape, sexual abuse"* and referred to being *"unsure why Mr Jones had taken such a dislike to me".*

129. A *'Face2Face'* meeting to hear the grievance took place on 16 February 2022 and was heard by Magda Bowskill who was employed by

Peninsula and clearly not connected with the incidents described in the grievance. It was held remotely by Microsoft Teams and Ms Hargreaves attended without representation, despite having been informed when invited that she could have a representative with her. The minutes of the meeting were 16 pages in length, (pp278 to 293). The decision was reached relatively quickly, and an outcome report was sent to Ms Hargreaves on 25 February 2022, (pp264-277). Of the 5 identified grievance points, 4 were not upheld with point 3 being *"unsubstantiated".* Point 3 related to the allegation that Mr Jones had taken a dislike to Ms Hargreaves.

130. Ms Hargreaves was offered a right of appeal to the grievance which she subsequently requested on 10 March 2022, (p300). She did not receive a response to this request which arose following her dismissal.

131. During her absence from work, Mr Jones said he was looking for Ms Hargreaves' contract of employment and as he was unable to find it, he jumped to the conclusion without any investigation taking place or evidence being available, that she had taken the document without permission. Although it was not entirely clear how the decision to dismiss was reached, on balance of probabilities, we find that this was a decision taken unilaterally by Mr Jones, without Mr Brown's direct involvement or any advice being taken from Peninsula or other employment advisors.

132. This conclusion was supported by the evidence of Mr Jones that he made a number of attempts to draft a letter of dismissal and which he recalled amounting to 7 in number. He acknowledged that this was something he had no experience of doing and as it turned out, it was an unfortunate decision on his part.

133. The letter which he initially sent was dated 4 March 2022 and informed Ms Hargreaves that:

"…your employment with Reactive Solutions FM LTD will end as of 4/3/22."

It went on to say:

"Your employment has been terminated Due to a breakdown of relations confidence and trust…"

"…you keep asking us for a signed copy of your contract and employment handbook which you know full well as office manager you were tasked with making filing and keeping up to date these files which just yours have gone missing. We suspect you have stolen these."

"The theft has been reported to the police and I'm also seeking legal advice advice to bring a prosecution against you for theft & deformation (sic) of character, this alone would making make working with you very difficult as I'm sure you will agree."

"As a result, we have no alternative than to remove you from your role as office manager as Reactive Solutions FM Ltd with immediate effect."

"Due to the dismissal being for gross-misconduct and theft no notice period has been offered."

134. This was an extraordinary letter to send when no investigation had been carried out and Mr Jones accepted when giving evidence that he was angry and upset at the time. Whatever the reasons, this was a wholly unacceptable way for an employer to behave as Ms Hargreaves was not given the benefit of any disciplinary process whatsoever. No right of appeal was offered. Interestingly, the missing contract of employment eventually turned up and Reactive were able to include it in the bundle.

135. Mr Jones said that when he shared this dismissal letter with Mr Brown, he realised that he had sent the wrong draft to Ms Hargreaves and sent a revised letter on 6 March 2022 following her acknowledgement of the initial dismissal letter on 4 March 2022. The revised letter was still dated 4 March 2022. It was very brief and said, *"Your employment has been terminated Due to a breakdown of relations confidence and trust."* No mention of theft was made, and she was informed that there would be a months' notice pay (described as *'garden leave'*), (p297).

136. No right of appeal was offered in the revised letter but in any event, Ms Hargreaves sent a further grievance letter on 16 March 2022 challenging the dismissal and which was effectively, an appeal. However, Reactive did not react to this letter and no further action took place, (p302). Ms Hargreaves sent a reminder on 31 March 2022 and no reply was sent. Ms Hargreaves does accept however, that she did was paid her notice pay, outstanding wages and holiday pay.

137. Ms Hargreaves did argue that she made 2 disclosures to Reactive concerning the company's behaviour and which tended to show a failure of their duty under s43B(1)(a) and/or (b) concerning the following matters:

a) In June 2021 and 9 February 2022, she informed Mr Jones and Mr Brown of their decision to claim furlough payments for employees who were working full time.
b) In August 2021 and 9 February 2022 she informed Mr Jones and Mr Brown the use of a former employee's electrical 18th edition certificate to dishonestly gain safe contractor status.

138. In June 2021, the Covid pandemic was at its height and the government's furlough scheme in its original guise of the Covid Job Retention Scheme. This initially required employees to be either on furlough or in work and from July a more flexible furlough scheme was introduced where employees worked reduced days or on a rotational basis.

139. Ms Hargreaves believed that there was a deliberate attempt by Reactive to wrongly claim furlough payments for employees who were working. We did not hear a great of evidence concerning this allegation, but Ms Hargreaves believed Covid payments were not specifically identified on wage slips and consent letters were not obtained from employees to place

them on furlough. We were not presented with substantive evidence, but Mr Jones accepted that he did claim furlough that he believed it was in accordance with the CJRS rules, although he did admit that he had not been able to resolve the identification of payments on the payslips.

140. However, in June 2021, it appeared that Ms Hargreaves did not actually disclose her concerns to Mr Jones or Mr Brown but was present when discussions were taking place regarding who could claim furlough payments. As a consequence, on balance of probabilities we find that no verbal disclosure took place as alleged and Ms Hargreaves was aware of furlough being an issue at this time.

141. On 9 February 2022 when she walked out of the office, she had asked Mr Jones why the staff and her had not been made aware that he had been claiming furlough. This was a verbal rather than a written disclosure and Mr Jones and Mr Brown were unable to recall any conversations but believed that they followed Covid rules correctly. However, when Mr Brown was pressed in evidence by Ms Hargreaves that he had ever claimed furlough for her he said *'possibly, he could not be sure'.*

142. Ms Hargreaves did refer to furlough in a WhatsApp or SMS text message sent to Mr Brown on or shortly after 9 February 2022 that she would *"…report him for claiming furlough".* Mr Brown argued that it was *"…a mere allegation."*

143. A further matter related to events in August 2021 relating to the provision of certificates which confirmed what types of work Reactive were accredited by a regulatory body to carry out. These certificates formed part of the disclosure request at the beginning of the hearing and were added to hearing documents on day 2 as bundle R1.

144. It was the case that in the year September 2020 to September 2021 (the period when these certificates were effective), electrical work was included as a permitted activity. From September 2021 to September 2022 a certificate was issued which excluded any electrical installation work, but which was the subject of an amended certificate. This was understood to have been reissued several months later, but it did not have a specific date of amendment/reissue produced on it. This did cause some confusion, but it was accepted that it replaced the earlier 2021/22 certificate and included the necessary electrical installation work.

145. The documents produced by Mr Jones and added to the bundle as document R1, also included seemingly valid City and Guilds electrical installation certificates for Gary Jones (awarded 3 December 2010), Scott Wrightson (date unreadable), David Miller (awarded Level 3 in February 2001). Mr Miller was accepted by Mr Jones as being a sub contractor of the business and included an invoice from his business Miller-Metre Electrical Maintenance Services from 26 May 2022. Ms Hargreaves said she did not recognise Mr Miller and felt that neither his nor Mr Jones' certificates were used in August 2021 when the application was made.

146. The Tribunal were unable to conclude that there was anything untoward taking place in relation to the certification that was obtained by Reactive and in fact, the variation of the certificate for 2021 to 2022 so that electrical contractor was only added later in that year, suggests that the business was willing to renew its certification without the electrical accreditation so that the other work areas remained regulated. Ms Hargreaves and Mr Brown were according to Mr Jones, responsible for this accreditation and we accept his evidence on this matter. We accepted Mr Brown's evidence that electrical accreditation was not sought in September 2021 as *"…we needed a certificate for the other jobs".* Mr Miller's certificate was later used to add this accreditation to the certificate in 2021/22.

147. In terms of disclosure however, the evidence which we heard concerning conversations in August 2021 were confused and did not on balance demonstrate that an actual disclosure took place by Ms Hargreaves to Mr Jones or Mr Brown. At its highest, there were conversations taking place and there may have been discussions about the necessary certificates required to renew accreditation. We needed something more to persuade us that Ms Hargreaves made an actual disclosure.

148. There was of course a second part to this alleged disclosure and this involved events on 9 February 2022. In cross examination, Ms Hargreaves was unclear about what she said regarding the alleged protected act on this date relating to the electrical accreditation. She said that she made reference to informing Mr Brown verbally on a phone call. This was not accepted by Mr Brown in his evidence and he was not challenged by Ms Hargreaves during cross examination as her focus was upon the matter of furlough. Taking into account the earlier alleged incident in August 2021 which appeared to involve Mr Brown leaving off the electrical accreditation on the 2021/2022 certification.

149. Ms Hargreaves does have a duty to prove the allegation that she made a protected disclosure in February 2022 to Mr Brown or someone else relating to the employer at this time and unfortunately, we were unable to be persuaded on balance of probabilities, a disclosure was made either verbally or in writing, which suggested that there was a failure by Reactive to properly apply for contractor accreditation in 2021/22 using current and valid certification of suitably qualified employees or sub contractors.

150. Ms Hargreaves may well have believed that things were not being done properly, but it was the actual communication of information which was essential to amount to a protected disclosure and we are not satisfied that the allegations made in relation to protected disclosure 2 involved a disclosure of the relevant information.

151. As a consequence, on balance of probabilities, we were unable to accept that the decision to dismiss, while reached in a chaotic and unsystematic way, arose in connection with the protected disclosures relied upon by Ms Hargreaves.

Law

Protected disclosures

152. Part IVA of the Employment Rights Act 1996 (ERA) deals with protected disclosures and section 43B(1) identifies those disclosures which qualify for protection, which are as follows:

(a) That a criminal offence has been committed, is being committed or is likely to be committed,
(b) That a person has failed, is failing or is likely to fail to comply with any legal obligations to which he is subject,
(c) That a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) That the health or safety of any individual has been, is being or is likely to be endangered,
(e) That the environment has been, is being or is likely to be damaged, or
(f) That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

153. Section 43C ERA provides that a protected disclosure can be made to a worker's employer or any other person who has legal responsibility for them.

154. Section 47B ERA explains that a worker has the right not to be subjected to any detriment by any at of deliberate failure to act, by their employer on the ground that they made a protected disclosure.

Automatic unfair dismissal

155. Within Part X ERA, section 103A provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason, (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

156. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

157. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal.

158. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing

the employee; and must be determined in accordance with equity and substantial merits of the case.

Disability

159. Section 6 of the Equality Act 2010 provides that a person has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his ability to carry out day-to-day activities. Section 212 provides that substantial means more than minor or trivial. Schedule 1 of the Act provides that the effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect.

160. When considering whether a Claimant is disabled within the meaning of the Equality Act 2010, the Tribunal must take into account the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) issued by the Secretary of State which appears to it to be relevant.

Direct discrimination

161. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

162. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

Comparators

163. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

Harassment

164. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

(a) A engages in unwanted conduct related to a protected characteristic (race in this case); 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.

165. Section 26(4) provides that 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.

166. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

Reasonable adjustments

167. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know, and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.

Burden of proof

168. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

Time Limits under the Equality Act 2010

169. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period

is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Discussion

Time limits

170. In terms of jurisdiction, Ms Hargreaves was relying upon automatic unfair dismissal only and did not have sufficient service under section 108 ERA in which to bring an ordinary unfair dismissal complaint under Part X ERA. However, she was bringing a complaint of automatic unfair dismissal contrary to section 103A ERA, arguing that the dismissal was connected with the making of protected disclosures. These complaints are not subject to the minimum service requirements of section 108 ERA and the complaint can proceed. However, it is subject to the question of whether or not an effective protected disclosure was made under section 43B ERA.

171. In terms of the complaints of discrimination, section 136 EQA, we heard helpful submissions from Mr Ramsbottom relating to the complaints of discrimination made under sections 13 and 26 EQA. Mr Ramsbottom was instructed to concede that even if the allegations took place more than 3 months before the notification of a potential claim to ACAS, (which we calculated as being any date before 10 December 2021), they would in all likelihood form part of a series of continuing acts, or alternatively it would be just and equitable to extend time in accordance with section 123 EQA.

172. While we have considered these allegations and find that most of them happened before 10 December 2021, (mainly May 2021). Some appeared to happen in isolation, but they formed part of an overarching situation where Reactive had to comply with their duties to support Ms Hargreaves and were effectively something which formed part of a series of events continuing until her date of termination. However, in any event if this was not correct, we accept that it would be just and equitable to extend time and accept these complaints. The reason is that Ms Hargreaves was clearly facing a very challenging time with the ongoing management of her deteriorating sight and her attempts to secure adjustments in the workplace. She was only able to reflect and consider the events that arose following her diagnosis when she began sick leave in February 2022. Under these circumstances, it was not reasonable to expect her to have raised these matters at an earlier date, especially as we accepted that she felt vulnerable and was worried about becoming unemployed as a consequence of the anxieties which surrounded her progressive condition.

173. For the avoidance of doubt, the duty to make reasonable adjustments under section 20 & 21 EQA continued from the notification of disability in December 2020 until Ms Hargreaves' dismissal on 4 March 2022.

Disability

174. It was accepted that Ms Hargreaves was disabled from December 2020 in accordance with section 6 EQA by reason of the condition of retinal dystrophy.

Direct disability discrimination

175. Ms Hargreaves relies upon 19 allegations of treatment which she says were detriments and that she was treated less favourably than an employee Matt, who was not identified, (nor any explanation provided about during the hearing) and other members of staff who were engineers in relation to the purchase of office equipment. In respect of other allegations, hypothetical comparators were relied upon.

176. The Tribunal felt that the allegations of direct discrimination in relation to a failure to make reasonable adjustments and the allegations relating to the failure to purchase office equipment were ill conceived as they should be brought within the actual complaint of a failure to make reasonable adjustments under sections 20 & 21 EQA. This is because Ms Hargreaves could not demonstrate that a hypothetical comparator without a disability like hers would have received these adjustments in materially similar circumstances. There was certainly no evidence to suggest that a non disabled person would seek the specified adjustments and even if they have, that they would have been allowed. There is a separate complaint of failure to make reasonable adjustments brought by Ms Hargreaves which deals with the question of a failure to provide equipment etc, to support her impairment and this is discussed below.

177. There were also allegations relating to the removal of Ms Hargreaves' access to emails and accounts, a failure to implement recommendations suggested during the grievance process, dismissing her and making allegations of theft and gross misconduct.

178. Reactive did not dispute that Ms Hargreaves was treated in this way and we accept that they happened as alleged. They clearly amount to detriments. However, based upon our findings in this case, we do not accept that this treatment was connected with her disability in that a hypothetical non disabled employee in the same material circumstances would have been treated in the same way. Those same circumstances would be an employee walked out of the office after shouting at a director, who had raised a similar grievance and who was suspected (albeit unreasonably) of stealing company files, would have been treated in the same way.

179. In relation to the other allegations involving things said, the Tribunal was unable to accept that Mr Jones made these comments in the way which they were alleged by Ms Hargreaves. While we noted that Mr Jones could be clumsy in how he spoke, on balance we were unable to accept that the treatment happened as alleged. He was clearly and credibly concerned with Ms Hargreaves' health and his real difficulty was being unable to adopt a less emotional and instead take an efficient and practical approach to ensure the

adjustments requested were implemented as quickly as possible. This however, was not less favourable treatment as his failure to react would have happened with a non disabled hypothetical comparator (and in the absence of any evidence to the contrary, the identified comparators). However, these particular matters are considered in relation to sections 20 and 21 EQA below.

180. Ultimately for those allegations which appear to have happened as alleged (at least to some extent), there needs to be something more than a claimant having a disability. The allegation has to bear some relationship to the asserted disability so as to suggest direct discrimination and having considered the evidence in this case, we were unable to identify something sufficient to shift the burden of proof to Reactive as respondent.

Harassment disability

181. These allegations are effectively a repetition of those made within the direct discrimination complaint which related to things said concerning Ms Hargreaves's treatment and support which she required such as learning to use a white stick and applying for a guide dog by way of example.

182. For the reasons explained above we do not find that Mr Jones said the alleged things at all or in the context which has been described. It is therefore not necessary to consider whether they had a particular purpose or effect and this complaint is not successful.

Harassment sex

183. These allegations were not found to have happened as alleged. While Mr Jones had to stand behind Ms Hargreaves' desk when accessing the printer this situation arose as a consequence of her requesting the printer to be moved there so she could easily access it. Given her impairment, it is understandable that she might want to limit how often she had to cross the office. However, we were unable to accept that Mr Jones behaved inappropriately, and it was not related to sex or of a sexual nature. While it is understandable that sometimes it can feel intrusive having someone step behind you as Ms Hargreaves alleged, these actions arose from necessity and her desire to have the printer placed where it was most convenient for her. On balance, we cannot accept that in the context of this case, this allegation had involved unwanted conduct of a sexual nature.

184. The series of alleged sexual and crude comments were denied and not accepted by Reactive. There was some conversation about *'is she the fit one or the fat one'* in relation to a client/customer, but we concluded that this arose from a shared discussion where at the time Ms Hargreaves was a participant in these discussions and was willing to join in without any suggestion of coercion or unwillingness on her part.

185. There was a conversation about rape and suicide. But in terms of overall context, this related to an initial discussion which Ms Hargreaves freely participated in and related to a further discussion a few months later. While she became unhappy with Mr Jones when she walked out of the office, we do

not accept it was unwanted conduct as it arose from an incident which she had shared, where she appeared unconcerned and where Mr Jones reasonably thought it could be referred to again when another event reminded him of it. In our finding, this appeared to be a single further incident and was not something that he routinely raised for no apparent reason or by way of titillation. Even though these incidents arguably were of a sexual nature in relation to rape comments it did not have the purpose of creating an intimidating hostile degrading, humiliating or offensive environment or Ms Hargreaves nor did they have that effect. In terms of her perception, Ms Hargreaves would have been aware that the comments related to an earlier conversation about these matters, and it was not reasonable to conclude that the conduct in question had that effect.

Reasonable adjustments

186. It is alleged that Reactive had a policy of not complying in full or at all with the recommendations made by Access to Work. This relates to the report provided by Access to Work on 24 March 2021, and which listed equipment and training which needed to be provided by Reactive to minimise the disadvantage experienced by Ms Hargreaves in the workplace by reason of her disability.

187. In principle Reactive were willing to comply with the recommendations, but they failed to do so, and this was seemingly because they expected Access to work to sort these things out on their behalf. That was not how the system worked and they were expected to be more proactive.

188. There were clearly difficulties arising from Mr Jones and Mr Brown relying upon Ms Hargreaves to carry out administrative functions and this was an occasion where the burden was placed upon them. We did not accept that there was an active process of deliberately avoiding compliance with the Access to Work recommendation. By September 2021 a point had been reached where limited support and screens had been obtained.

189. However, as time progressed and business picked up, the question of adjustments appeared to be forgotten about and there was an acceptance in relation to this duty, that *'it fell by the wayside'* (to use Mr Brown's own words). By default, a practice arose which resulted in a failure to comply with the bulk of the requirements, and they failed to support Ms Hargreaves, when she had asked so many times already, and in her own words*, "I just gave up."* The Equality and Human Rights Commission Code of Practice on Employment (2011) section 6.10 recommends that the phrase provision, criterion or practice should be 'construed widely' and the Tribunal finds that a PCP arose from an incorrect expectation that the implementation of the recommendations were the responsibility of Access to Work and not the employer. This was a mistake and adversely affected Ms Hargreaves as her condition progressed.

190. Accordingly, there can be no dispute that the failure to put in place the Access to Work recommendations placed Ms Hargreaves at a substantial disadvantage compared with someone without her disability. These recommendations were made by Access to Work because a substantial

disadvantage had been identified and as long as these steps were not implemented, the disadvantage continued, and this was especially the case as Ms Hargreaves' condition deteriorated and she became more stressed in relation to her ability to function effectively within the workplace and her anxiety about becoming incapable of doing her job.

191. Reactive were aware at all times of the requirement to comply with the recommendations of Access to Work and indeed both Mr Jones and Mr Brown acknowledged that they had this duty.

192. Reactive failed in this duty in that they expected Access to Work to resolve all of the measures recommended and while there may have been temporary cash flow issues, these appeared to diminish as 2021 progressed with the screens being purchased in September 2021. However, this took longer than it should have done and apart from the purchase of a large type keyboard which did not work with Ms Hargreaves' computer in December 2021, Mr Jones and Mr Brown gave up. While we acknowledged that Mr Jones and Mr Brown were inexperienced in the ways of running a business, they should have been able to instruct an external advisor to assist with complying with the recommendations and as such, they failed in their duty to Ms Hargreaves.

Unfair dismissal

193. Ms Hargreaves did not have sufficient service under s108 ERA to bring a complaint of ordinary unfair dismissal under Part X ERA. Had she been able to bring such a complaint, it is likely that it would have succeeded given the disappointing way in which her employment was terminated by Mr Jones. His total failure to follow procedure was wholly unfair and he had no reason to accuse Ms Hargreaves of theft. What is particularly egregious is that she was absent from work through ill health and was provided with the initial letter without any warning and at a time when she was particularly vulnerable. It is hoped that Reactive will reflect upon what has happened in this case and ensure that in future it has in place a proper disciplinary process which follows the ACAS Code of Practice and importantly understands how and why that process works the way that it does.

194. Ms Hargreaves was of course permitted to bring a complaint of automatic unfair dismissal contrary to section 103A ERA in relation to the protected disclosures concerning furlough payments (PD1) in June 2021 and/or 9 February 2022 and concerning dishonestly gaining contractor certification for 2021/22 (PD2) in August 2021 and/or 9 February 2022.

195. Whether or not there was a failure by Reactive to comply with requirements relating to furlough or obtaining contractor status, we accepted that she genuinely believed that there were issues with the way that the company dealt with its obligations concerning these matters. Taking into account our findings above concerning the inexperience of Mr Jones and Mr Brown in running a business, the real issue may well have been their overall disorganisation, but whatever the reason, it is not a matter which directly concerns this Tribunal.

196. What is relevant is whether Ms Hargreaves on the dates identified in relation to PD1 and PD2 actually disclosed information to her managers either verbally or in writing which tended to show a failure identified in section 43B ERA such as legal obligations or health and safety duties or even a criminal act. There did appear to be conversations in relation to both PD1 and PD2 in June and August 2021 respectively which did not reach the point of being disclosures information by Ms Hargreaves. In relation to PD2, we did not hear evidence which proved on balance of probabilities a further disclosure took place in February 2022. In terms of PD1, Ms Hargreaves did refer to furlough in a WhatsApp or SMS text message sent to Mr Brown on or shortly after 9 February 2022 that she would *"…report him for claiming furlough"* and *"…falsely claiming benefits".* Mr Brown argued that it was *"…a mere allegation."*

197. We accepted that Ms Hargreave was concerned about the furlough payments being claimed and it was certainly the case that both Mr Jones and Mr Brown struggled with administrative tasks. However, on balance we do find that there was a disclosure of information to Mr Brown on or around 9 February 2022 relating to the question of Reactive claiming furlough payments. However, we felt on balance that while a vague reference was made to failures on the part of Reactive it was not articulated to a sufficient degree where it *"…tends to show one or more of the following [i.e. legal failures by an employer under s43B(1)(a) to (f) ERA]."* Something more was needed to be able to constitute a material disclosure under section 43B and in the context and the limited way it was made, meant that it was not in our view a qualifying protected disclosure.

198. Accordingly, we must conclude that there was insufficient evidence to suggest that actual disclosures of information had taken place which Ms Hargreaves believed showed a criminal offence or failure legal obligation. We accept that she had concerns but did not articulate them in a way which put Reactive or indeed anyone else on notice of a failure to comply with legal obligations. There was a suggestion that an implicit threat or fear of making a disclosure because of comments made regarding Mr Jones saying that he would do anything to protect his family. However, the evidence which we heard was not sufficient for us to make a positive finding in relation to this allegation. The burden of proving this disclosure does of course rest with Ms Hargreaves as claimant and unfortunately, she was unable to provide convincing evidence which on balance, persuaded us that such disclosures took place on any of the dates identified.

199. As a consequence, we are unable to find that the decision to dismiss Ms Hargreaves by Mr Jones on behalf of Reactive was carried out for the reason or principle reason that protected disclosures PD1 and PD2 protected by section 43B ERA had been made by her.

Conclusion

200. Accordingly, the Tribunal reaches the following decisions in relation to the claimant Ms Hargreaves' complaints:

a) The claimant did not make protected disclosures in accordance with section 43B Employment Rights Act 1996.

b) The claimant's dismissal was not for the reason or principal reason that the claimant made a protected disclosure contrary to section 103A Employment Rights Act 1996. Accordingly, this complaint fails.

c) The complaint of harassment relating to the protected characteristic of disability contrary to section 26 Equality Act 2010 is not well founded and is unsuccessful.

d) The complaint of direct disability discrimination contrary to section 13 Equality Act 2010 is not well founded and is unsuccessful.

e) The complaint of harassment relating to the protected characteristic of sex contrary to section 26 Equality Act 2010 is not well founded and is unsuccessful.

f) The complaint of a failure to make reasonable adjustments contrary to sections 20 & 21 Equality Act 2010 is well founded and succeeds in relation to the failure of the respondent to purchase equipment recommended by Access to Work without delay and to attend/undertake training recommended by Access to Work.

201. The question of quantification of the claimant's losses arising from the respondent's failure in its duty to make reasonable adjustments will now be determined at a remedy hearing on a date to be confirmed. The remedy hearing will take place before the same Tribunal which heard the final hearing on liability whose decision is given in this judgment, and it will be listed for 1 day in the Liverpool Employment Tribunal.

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Employment Judge Johnson

Date 20 June 2023

JUDGMENT SENT TO THE PARTIES ON

27 June 2023

FOR THE TRIBUNAL OFFICE