Reserved Judgment

Case Number: 2200458/2022

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Miss R Barker		**Miracle Art and Inspired Sanity Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 11-14 July; 17-18 July 2023 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mr I McLaughlin, Mrs J Griffiths**

On hearing the Claimant in person and Mr N Roberts, counsel, on behalf of the Respondent, the Tribunal determines that:

(1) The Claimant was at all material times[1]:
   (a) employed by the Respondent for the purposes of the Equality Act 2010 ('the 2010 Act'); and
   (b) employed by the Respondent as a worker for the purposes of the Employment Rights 1996 Act ('the 1996 Act') and the Working Time Regulations 1998 ('the 1998 Regulations'),

   and accordingly the Tribunal has jurisdiction to consider her claims under those Acts and Regulations.

(2) The Claimant's claims for 'holiday pay' and 'other payments' under the 1996 Act and/or the 1998 Regulations are adjourned for consideration at a further hearing on a date to be fixed, unless resolved privately by the parties in the meantime.

(3) Claimant's complaint of unfair dismissal under 1996 Act, s98 is dismissed on withdrawal.

(4) The Claimant's application to amend the claim form to add a complaint of unfair dismissal under the 1996 Act, s100 is refused.

(5) The Claimant's complaints under the 2010 Act of direct discrimination because of disability are not well-founded.

(6) The Claimant's complaints under the 2010 Act of discrimination arising from

[1] As is explained in the accompanying Reasons, the Tribunal holds that the Claimant was 'employed' for the purposes of the applicable legislation when performing work for the Respondent, but not during intervals between periods of working.

disability are not well-founded.

(7) The Claimant's complaints under the 2010 Act of failure to make reasonable adjustments are not well-founded.

(8) The Claimant's complaints under the 2010 Act of harassment related to disability are not well-founded.

(9) The Claimant's complaint under the 2010 Act of victimisation is not well-founded.

(10) In so far as the Claimant sought to base any claim on an incident alleged to have happened in December 2019, such claim fails on the further ground that it was brought out of time and the Tribunal has no jurisdiction to consider it.

REASONS

Introduction

1 The Respondent is a small company which trades from premises in Clerkenwell. Its founder, owner and guiding hand is Mr Steven Lowe.

2 The Claimant, Miss Rachel Barker, who is 36 years of age, is affected by a number of medical conditions, of which the most significant, at least for the purposes of these proceedings, is autism and specifically, Asperger Syndrome. She undertook casual work intermittently for the Respondent between early 2016 and 10 September 2021. On 16 October 2021 she told Mr Lowe that she would not be returning to work for the company.

3 By a claim form presented on 1 February 2022 the Claimant, then acting in person, brought complaints against the Respondent and Ms Sophie Polyviou, who was and is the Respondent's sole employee, of unfair dismissal and disability discrimination, together with claims for 'holiday pay' and 'other payments'. A detailed chronology was attached, which recounted a history of the relationship between the parties and its breakdown and specifically complained that the Claimant was denied holiday pay and sick pay, pointing out that Ms Polyviou did receive such benefits. The claim form did not identify the specific legal rights, or legislation, on which she was seeking to rely.

4 By the response form it was contended (*inter alia*) that: the claim against Ms Polyviou had been brought out of time; there was no jurisdiction to consider the other claims because the Claimant (a) had not been 'employed' by the (First) Respondent for the purposes of the 2010 Act, (b) had not been an 'employee' of the (First) Respondent within the meaning of the 1996 Act (for a continuous period of two years or at all) so as to qualify for the right not to be unfairly dismissed, and (c) had not been an employee or 'worker' of the (First) Respondent for the purposes of the legislation governing the holiday pay and 'other payments' claims. Without prejudice to these challenges to jurisdiction, the Respondents pleaded a full factual narrative, which included the implicit admission that the Claimant had

not received holiday pay or sick pay and the express averment that she had not been entitled to such benefits owing to her "status as an independent contractor".

5 At a preliminary hearing for case management held on 28 August 2022, at which the Claimant appeared in person and the Respondents were represented by counsel, EJ Jeremy Burns recorded (among others) the following matters:

(1) The claims were for unfair dismissal, direct disability discrimination, harassment related to disability, failure to make reasonable adjustments, holiday pay and 'other payments'. (Where convenient we will refer to the latter two as the 'money claims'.)
(2) The only condition relied on for the purposes of the disability discrimination claims was Asperger Syndrome and the Respondents admitted that the Claimant had that condition and was disabled by it.
(3) It was agreed that, if she was an employee, the Claimant resigned on 30 September 2021.
(4) The Claimant was required by 9 September 2022 to provide further particulars of all claims to be pursued, including those for holiday pay and 'other payments'. The particulars were to be concise and "not expand on the contents of the ET1 and attachment".
(5) A public preliminary hearing was listed for 25 November 2022 to determine whether the claim against Ms Polyviou had been brought in time.
(6) A final hearing was listed for 11-18 July 2023 (six days).
(7) Sundry case management directions were given.

6 The Claimant delivered further particulars, purportedly in compliance with EJ Burns's order. In many respects these included information which appeared to stray outside the scope of the original claim. In respect of the money claims, the particulars: (a) contained what appeared to be a calculation based on the stated value of paid annual leave 'earned' by the Claimant but which she had not been permitted to take; and (b) claimed (presumably as 'other payments') reimbursement of £300 in respect of expenses.

7 The public preliminary hearing listed by EJ Burns was eventually held by EJ Heath on 24 February 2023. On this occasion both sides were legally represented. The judge took (among others) the following steps.

(1) The claim against Ms Polyviou was dismissed as having been presented out of time.
(2) Directions were given for further particulars of the claims to be delivered by reference to a detailed 'template' (prepared by the judge), which contained, in respect of each head of claim, a generic list of the questions which the applicable legislation posed. The template document in the bundle includes sections directed to holiday pay and unauthorised deductions from wages.
(3) Directions were given designed to facilitate the production of an agreed list of issues.
(4) Consideration was given to applications for procedural adjustments for the final hearing namely (a) directing that the Tribunal should sit on alternate days and (b) requiring the Respondent to serve details of intended cross-

examination topics and bundle references a month before trial, but both applications were refused.

8 In reasons accompanying his Order, EJ Heath found (by implication at least) that the particulars served pursuant to EJ Burns's orders had impermissibly sought to bring into the case some new matters of complaint outside the scope of the claim form. He passed no comment on the particularisation of the money claims. As to adjustments for the final hearing, he stated that the evidence presented did not justify what the Claimant was seeking but added that (a) the further proposal for hourly ten-minute breaks was unlikely to be contentious and (b) more generally, he was not excluding the possibility of further adjustments at trial.

9 On or about 23 March 2023, pursuant to EJ Heath's order, the Claimant delivered further details of her claims, drafted by, or with the assistance of, counsel. These began with the observation that, despite the terms of the order, no template had been attached. Particulars were then set out of the claims for direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, disability-related harassment, victimisation and holiday pay. The last of these is framed in these words:

> **As an employee/worker the Claimant was entitled to receive holiday pay. No such pay was ever provided to her and therefore pay for all accrued holiday was due upon termination of her employment.**

The final paragraph of the particulars states:

> **The Claimant seeks compensation for unfair dismissal, wrongful dismissal, disability discrimination and unpaid holiday pay.**

10 The Respondent served amended grounds of resistance on 31 March 2023 pleading to the claims as clarified in the particulars of 23 March. These acknowledged (para 63(i)) a complaint of direct disability discrimination based on the fact that Ms Polyviou was entitled to paid leave and sick pay but the Claimant was not. But in answer to the claim asserting a statutory entitlement to 'holiday pay', the Respondent pleaded (para 73):

> **The Claimant has failed to properly plead a claim for "holiday pay", whether in her original claim or in her further particulars. She may not pursue such a claim. Any such claim is denied. It is denied that the Claimant had employee or worker status.**

11 The matter came before us in the form of a final 'remote' hearing on 11 July 2023 by CVP with six sitting days allocated. The Claimant appeared in person; Mr Nathan Roberts, counsel, appeared for the Respondent.

12 Having read into the case on the morning of day one we heard evidence over the afternoon of day one, days two, three and the morning of day four. On the afternoon of day four we heard closing argument from Mr Roberts. The Claimant replied briefly but did not feel able to continue. Accordingly, it was agreed that she should be permitted to make her points in writing over the weekend (day four was a Friday) and we made provision for the Respondent to reply in writing by noon on day five, if so advised. We then reserved judgment, reminding the Claimant of

some guidance (oral and written) on the nature and purpose of closing argument which we had provided on day three. Her written submissions duly arrived on the morning of day five, and the Respondent's brief comments followed in short order. We completed our private deliberations on day six.

13 On the morning of day two the Claimant formally conceded that she could not maintain her unfair dismissal claim since, even if she had the status of an employee while working, she was not *continuously* employed for a period of two years ending with her (alleged) dismissal and so could not by the date of termination have acquired protection from 'ordinary' unfair dismissal. That concession was, in our view, plainly correct, and we accepted it. The Claimant then applied for permission to amend the claim form to add a complaint of 'automatically' unfair dismissal on a health & safety ground under the 1996 Act, s100. For such a claim, no minimum service qualification applies. For reasons given orally, we refused the application. In summary, we held that the proposed claim faced obvious and probably insurmountable difficulties and that, in any event, granting the application (on day two of the trial) would occasion severe prejudice to the Respondent and be contrary to the overriding objective (see the Employment Tribunals Rules of Procedure 2013, r2).

14 Management of the hearing was otherwise largely consensual. There was, however, some debate before us about the time allocation. At the start of the hearing the Claimant complained about the Respondent, as she put it, "calling" a six-day hearing, maintaining that four days would have been ample. Later, she challenged our request for her to complete cross-examination of the Respondent's three witnesses in one day (day three), arguing that she should be allowed the rest of the allocation for cross-examination. We explained that the allocation was designed to allow time for closing argument, the Tribunal's private deliberations, an oral judgment and, if needed, a brief remedies hearing. Fortunately, after reflection the Claimant moderated her stance, and we agreed that the cross-examination could continue into the morning of day four, provided that the evidence was completed in time to permit presentation of closing argument on day four – a compromise which she was good enough to acknowledge as reasonable. As we have mentioned, we also accommodated her indisposition on the afternoon of day four by permitting her to present written submissions. She told us that she was also content with this arrangement.

15 More general adjustments were discussed at the start of the hearing. We gladly agreed to the Claimant's request for hourly 10-minute breaks and assured her that we would consider more frequent breaks or other adjustments if the need arose, and that she must feel free to request our assistance at any time.

The Legal Framework

Employment status

16 The Employment Rights Act 1996, s230 includes:

> **(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**
>
> **(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.**
>
> **(3) In this Act, "worker" … means an individual who has entered into or works under (or, where the employment has ceased, worked under) –**
>
> **(a) a contract of employment, or**
> **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes do all perform personally any work or services for another party to the contract whose status is not by virtue of the contract a client or customer of any profession or business undertaking carried on by the individual;**
>
> **and any reference to a worker's contract shall be construed accordingly.**

The same definitions apply under the Working Time Regulations 1998 (see reg 2(1)).

17 Much more straightforwardly, the 2010 Act by s83(2)(a) defines employment as meaning "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

18 It has been authoritatively held that there is no distinction between the 'worker' under the 1996 Act and the individual working under a "contract personally to do work" under the 2010 Act (see *Pimlico Plumbers Ltd v Smith* [2018] IRLR 872 SC *per* Lord Wilson, para 14).

19 An essential characteristic of any contract of employment or 'worker' contract is mutuality of obligation. This may be expressed as an obligation on the employer to provide work and a corresponding obligation on the employee or worker to accept and perform it. In *Carmichael v National Power Plc* [1999] ICR 1226 HL it was held that the contract governing relations between Mrs Carmichael and the Respondents was not a contract of employment because of the absence of mutuality of obligation between assignments. She was engaged as a guide on a "casual as required" basis and was entirely free to accept or reject any offer of an assignment which was forthcoming. The contract set out the terms on which she would work but imposed no obligation on her to work at all. Allowing that it was entirely possible that when working her status was that of an employee, the House of Lords was clear that during the gaps there was no employment contract.

20 The identifying features of a contract of employment have long been debated before the common law courts. Proposed tests have laid emphasis on the extent to which an individual is controlled by the putative employer or the degree to which he or she is integrated into the relevant business or organisation. In modern times it has been recognised that no single test can be applied. Rather, the function of the court is to assemble all relevant information and make a considered

assessment of the relationship in question, based on the accumulated detail (see *eg Hall (Inspector of Taxes) v Lorimer* [1994] ICR 218 CA).[2]

21 Unlike the employee properly so called, the 'worker' is creature of recent origin. In *Byrne Brothers (Formwork) Ltd v Baird & others* [2002] ICR 667 the EAT addressed the definition under the 1996 Act, s230(3)(b). Giving judgment, Mr Recorder Underhill QC, as he then was, commented (at para 17):

> **(1) We focus on the terms "[carrying on a] business undertaking" and "customer" rather than "[carrying on a] profession" or "client". Plainly the Applicants do not carry on a "profession" in the ordinary sense of the word; nor are Byrne Brothers their "clients".**
>
> **(2) "[Carrying on a] business undertaking" is plainly capable of having a very wide meaning. In one sense every "self-employed" person carries on a business. But the term cannot be intended to have so wide a meaning here, because if it did the exception would wholly swallow up the substantive provision and limb (b) would be no wider than limb (a). The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business. …**
>
> **(3) The remaining wording of limb (b) gives no real help on what are the criteria for carrying on a business undertaking in the sense intended by the Regulations – given that they cannot be the same as the criteria for distinguishing employment from self-employment. Possibly the term "customer" gives some slight indication of an arm's-length commercial relationship – see below – but it is not clear whether it was deliberately chosen as a key word in the definition or simply as a neutral term to denote the other party to a contract with a business undertaking.**
>
> **(4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees *stricto sensu* - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.**
>
> **(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment**

[2] The case-law on employment status must be read with care because most of the leading cases are concerned with a binary choice: was the individual an employee or an independent contractor in business on his/her own account? Today, a third possibility – 'worker' status – will almost always also be in play.

> **the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.**
>
> **(6) What we are concerned with is the rights and obligations of the parties under the contract - not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position: see Carmichael (above), esp. per Lord Hoffmann at pp 1234-5.**

22 In *Clyde & Co LLP v Bates van Winkelhof* [2014] ICR 730 SC, Lady Hale discussed the concept of a 'worker'. Her judgment includes these passages:

> **24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.**
>
> **25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] UKSC 40, [2011] 1 WLR 1872 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else. The general medical practitioner in *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005; [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act. Had Parliament wished to include this "worker" class of self-employed people within the meaning of section 4(4), it could have done so expressly but it did not.**
>
> **…**
>
> **34. In *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, Langstaff J suggested, at para 53, that**
>
> > **". . . a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls".**
>
> **35. In *James v Redcats (Brands) Ltd* [2007] ICR 1006, Elias J agreed that this would "often assist in providing the answer" but the difficult cases were those where the putative worker did not market her services at all (para 50). He also accepted, at para 48, that**
>
> > **". . . in a general sense the degree of dependence is in large part what one is seeking to identify – if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached – but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer."**

36. After looking at how the distinction had been introduced into the sex discrimination legislation, which contained a similarly wide definition of worker but without the reference to clients and customers, by reference to a "dominant purpose" test in *Mirror Group Newspapers Ltd v Gunning* [1986] ICR 145, he concluded, at para 59:

> **". . . the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? . . . Its purpose is to distinguish between the concept of worker and the independent contractor who is on business in his own account, even if only in a small way."**

37. The issue came before the Court of Appeal in *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005, [2013] ICR 415, a case which was understandably not referred to in the Court of Appeal in this case; it was argued shortly before the hearing in this case, but judgment was delivered a few days afterwards. The Hospital Medical Group argued that Dr Westwood was in business on his own account as a doctor, in which he had three customers, the NHS for his services as a general practitioner, the Albany Clinic for whom he did transgender work, and the Hospital Medical Group for whom he performed hair restoration surgery. The Court of Appeal considered that these were three separate businesses, quite unrelated to one another, and that he was a class (b) worker in relation to the Hospital Medical Group.

38. Maurice Kay LJ pointed out (at para 18) that neither the *Cotswold* "integration" test nor the *Redcats* "dominant purpose" test purported to lay down a test of general application. In his view they were wise "not to lay down a more prescriptive approach which would gloss the words of the statute". Judge Peter Clark in the EAT had taken the view that Dr Westwood was a limb (b) worker because he had agreed to provide his services as a hair restoration surgeon exclusively to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations. That was the right approach. The fact that Dr Westwood was in business on his own account was not conclusive because the definition also required that the other party to the contract was not his client or customer and HMG was neither. Maurice Kay LJ concluded, at para 19, by declining the suggestion that the Court might give some guidance as to a more uniform approach …

39. I agree with Maurice Kay LJ that there is "not a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. …

23 In *Secretary of State for Justice v Windle & another* [2017] ICR 83 CA, the Court of appeal was concerned with whether the absence of an umbrella contract was a factor relevant to the assessment of the putative employee's status when working. Underhill LJ commented (para 23):

> **I accept of course that the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course it will not always do so, nor did the ET so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it *in limine* runs counter to the**

> **repeated message of the authorities that it is necessary to consider all the circumstances.**

24 But in the *Pimlico Plumbers* case in the Court of Appeal (2017 EWCA Civ 51), the same judge, having referred to his own remarks in *Windle*, added this (para 145):

> **But it is not only legal obligations that may shed light of that kind. If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly (and genuinely) provided that there was no legal obligation either way in between the periods of work.**

25 In *Uber BV and others v Aslam and others* [2021] UKSC 5, the Supreme Court upheld an Employment Tribunal's decision that the claimant drivers were employed as workers when within their designated zones with the Uber App switched on and ready and willing to accept trips. Giving a judgment with which all other members of the Court agreed, Lord Leggatt held that it was wrong in principle to take as a starting-point the legal agreement between the parties. Rather, the correct approach was to consider the purpose of the legislation, which was to provide protection to persons in a subordinate or dependent position in relation to a person or organisation exercising control over their work (paras 71-76).

The 2010 Act

26 The 2010 Act protects employees (as defined – see above) and applicants for employment from 'prohibited conduct' based on or connected with specified 'protected characteristics'. Protected characteristics include disability (s6).

Definition of disability

27 The 2010 Act s6 materially provides:

> **(1) A person (P) has a disability if –**
>
> **(a) P has a physical or mental impairment, and**
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.**

28 "Substantial" means more than minor or trivial (s212(1)).

29 Schedule 1 to the 2010 Act contains further provisions supplementing the s6 definition of disability. By para 2(1), the effect of an impairment is "long-term" if (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.

30 The burden of proving disability is on the claimant: see *Tesco Stores Ltd v Tennant* [2020] IRLR 363 EAT, at para 11. Whether or not a person has a disability has to be judged as at the date of the alleged discriminatory act.

Direct discrimination

31 Chapter 2 of the Act identifies the various forms of prohibited conduct. The first of these is direct discrimination, which is defined by s13 in (so far as material) these terms:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

32 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

It is not in question that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.[3]

Discrimination arising from disability

33 By the 2020 Act, s15 it is provided, materially, that:

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

Valuable guidance on these provisions was provided in *Pnaiser v NHS England* [2016] IRLR 170 EAT (Simler J), especially at para 31. The first part of the definition (s15(1)(a)) posits two separate linkages. The first is between the disability and the 'something arising'. Here the question is objective: was the disability a material *cause* of the 'something'? The second linkage is between the unfavourable treatment and the 'something'. The 'because of' test requires a focus upon the subjective *reason(s)* behind the decision-making of 'A': was his or her treatment of B materially influenced by the 'something'?

Reasonable adjustments

34 The duty to make reasonable adjustments for disabled persons is covered by the 2010 Act, s20, the material parts of which state:

[3] See *eg Onu v Akwiwu* [2014] EWCA Civ 279 CA.

> **(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.**

Failure to comply with a duty to make reasonable adjustments amounts to unlawful discrimination (s21(2)).

35 The duty to make reasonable adjustments does not apply where the respondent does not know (*inter alia*) that an interested disabled person has a disability and is liable to be placed at the disadvantage referred to in s20(3) (schedule 8, para 20(1)(b)). It is for the respondent to prove that the exclusion applies.

36 The higher courts have often stressed the importance of a methodical approach to the reasonable adjustments jurisdiction (see *eg Environment Agency v Rowan* [2008] ICR 218 EAT).

Harassment

37 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(1) A person (A) harasses another (B) if –**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of –**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in sub-section (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.**

38 In *R (Equal Opportunities Commission) v Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that, for the purposes of the 'related to' wording (in the Sex Discrimination Act 1975), an 'associative' connection was all that was required. Burton J did not question the concession. The EHRC Code of Practice on Employment (2011), deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic. The Code does not claim to be an authoritative statement of the law (see para 1.13), but we accept its guidance here as correct and direct ourselves accordingly.

39 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are, we think, ensured by the other elements of the statutory definition. Two points in particular can be made. First, the claimant must show that the conduct was unwanted. Second, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit entailing one subjective factor, the perception of the complainant (s26(4)(a)). Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

40 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry v Grant* [2011] ICR 1390 CA (para 47):

> **… even if in fact the [act complained of] was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.**

Victimisation

41 By the 2010 Act, s27, victimisation is defined thus:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because –**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act –**
>
> **…**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

42 When considering whether a claimant has been subjected to particular treatment 'because' he has done a protected act, the Tribunal must focus on "the real reason, the core reason" for the treatment; a 'but for' causal test is not appropriate: *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 HL, para 77 (*per* Lord Scott of Foscote). On the other hand, the fact of the protected act need not be the sole reason: it is enough if it contributed materially to the outcome (see *Nagarajan*, cited above).

Protection against discrimination etc

43 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(d) by subjecting B to any other detriment.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL.

44 Employees enjoy parallel protection against harassment and victimisation by the 2010 Act, ss40(1)(a) and 39(4)(d) respectively.

45 To prevent double-claiming, the 2010 Act, s212(1) provides that (save in circumstances not relevant here) a 'detriment' does not include conduct which amounts to harassment.

46 By s39(5) the duty to make reasonable adjustments applies to an employer.

47 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

48 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation, including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have "nothing to offer" where the Tribunal is in a position to make positive findings on the evidence. Recently, in *Efobi v Royal Mail Group Ltd* [2021] 1 WLR 3863, the Supreme Court held that the changes in the wording of the burden of proof provisions introduced by the 2010 Act, s123 did not bring about any change in the law. Dealing with the proper approach to the drawing of inferences, Lord Leggatt, who gave the only substantial judgment, commented (para 41):

> **I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or decline to draw, inferences from the facts of the case before them without the need to consult law books before doing so.**

49 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which

the complaint relates, or such other period as the Tribunal thinks just and equitable. Now, under the Early Conciliation ('EC') provisions, the period is further extended by the time taken up by the conciliation process. The time limit is jurisdictional. 'Conduct extending over a period' is to be treated as done at the end of the period (s123(3)(a)). Where the claim has not been presented within the primary three-month period (as extended by EC), it is for the Claimant to justify on evidence the substitution (under s123(1)) of a longer period.

Holiday pay and unauthorised deductions from wages

50 The Working Time Regulations 1998, regs 13-16 provide for the right to paid annual leave and to receive compensation on termination for unused annual leave entitlement. 'Holiday pay' may also be recovered under the protection of wages provisions contained in the 1996 Act, Part II. These protections attach to employees working under employment contracts and 'workers' as defined (see above).

The Issues

51 Despite EJ Heath's efforts, the parties did not agree upon a list of issues and two drafts were put before us. The Claimant's was defective because it included some matters of complaint which were not contained in her pleaded case (by which we mean the claim form and the legitimate further particularisation thereof). It also appeared to omit certain pleaded matters of complaint. Accordingly, in respect of the claims under the 2010 Act, we found the Respondent's draft more helpful (although of course it could not be treated as a substitute for the pleadings proper). That said, we have made findings on certain matters included in the Claimant's list and not in the Respondent's. It is often appropriate to make findings on points that fall outside the four corners of the pleaded case because they may help to explain the Tribunal's decisions on the claims themselves.

52 A copy of the Respondent's list of issues (inappropriately styled an "agreed" list) is appended to these Reasons. As we will explain, although it is more helpful than the Claimant's in relation to the 2020 Act claims, it too is defective, in that it simply excludes the money claims.

Evidence and Documents

53 We heard oral evidence from the Claimant and, on behalf of the Respondent, Mr Steven Lowe, the founder and owner of the Respondent, Ms Sophie Polyviou (already mentioned), the only permanent employee of the Respondent, and Mr Adam Wood, a self-employed artist who worked (and still works) at the Respondent's premises.

54 In addition to witness evidence we read the documents to which we were referred in the agreed bundle of just over 500 pages. The Claimant also produced a short supplemental bundle (27 pages).

55 The paperwork was completed by the two lists of issues, opening notes produced on both sides, two further notes produced by the Claimant concerning adjustments for, and timetabling of, the hearing, Mr Roberts's closing skeleton argument, the Claimant's closing submissions and the Respondent's further brief comments on those submissions.

The Primary Facts

56 The evidence was quite extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history. The facts essential to our decision are set out below.

The main narrative

57 Our account below is given wholly or largely in the past tense because we are concerned with facts and circumstances which arose during the period to which the claims relate. Unless otherwise stated, we should not be taken to imply that there has been any material change in those facts and circumstances since.

Setting the scene

58 Mr Lowe founded the Respondent in 2006. He describes it as a small art and publishing studio that helps develop and facilitate the work of a small group of artists.

59 Ms Polyviou has been involved with the Respondent since 2013. She started on a freelance basis but was acknowledged as an employee under a permanent contract of employment in or around 2021. It seems that at all relevant times she worked a four-day week. She was the company's only employee. She would deputise for Mr Lowe when he was away. She was held out as authorised to act on behalf of the company. She had a work email address. Aside from her duties as an employee she would spend some of her working time on her independent photography business.

60 The Claimant's association with the Respondent began in 2016, when she performed certain ad-hoc services for it. At that time she was living in the north of England. In 2018 she moved to London to study for a degree. From then on she would carry out work for the company from time to time. There was no guarantee of work and no obligation on her to undertake work. Periods of working were simply agreed ad hoc. There was a clear understanding that the Claimant was 'self-employed'. She was paid against invoices prepared and rendered by her. She was responsible for her own income tax and national insurance arrangements. She worked under the guidance and direction of Mr Lowe and, in his absence, Ms Polyviou. She did not have a work email address and was not held out as authorised to represent the company externally. Her tasks were diverse. They might consist of packaging and dispatching work, tidying and de-cluttering or doing a run of screen-printing. Essentially, she was seen as an extra pair of hands at busy times. A reference in the documents to her undertaking work on a 'project by project' is misleading. The reality was that she was engaged as support in the performance of miscellaneous tasks, according to the needs of the business. She

was not assigned to 'own' particular projects (although she certainly contributed to the work needed to see projects through). Consistent with this state of affairs, she was not paid by the 'project'. She was paid by the hour. Latterly the rate was £15.00 per hour. Her pay did not vary according to the nature of the work carried out. She did not provide any tools or equipment for the performance of her duties and was not expected to do so.

61 The Claimant's service for the Respondent did not follow any clear pattern. There were some sustained spells of working, but there were also lengthy periods of absence – for example through some months in 2018, most of 2019 and the early part of 2021.

62 Throughout her association with the Respondent, the Claimant was at all times free to work for other employers and sometimes did so.

63 The Claimant's assertion that she was required to work a 35-hour week in 2021 is wrong. There was never any obligation or expectation on either side in respect of working hours.

64 The Claimant did not receive paid leave. Nor did she receive sick pay, save for the occasion in August 2021 referred to below.

The Claimant's medical conditions

65 The Claimant was first diagnosed with Asperger Syndrome/Autistic Spectrum Disorder in January 2016. In the assessment, which was carried out by a Consultant Psychiatrist, she scored particularly highly against social interaction and social communication impairment criteria (meaning that the degree of impairment was considerable). In her evidence, she told us that her autism affects her daily and that to cope with it she needs to make informed choices and rely on others. She also needs 'down-time' to recuperate from social situations. She told us of the difficulty she experiences in processing information. That said, she also describes herself as 'high-functioning' (p395).

66 The Claimant also told us without challenge that she has dyslexia and syringomyelia, a spinal condition.

67 In addition, there is reference in the documents to ADHD, PTSD and depression, although the Claimant did not give evidence about these.

68 The Claimant was at all times open about her medical conditions in her dealings with the Respondent. There is no evidence of either affecting her ability to work or the quality of her performance. That said, Mr Lowe and Ms Polyviou saw at first hand that her autism presented her with difficulties at times. So, for example, Ms Polyviou described how in 2016 the Claimant had become distressed and anxious when plans for a particular piece of work changed. This had brought home the special need to ensure that instructions given to her were entirely clear. We accept Ms Polyviou's evidence and that of Mr Lowe that the Respondent took practical and empathetic steps to accommodate the Claimant's autism-related concerns on the rare occasions when she raised them.

Relations in the workplace before 26 August 2021

69 Prior to 26 August 2021 relations between the Claimant on the one hand and Mr Lowe, Ms Polyviou and the others who worked at the Respondent's studio were entirely satisfactory. There was, in the main, a friendly, collaborative environment in the workplace. We accept that Ms Polyviou could occasionally be 'grumpy' when under pressure. But we wholly reject the Claimant's attempt to characterise her attitude, or behaviour, towards her as negative or even hostile.

70 We reject the allegation that Ms Polyviou punched the Claimant in 2019.

The incident on 26 August 2021 and related events

71 On 26 August 2021 Mr Lowe was abroad, on holiday. It seems that a somewhat uncomfortable atmosphere had developed in recent days between the Claimant and Ms Polyviou. Ms Polyviou had a lot of work to get through and formed the view that the tasks the Claimant was attending to did not amount to a satisfactory use of her time and energy. For her part, the Claimant felt that Ms Polyviou was not forthcoming when she approached her with any request or query, and so she had taken to sending messages to Mr Lowe, despite the fact that he was on holiday. It was in this context that the short exchange occurred which precipitated the end of the working relationship between the Claimant and the Respondent. At 6.00 p.m. Ms Polyviou wished to leave for the day and asked the Claimant if she would lock up. She replied, in a slightly agitated manner, that she was not trained in locking up and did not know where the light switches were (the lights would need to be switched off). To this, Ms Polyviou gave an exasperated sigh and said that she would do the locking up. The episode ended there. It was rightly described by Ms Polyviou in her witness statement (para 12) as a short-lived instance of tetchiness at the end of a long day.

72 Later on 26 August, the Claimant sent a message to Mr Lowe complaining of "textbook workplace bullying". Mr Lowe attempted to calm things down but to no avail. Numerous messages from the Claimant followed, many containing thoroughly offensive language. Mr Lowe wrote to Ms Polyviou asking for her account of what had happened. He also suggested that the Claimant should consider staying away from work for a few days, and offered to pay her for doing so. He did not exclude her from the studio and made it clear that she was free to accept or decline the offer, as she saw fit. And he did not pass any comment about *her* "communication issues" (we do not discount the possibility of something having been said about "communication issues" between Ms Polyviou and her).

73 After some equivocation, the Claimant took up Mr Lowe's offer and remained away from the workplace until 6 September.

74 We reject the Claimant's evidence that Mr Lowe sent the Claimant messages describing Ms Polyviou as a "bitch" or saying that he would take her side in any event. We also reject her allegation that he had subsequently deleted messages so as to falsify the record.

75 Mr Lowe returned to work on 1 September, having been away for a fortnight. He spoke with Ms Polyviou, who was shocked and distressed by the allegation of bullying and gave an account consistent with the simple facts recited above. He also spoke with Mr Wood (already mentioned), who said that he had sensed a little tension between the Claimant and Ms Polyviou, but had not seen anything significant. He had not witnessed the exchange about locking up. Mr Lowe asked the Claimant to come to the studio the same day.

76 In the event, she came the following day, 2 September. A meeting took place between Mr Lowe and the Claimant by agreement at a local pub. It lasted about three hours. We reject her evidence that, at an early stage in the meeting, he told her that she was "oversensitive, performative and obstreperous". Nor did he call her Machiavellian, as she alleged in her oral evidence. On the contrary, he trod carefully and offered repeated assurances of his determination to resolve the problem between her and Ms Polyviou. It was agreed that the next step towards a new understanding would be an exchange of emails. By the end of the meeting the Claimant's mood had brightened and Mr Lowe was hopeful that a fresh start was possible.

77 The Claimant returned to work on 6 September. Her return coincided with Ms Polyviou starting a two-week holiday. She seemed pleased to be back and there were no difficulties.

78 On 9 September, the Claimant sent a text message to Mr Lowe apologising for "reacting so intensely" and thanking him for all his support over the years.

79 10 September 2021 was the Claimant's last working day with the Respondent, after which she left London to spend time in the north of England. The understanding was that on her return to the Capital she would again be looking to pick up work at the studio.

80 Mr Wood gave evidence that on the evening of 10 September he went to a local pub for an after-work drink with the Claimant, Mr Lowe and Mr Michael Curran, described by Mr Wood as a "friend of the studio." He described the evening as "pleasant and relaxed" throughout. He said that Mr Lowe had not passed any comment about the Claimant being over-sensitive or not being able to take a joke. Mr Lowe left after one drink. After a second drink, the three remaining members of the party went their separate ways. We accept Mr Wood's account.

81 On 17 September the Claimant sent to Mr Lowe a draft email to be sent to Mr Polyviou. Mr Lowe judged it slightly aggressive and suggested certain changes. The final version was sent to Ms Polyviou on 23 September. Mr Lowe encouraged her to treat it as an "olive branch" (although somewhat "barbed") and she responded in conciliatory terms the following day, apologising to the Claimant for the fact that "things had got very tense" and that the Claimant had been "very hurt by the whole situation". She added the hope that when the Claimant returned to the studio the two could "get back to being friends".

82 On 27 September the Claimant accused Mr Lowe of telling Mr Curran that she was "over-sensitive". This seems to have been a reference to the visit to the

pub on 10 September, but may allude to a separate conversation. At all events, on the material before us we are not persuaded that the comment was made by Mr Lowe to, or in the hearing of, Mr Curran, on 10 September or on any other occasion.

83 Mr Lowe's fading hopes that the problem was solved were dashed on 29 September, when the Claimant renewed her allegations of bullying by Ms Polyviou and accused him of "siding with the bully".

84 Matters escalated. On and after 3 October the Claimant sent a host of strange, erratic and disturbing messages to Mr Lowe, which included numerous scurrilous and bizarre allegations. Being genuinely worried about her wellbeing and safety (he had never witnessed her behaving in this way), he traced her sister through a social media platform and told her of his concerns. The sister responded, thanking Mr Lowe for "looking out for" the Claimant. This contact became known to the Claimant soon afterwards and provoked a furious reaction from her. Further hostile and abusive messages to Mr Lowe followed.

85 A telephone conversation took place on 4 October between the Claimant and Mr Lowe. Several matters were discussed. The Claimant raised the matter (already ventilated in correspondence that day) of a grievance process. Mr Lowe replied that she had no right to make use of such a process, being a casual worker, but said that he would be producing a written response to her concerns. We are not persuaded that he shouted at her during the conversation, or exclaimed, "Accusations, accusations!" (or similar) but he did show a degree of exasperation. He did not make any gratuitous reference to her autistic condition.

86 After 4 October Mr Lowe attempted without success to stem the flow of messages from the Claimant by reminding her that he was going to address her complaints in writing. His report was completed by 16 October. He did not share it with her because she had asked him not to. But he did send her a one-page summary the same day. In short, he concluded that the difficulties between the Claimant and Ms Polyviou had resulted from "workplace friction" and not bullying. But he acknowledged the Claimant's assertion that the episode had triggered PTSD connected with bullying which she claimed to have experienced some years before in another job and accepted that her Asperger Syndrome may have increased her vulnerability. He also noted that Ms Polyviou had apologised for the hurt which the Claimant had experienced and now understood that if workplace relations became "unmanageable" in the future, she must report the matter to him at once (even if he was on holiday). He added his own apology for leaving her (while he was on holiday) with a workplace task for which she had not received adequate instructions and for failing to spell out clearly the "structure, roles and hierarchy" which was to apply during his absence.

87 The Claimant replied to Mr Lowe the same day making it clear that she did not intend to return to working at the studio and thanking him warmly for all he had done for her.

88 More messages followed, many erratic and/or hostile. Eventually Mr Lowe resorted to blocking them.

Findings on miscellaneous further matters of complaint

89 The Claimant complained before us that she had been subjected to bullying and harassment by Ms Polyviou since 2019. We reject that allegation. There was no such treatment.

90 We do not accept that Mr Lowe 'gave preference' to Ms Polyviou over the Claimant. If the complaint is about status generally, it is misplaced. Ms Polyviou was a permanent presence with broad responsibilities and authority to deputise for Mr Lowe when necessary. The Claimant was a temporary assistant. In a small and informal business where status was not highly prized, Ms Polyviou was naturally seen as holding a senior position relative to the Claimant.

91 If the complaint of 'giving preference' is about the way in which Mr Lowe handled the Claimant's complaint arising out of the events of 26 August, we find that it is not made out in fact. He heard both sides of the argument. He did not favour one version over another: there was little or no discernible difference factually between the two accounts. His finding that it was a case of workplace friction, not bullying, will be addressed in our secondary findings below.

92 In her list of issues, the Claimant appeared to assert that, on 19 September 2021, Mr Lowe had called her "over-sensitive" and told her that she "couldn't take a joke". It seems to us that the date is an error and the allegation merely repeats the complaint about things said at the pub on 10 September. But whether or not that is so, we are in any event not persuaded that Mr Lowe made either remark on that date or any other.

93 Nor do we accept that Mr Lowe (or Ms Polyviou) ever 'blamed' the Claimant for her disability or any characteristic associated with it.

94 We further reject the Claimant's complaint that Mr Lowe 'belittled' her grievance about the events of 26 August 2021 to a third party. In her list of issues she dates this event at 14 September 2021. Again, the date may be an error, but in any case we acquit Mr Lowe of making any 'belittling' comment on any date.

95 The Claimant further complained that Mr Lowe failed to reassure her that she would be able to return to work safely. This too, we reject. The constant tenor of his messages to, and conversations with, her was there was no obstacle to her returning and that the crucial thing was for both protagonists to put the episode of 26 August behind 2021 them and resume working collaboratively as they had done before.

96 One strand of the failure to make reasonable adjustments claim rested on an alleged 'PCP' of allowing Ms Polyviou to post photographs of the Claimant (and others) on her personal and/or business social media platform(s) and business website.[4] We find as a fact that Mr Lowe did no such thing. Nor could he: Ms Polyviou's photography business was her own affair, over which the Respondent

[4] See the attachment to the claim form, para 44. The complaint is about *Ms Polyviou's* social media accounts and website, not those of the Respondent.

and Mr Lowe had no authority. The Claimant complained to Ms Polyviou in December 2021 about her (Ms Polyviou) holding photographs of her (the Claimant). After some time Ms Polyviou deleted them.

Secondary Findings and Conclusions

Rationale for primary findings

97 In so far as it has been necessary for us to resolve conflicts in the evidence, we have largely preferred the accounts given on behalf of the Respondent. We have found that that evidence tended to be inherently plausible and internally consistent. It was also to a large extent corroborated by, or at least consistent with, contemporary documents. By contrast, parts of the Claimant's evidence struck us as implausible and/or internally inconsistent and/or contradicted by, or at least inconsistent with, contemporary documents.

98 As to contemporary documents, the WhatsApp messages in the bundle presented the Claimant with particular problems, which she sought to overcome by accusing Mr Lowe of doctoring the record by deleting some items. This tactic only served to weaken her position further. It was obviously not plausible that Mr Lowe would have made such a crass mistake, in circumstances where he had no reason to suppose that she would not be in a position to produce all messages she had received from him.

99 For the avoidance of doubt, our finding is that the Claimant's evidence was in some respects unreliable. We have not said that she set out to mislead the Tribunal.

Employment status

100 Although the Respondent's pleaded case said otherwise, Mr Roberts sensibly accepted that the Claimant worked under a "contract to do or perform personally any work or services" (the 1996 Act, s230(3)(b)). The Claimant had no right to perform her obligations through a substitute.

101 Mr Roberts submitted that there was no overarching, or 'umbrella' contract. We agree. Each period of working was pursuant to a separate agreement which, once ended, left the parties free of any continuing obligation to one another. The fact that there was an expectation (no doubt on both sides) that the Claimant would return to work for further stints does not warrant the inference of an obligation on her to do so or on the Respondent to give her the opportunity to do so.

102 Accordingly, the critical question is, what was the legal character of the relationship during the Claimant's periods of working for the Respondent? Mr Roberts submitted that she worked as an independent contractor in business on her own account. We disagree. There are many features of the relationship between the parties which, in our view, demonstrate clearly that she did not enter into what can sensibly be classified as an arm's length commercial arrangement between businesses. They include the degree of control exercised over the Claimant's work; the fact that she was supplied with materials, facilities and

support in performing her tasks; the fact that she was allocated work for agreed periods of time, rather than for the completion of specified projects; and the fact that she was paid an hourly rate. The terms are also eloquent of the inequality in bargaining power between the parties, a further factor which argues against the Claimant having had the status of an independent contractor in business on her own account. Stepping back, we think it unreal to describe the dealings between the parties as transactions in which the Respondent stood as the 'client or customer of any business undertaking' carried on by the Claimant. Rather, those dealings are characterised by a dependant work relationship under which the Claimant provided her labour in furtherance of a business operated by the Respondent.

103 Since the unfair dismissal claim has gone, nothing now turns on the question whether the Claimant worked for the Respondent under a contract of employment or a 'worker' contract. For completeness, however, we find that she had the status of a 'worker'. The loose, casual, ad hoc nature of the association, the absence of full integration (for example by being given a work email address), the absence of set hours, the pay and tax arrangements and the agreed 'self-employed' designation are among the main features marking this out as almost a paradigm case in which, to adopt the EAT's language in the *Byrne Brothers* case, the individual falls short of establishing employee status but comfortably exceeds the lower 'pass-mark' to qualify for the more limited protection afforded to 'workers'.

Disability

104 We were surprised that the Respondent disputed disability (which it seemed to have conceded at the first preliminary hearing). The Claimant's autism was self-evidently an impairment and (as a lifelong condition) long term. It plainly had an effect on her ability to undertake normal day-to-day activities. Was that effect 'substantial', that is to say 'more than trivial'? The statutory test does not place the bar very high. There is ample evidence, none the subject of challenge, of the Claimant's difficulties managing social communication and social interactions and in processing information. And as we have noted, the Respondent's witnesses told us of their experience at first hand of her distress and anxiety on being told of a change in plans concerning a particular piece of work. In our judgment, she very clearly qualifies as a person disabled within the meaning of the 2010 Act. We rest this finding on her autism alone and do not regard it as proportionate to consider the other conditions which she mentioned, since none featured in any significant way in the complaints she pursued.

Knowledge

105 It was not in dispute that the Respondent, through Mr Lowe and Ms Polyviou, was aware of the Claimant's disability.

106 For the purposes of the failure to make reasonable adjustments claim, we will give separate consideration below to a discrete point on knowledge.

Direct discrimination

Detriment?

107 We will deal with the alleged detriments (list of issues, paras 16.1-16.7)[5] in turn.

108 The Respondent's admitted failure to pay holiday pay and sick pay (16.1) to the Claimant amounts (given our holding on status) to an arguable detriment.

109 As to the complaint about the handling of the Claimant's 'grievance' (16.2), we find no arguable detriment. In our judgment, Mr Lowe dealt with the matter in a fair and reasonable way and his characterisation of the incident of 26 August 2021 as workplace 'friction' rather than bullying was unimpeachable. We see no justification for the allegation that his conclusion was tainted by his perception that she was 'oversensitive'.

110 The allegation that Ms Polyviou punched the Claimant in December 2019 (16.3) does not get off the ground because we are not persuaded that this incident happened. No detriment is shown.

111 We are prepared to assume that Ms Polyviou's testy behaviour in the brief exchange with the Claimant on 26 August 2021 (16.4) was sufficient to clear the low hurdle of establishing an arguable detriment.

112 We have found that Mr Lowe's alleged remarks to the Claimant on 26 August 2021 about Ms Polyviou and about the Respondent taking her side (16.5) were not made. The detriment relied on is not made out in fact.

113 Again, the detriment relied on in respect of a communication by Mr Lowe on 27 August (16.6) falls on our factual findings. He did not instruct the Claimant to stay away from the workplace, but gave her the option to do so and receive pay nonetheless. And he did not refer to her having 'communication issues.'

114 The final detriment (16.7) also fails on the facts. Mr Lowe did not refuse to listen to the Claimant. He spent a lot of time listening to her and demonstrated an impressive reserve of patience.

Less favourable treatment 'because of' disability?

115 Two arguable detriments survive (16.1 and 16.4).

116 The direct discrimination claim faces the difficulty which besets most such claims where the protected characteristic is disability. Any case of direct discrimination turns on whether (a) the complainant was treated less favourably than a comparator, real or hypothetical, was or would have been treated in comparable circumstances and (b) such treatment was 'because of' the relevant protected characteristic. That is the effect of the 2010 Act, ss13(1) and 23(1). This

[5] To which, unless otherwise stated, all para numbers below refer

means that the comparison must be between the treatment applied to the Claimant and that which was or would have been applied to an imaginary comparator (no 'actual' comparator being cited) whose circumstances and attributes were in all respects the same as hers except that the comparator's medical condition did not satisfy the statutory definition of disability. Once the proper comparison is drawn, it often becomes obvious that the direct discrimination claims cannot succeed because there is no sensible ground for thinking that the hypothetical comparator would have experienced more favourable treatment than the complainant.

117 The usual difficulty applies here. We see no possible reason for supposing that the hypothetical comparator would have been more favourably treated than the Claimant was. As to 16.1, it is obvious that a casual worker with all the Claimant's attributes and circumstances save disability would, like her, have received no holiday pay or sick pay. As in the case of the Claimant, Mr Lowe would have proceeded on the basis of his sincere but mistaken perception that the comparator as a 'self-employed' person had no right to those benefits. As to 16.4, Ms Polyviou would have been no less (or more) impatient with the Claimant's hypothetical non-disabled comparator than she was with the Claimant on 26 August 2021. There is no rational basis for supposing in either case that the fact of the disability was a material influence behind the treatment complained of.

Discrimination arising from disability

118 The difficulty in making out a claim for direct disability discrimination explains why Parliament provided for a different sort of claim under the 2010 Act, s15, colloquially known as disability-related discrimination. Here the s13 comparison disappears and the question is whether the complainant was treated *un*favourably (not *less* favourably) because of something arising from the disability. In other words it is concerned with discrimination based on *consequences* of disability, rather than disability itself.

Unfavourable treatment?

119 The Claimant relies on two instances of alleged unfavourable treatment: failing to deal properly with her 'grievance' and excluding her from the workplace on 27 August (paras 22.1 and 22.2 respectively). For the reasons given above in relation to detriments for the purposes of the direct discrimination claim, we are clear that she fails to demonstrate unfavourable treatment under either head.

Because of something arising in consequence of disability?

120 In the absence of unfavourable treatment, the claim for discrimination arising from disability necessarily fails, but for completeness we will briefly complete the analysis. The 'something arising' is said to be Mr Lowe's perceptions that the Claimant was 'oversensitive' and that she had 'communication issues' with Ms Polyviou. It appears that an employer's perception or belief may amount to a 'something arising' for the purposes of s15(1) (see *Pilkington UK Ltd v Jones* [2023] EAT 90). But we have rejected the allegations that Mr Lowe passed comments to the effect that the Claimant was oversensitive or had communication issues and we further reject the assertion that he held such perceptions or beliefs.

It follows that the claims under s15(1) fail on the second limb of the test as well as the first.

Failure to make reasonable adjustments

Applicable PCPs?

121 The Claimant relied on two PCPs allegedly applied by Mr Lowe. The first was to require her to work with Ms Polyviou (para 25.1). The second was to allow Ms Polyviou to post photographs of other employees on her personal and/or business social media account(s) and/or business website (para 33.1).

122 We find that the first PCP is made out in respect of the period up to 26 August 2021. The Respondent's only site was the studio. It is a small site. The work had to be performed at the site. Ms Polyviou was necessarily present at the studio when working. A necessary incident of the Claimant's working life was sharing space with Ms Polyviou. But the PCP did not apply after 26 August 2021 because there was no requirement for the Claimant and Ms Polyviou to work together thereafter. The Claimant's agreed spell of working ended on 10 September 2021 (before Ms Polyviou returned from leave), bringing the last 'worker' contract between the parties to an end. No further contract was agreed.

123 The second PCP is not made out. It is not real to speak of Mr Lowe 'allowing' Ms Polyviou to make any particular use of her personal social media account(s) or any social media account or the website through which she operated or promoted her photographic business. As we have found, he had no place to give her any instruction or authorisation in relation to those matters.

Substantial disadvantage to the Claimant?

124 Did any valid PCP put the Claimant at a substantial disadvantage in relation to a relevant matter (employment as defined in the 2010 Act) in comparison with persons who were not disabled? The Claimant contended that the first PCP put her at a substantial disadvantage because Ms Polyviou subjected her to direct discrimination because of her disability. We reject that assertion. Ms Polyviou did not subject her to direct discrimination (or discrimination in any other form). Superfluously perhaps, we might add that if the case had been put on the basis of a PCP of requiring her to work with Ms Polyviou *in the future* it would have failed because (apart from anything else) no such requirement was in fact ever imposed.

125 The second reasonable adjustment claim has already failed because the necessary PCP has not been made out in fact. But it would have failed even if the PCP has been established, for two reasons. First, the substantial disadvantage asserted ('triggering' a mental health reaction in the Claimant) is not established on satisfactory evidence. Rather, it appears to rest on mere assertion. Second, in any event the alleged disadvantage did not arise in relation to a 'relevant matter' (see the 2010 Act, s20(3), and sch 8, para 5), namely employment of *the Claimant*. The issue of the photographs did not arise until well after her employment ended. On her own case, the alleged PCP could not have 'put' her, as a serving 'worker' at any disadvantage.

Respondent's knowledge of the disability/disadvantage

126 We refer to the 2010 Act, sch 8, para 20(1)(b). We have found that the Respondent was at all material times aware of the Claimant's disability. But the reasonable adjustments claims fail for the further reason that the Respondent did not know (at any material time) that the Claimant was likely to be placed at the disadvantage relied upon. As to the first claim, Mr Lowe had no possible reason to think before 26 August 2021 that the Claimant was at risk of suffering any disadvantage (let alone a substantial disadvantage) as a result of working alongside Ms Polyviou. As to the second claim, Mr Lowe was given no reason to think that the fact that Ms Polyviou held some innocent photographs of the Claimant might place her at a substantial disadvantage – certainly until well after she had ceased working for the Respondent.

Reasonable steps?

127 The claims have comprehensively failed. We will not take the reasoning to the next stage as we do not think it proportionate to pile one rejected hypothesis upon another in order to consider the reasonableness of proposed adjustments for which no arguable basis has been shown.

Harassment

Are the acts relied upon proved in fact?

128 Most of the complaints of harassment fail on the facts. Of the nine set out in the list of issues, the first seven (paras 38.1-38.7) are defeated by findings of fact made above under other heads of complaint. We will concentrate on the remaining two.

Unwanted conduct?

129 At para 38.8, the Claimant complains of about Mr Lowe contacting her sister, as to which we have made findings above. We accept that, from her perspective, the conduct of Mr Lowe was unwanted.

130 At para 38.9, the Claimant complains about the summary Mr Lowe sent her on 16 October 2021 of his conclusions on her complaint and the fact that it included a reference to her Asperger Syndrome but failed to propose any adjustments. We accept that the Claimant was dissatisfied on reading this document and that, in that sense, it was unwanted.

Unlawful purpose?

131 Did the conduct complained of at para 38.8 have a purpose which is made unlawful by the 2010 Act? We are very clear that it did not. Mr Lowe acted with the best of intentions. He was very concerned for the Claimant's welfare and believed that contacting her sister was the right thing to do in the circumstances.

132 As to para 38.9, again, Mr Lowe must be acquitted of having any malign purpose in deciding on the Claimant's complaint or in the way in which he expressed himself in his summary of 16 October 2021.

Unlawful effect?

133 If there was no unlawful purpose, is it shown that any unwanted conduct produced any *effect* within the 2010 Act, s26(1)(b)?

134 As to para 38.8, we consider that the Claimant's extreme response on learning that Mr Lowe had contacted her sister is eloquent of her severely unbalanced and vulnerable mental state at the time. Subjectively, she may well have perceived his action as creating for her a hostile or intimidating environment. But the section requires us to consider also whether her perception was reasonable and to have regard to "the other circumstances of the case". The perception of a complainant, particularly one affected by a neuro-developmental condition (or a mental health disability), is certainly an important consideration, but the "other circumstances" put into the balance a range of objective factors, including the need for the Tribunal's conclusions to reflect the gravity (if any) of the impugned act(s). Protection from harassment is not intended to make innocent or benign acts unlawful solely because of the way in which the complainant perceives them. We regret that the Claimant was distressed to learn that Mr Lowe had contacted her sister (she learned it from the sister, not from him), but we are very clear that it would be an affront to justice and common sense to hold that his act could amount to the serious tort of harassment.

135 As to para 38.9, there is no possible basis for finding that the matters complained of had a harassing effect. Mr Lowe made a conscientious assessment of the material provided to him and wrote a summary that was sensitively and carefully expressed. It would not have been appropriate to include anything about adjustments in the summary, but nothing said in it suggested any negative view on his part about possible adjustments in the event of the Claimant returning to the studio.

Conduct 'related to' disability?

136 The claims for harassment under paras 38.8 and 38.9 have failed because conduct capable of constituting actionable harassment is not shown. Had we found otherwise, we would have upheld both claims on the final element of the analysis since in each case the acts complained of were 'related to' the Claimant's disability.

Victimisation

137 The victimisation claim asks the question whether the Claimant was subjected to a detriment because she had done a protected act.

Protected act?

138 The protected act is said to be the 'grievance'. The complaint was not set out in a single document, but repeated in a number of messages and conversations. The theme did not change. The Claimant made a complaint of workplace bullying. She did not – even obliquely – allege or imply that she was a victim of discrimination or any other conduct prohibited under the 2020 Act. She did not cite any relevant protected characteristic. In our judgment, the victimisation claim falls at the first hurdle for want of any protected act.

Detriment?

139 The detriment relied on is the alleged act of excluding the Claimant from the workplace on 27 August 2021. As we have found, she was not excluded. The detriment relied on is not made out.

Burden of proof

140 We have reached our conclusions on the 2010 Act claims without applying the burden of proof provisions because on the evidence presented we are in a position to make full, positive findings. But we would add for completeness that, had we applied them, we would have arrived at the same result. We would have held, for all the reasons given above, that the Claimant had failed to make out a *prima facie* case and that if, contrary to our view, the burden had transferred to the Respondent, it was comfortable discharged.

Jurisdiction - time

141 As we understand it, the parties agree that all complaints pursued before us other than those alleging victimisation were presented within time.

142 On its face, the harassment claim resting on the allegation that Ms Polyviou punched the Claimant in 2019 was presented something like two years out of time. Since we have rejected that claim on its merits and we have found no later unlawful act which could be seen with it as constituting unlawful 'conduct extending over a period' (see the 12010 Act, s123(3)(a)), it would be idle and certainly not 'just and equitable' to consider extending the time limit in accordance with the 2010 Act, s123(1)(b). It follows that this element of the harassment claim fails also on jurisdictional grounds.

The money claims

143 Ultimately, the only money claim pursued by the Claimant was for 'holiday pay'.

144 It is and has been throughout a fact agreed on the pleadings that the Claimant did not receive any paid leave. Her claim was entitled to succeed if she won on the status issue.

145 Mr Roberts argued that no money claim was properly before the Tribunal. We cannot accept that submission. The Claimant explicitly claimed holiday pay in the claim form. She never withdrew or renounced that claim. EJ Burns recorded that her claims included a claim for holiday pay. She particularised the claim in particulars delivered pursuant to EJ Burns's order. She particularised it again in the particulars following EJ Heath's order. It is unclear why the Respondent, represented by counsel and solicitor throughout, did not engage with the pleaded case and ask for it to be further clarified if that was necessary.

146 The matter of holiday pay should have been raised at the start of the hearing before us. The Tribunal accepts its share of blame, but with the Claimant unrepresented and the Tribunal appearing to overlook it, the Respondent had, and should have taken, yet another opportunity to raise the matter. Simply pretending that the claim did not exist was not a permissible course.

147 What to do? We see no alternative to adjourning the holiday pay claim. The Respondent seems to have no defence to it. Quantifying it should be a matter of arithmetic. The claim cries out to be settled. If the Tribunal does not receive notification that it has been settled no later than 42 days after this judgment is promulgated, an instruction will be given for a preliminary hearing for case management to be listed with a view to listing a further hearing, with a two-hour allocation. Since the matter is 'part-heard' it appears that it will need to be before the full Tribunal.before the full Tribunal.

Outcome and Postscript

148 For the reasons given, the money claim is adjourned. All other claims fail and are dismissed.

Employment Judge Snelson

02/08/2023

_____

Judgment entered in the Register and copies sent to the parties on: 02/08/2023

..... for Office of the Tribunals