EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101905/2023

Heard in Edinburgh on 10, 11, 12, 13, 14 July 2023

Employment Judge J Young
Tribunal Member L Grime
Tribunal Member R Henderson

Shauna Moar **c/o Hann & Co**	**Claimant** **Represented by:** **Mr B Hann - Solicitor**
Dave Douglas **Future Gym**	**Respondent** **Represented by:** **Mr J Munro - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant was not a worker or employee under section 230 of the Employment Rights Act 1996; or an employee of the respondent under section 83 of the Equality Act 2010 or any extension of worker under section 43K of Employment Rights Act 1996 and so the Tribunal lack jurisdiction to hear the claimant's complaints of discrimination because of disability, detriment as a result of making a protected disclosure and

failure to provide a written statement of particulars of employment which are dismissed.

REASONS

introduction

1. In this case the claimant presented a claim to the Employment Tribunal complaining of discrimination because of the protected characteristic of disability (direct discrimination, discrimination arising from disability and failure to make reasonable adjustments), harassment related to disability and victimisation all under the Equality Act 2010 (EA); detriment as a result of making qualifying disclosures under section 43B of the Employment Rights Act 1996 (ERA); and failure to provide written statement of initial employment particulars under section 1 of ERA.

2. Those claims were resisted by the respondent who contended (a) that the claimant was a self employed person who provided services and so the Tribunal had no jurisdiction to determine the complaints made; (b) in any event any allegations of discrimination pre-dating 19 October 2022 were time barred under section 123 of EA; (c) the claimant was not a disabled person under section 6 of EA; (d) even if the claimant was a disabled person as so defined there was no discrimination because of that protected characteristic; (e) that the claimant had not made any disclosures of information which would entitle her to bring a complaint of detriment as a result of making protected disclosures or that the respondent subjected the claimant to any detriment.

3. At a preliminary hearing it was agreed that the complaints should be determined at a final hearing including the preliminary issues identified of employment status, disability status and time bar.

Issues for the Tribunal

4. Parties had agreed a Joint List of Issues for determination by the Tribunal being:-

"Jurisdiction Issue – Employment Status

1. Was the Claimant an employee of the Respondent within the meaning of Section 230 of the Employment Rights Act 1996?

2. Was the Claimant an employee of the Respondent within the meaning of Section 83 of the Equality Act 2010?

3. Was the Claimant a worker of the Respondent within the meaning of Section 230 of the Employment Rights Act 1996?

Jurisdictional Issue – Time Limits

4. Given the date the Claim Form was presented and the dates of early conciliation, any complaint about something that happened before 19 October 2022 may not have been brought in time.

5. Were each and every allegation of discrimination presented within the time limit in Section 123 of the Equality Act 2010? The Tribunal will decide:

a. Has each and every allegation been presented within a period of three months (plus early conciliation extension) of the date which the complaint relates?

b. If not, did any allegations dating before 19 October 2022 form part of a series of events the last of which took place after the 19 October 2022?

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

d. If not, were the claims made within a further period that 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 to extend the time limits?

Disability

6. Did the Claimant have a disability as defined in Section 6 of the Equality Act 2010 at the material time of the events the Claim is about? The Tribunal will decide:

a. Did she have a physical or mental impairment: Hypothyroidism?

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

c. If no, did the Claimant have medical treatment, including medication or take other measures to treat or correct the impairment?

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

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

i. Did they last at least 12 months, or were they likely to last at least 12 months?

ii. If not, were they likely to recur?

7. If so, at all material times, did the Respondent have knowledge, either actual or constructive, that the Claimant was a disabled person?

Direct Discrimination

8. Did the Respondent do the following things:

a. Mock the Claimant's disability and her discomfort from the cold, while ignoring and rejecting her requests to provide adequate heat in the premises? In particular:

i. At the gym, on the 13 October 2022, did the Respondent tell the Claimant that the that "*The heating stays off, as it costs money*".

ii. At the gym, on 19 October 2022, did the Respondent make comments to Neill Kelly (his PA), in the reception, about the Claimant being cold, and make fun of the claimant wearing extra layers, and laugh before and after Neill saying, "*Look at you in all those layers, I don't feel the cold*.

iii. At the gym, On 2 November 2022, did the Respondent come into work to find the Claimant in the office wearing lots of layers including a beanie hat and padded jacket, and laugh and said "*Are you cold again?*" and he continue to laugh as the Claimant replied, "*Dave it's not funny, I have a medical condition and it is affecting my health."* then continue to laugh and shake his head and leave the office without addressing her concern.

iv. At the gym, On 2 November 2022 after the Claimant turned on the heating and asked the Respondent to leave it on, also putting a post-it note on the heating switch which said "*Please leave on*", did the Respondent:

1. Take down her post-it note, crumple-it-up and throw it in the bin;

2. Switch-off the heating;

3. Give her angry looks, and ignore her the rest of the shift; and

4. Text her through disappearing text messages, rather than talking to her in person.

9. Was that less favourable treatment?

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

b. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

c. The Claimant has not named anyone in particular who she says was treated better than she was. The Claimant relies upon the following comparators:

   i. The Respondent's other employees;
   ii. Members of the public.

10. If so, was it because of a disability?

Discrimination Arising from Disability

11. Did the Respondent treat the Claimant unfavourably by doing the things identified at paragraph 8?

12. Did the following things arise in consequence of the Claimant's disability. Namely:

a. Ignoring the Respondent's instruction to leave the heating off in the office?

13. Was the unfavourable treatment because of any of those things?

14. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aim was to:

a. Maintain a reasonable temperature within the gym in accordance with Regulation 7(1) of the Workplace (Health, Safety and Welfare) Regulations 1992.

15. The Tribunal will decide in particular:

a. Was the treatment appropriate and reasonably necessary way to achieve this aim;

b. Could something less discriminatory have been done instead; and

c. How should the needs of the Claimant and the Respondent be balanced?

Failure to Make Reasonable Adjustments

16. A "PCP" is a provision, criterion or practice. Did the Respondent's refusal to allow heating in the premises amount to a PCP?

17. If so, was the PCP applied to the Claimant?

18. If so, did the Claimant's disability put her at a substantial disadvantage when compared with person who did not share the Claimant's disability? If so, how?

19. Did the Respondent know or ought to have known that the Claimant was so disadvantaged? In particular did the Claimant discuss:

a. With the Respondent on 13 October 2022 that she was more susceptible to the cold, when she asked the Respondent how to work the heating;

b. On 22 October 2022, when the Claimant's partner, Rachel, came to the gym, and then later that evening, while in the Respondent's house, how cold the gym was, and that the Claimant was struggling with the cold due to her hypothyroidism; and

c. On 2 November 2022, when the Respondent came into work to find the Claimant in the office wearing lots of layers including a beanie hat and padded jacket, and he laughed and said, *"Are you cold again?"* and he continued to laugh as the Claimant replied, *"Dave it's not funny, I have a medical condition and it is affecting my health."*

20. What steps could have been taken to avoid this disadvantage? The Claimant suggests:

a. To provide adequate heating of the office and also in the gym in general.

21. Was it reasonable for the Respondent to take those steps and when?

22. Did the Respondent fail to take those steps?

Harassment

23. Did the Respondent do the following things:

a. Mocking the Respondent about being cold on the 13 October 2022, 22 October 2022, and 2 November 2022; and

b. Being dismissive of her condition and complaints on the 13 October 2022, 22 October 2022, and 2 November 2022.

24. If so, was that unwanted conduct?

25. Did it relate to a disability?

26. 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?

27. 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.

Victimisation

28. Did the Claimant do a protected act as follows:

a. On 13 October 2022, 22 October 2022, and 2 November 2022 complaining about the lack of heating in the office affecting her health and wellbeing; and

b. Few weeks after starting work, complaining to the Respondent, about his treatment of a member of staff called Jamie Marnie, who had additional support needs, due to autism.

29. Did the Respondent do the following things:

a. Mocked the Claimant on the on 13 October 2022, 2d October 2022, and 2 November 2022 about being cold;

b. Force the Claimant to work in cold conditions;

c. Send the Claimant a message on 5 November 2022, stating that the Respondent was now only going to employ her for 15 hours a week;

d. Tell the Claimant that he could not afford to pay her more than 15 hours;

e. Cut the Claimant's hours, in the same week the Respondent hired a new Personal Trainer called Bruce;

f. Make the Claimant homeless on 8 November 2022, by forcing her out of his house without notice, telling her he had called the police, and telling her she couldn't come back;

g. Remove her access to the gym, and refused to allow her to collect her personal belongings in the gym, and the house;

h. Keep her personal items valued at around £500, and sentimental value; and

i. Keep £2,500 of gym equipment.

30. By doing so, did the Respondent subject the Claimant to detriment?

31. If so, was it because the Claimant did a protected act?

32. Was it because the Respondent believed the Claimant had done, or might do, a protected act?

Protected Disclosure

33. 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:

i. On 11 October 2022, during her first shift the Claimant complained to the Respondent that he had no 'Lone Working' policy, yet most of her shifts were lone working. She complained that there was no induction, or fire evacuation procedure shown, and no training given to her before being thrown in to teach classes. And also, that no first aid procedures were identified. She also complained that he had not supplied the uniform he had made her pay for back on 7th August 2022;

ii. On 24 October 2022, the Claimant raised her concerns with the Respondent and questioned whether it was legal for the Respondent to be recording and storing staff and gym members' conversations without their knowledge that there were cameras, and they were voice recording;

iii. On 2 November 2022, the Claimant argued that she wasn't comfortable with her equipment being used unsafely, and the legal implications for her, but the Respondent said that it was his equipment and she had to let members use her equipment;

iv. On 2 November 2022, the Claimant queried the legality of the Respondent taking her equipment and felt she had been deceived;

v. On 3 November 2022, the Claimant complained to the Respondent about his treatment of a member of staff called Jamie Marnie, who had additional support needs, due to autism. Part of the Claimant's

role at the gym was to organise the staff rota. The Respondent advised the Claimant to put Jamie on more shifts than the other staff (including the Claimant) because Jamie worked at the gym unpaid. The Respondent sent the Claimant a voicemail telling her to *"pull all support for Jamie"* and *"not to give him and inch"* he called him a *"floater"* and to use him *"to full advantage"*, and *"give him Friday nights, and Saturday and Sunday, every weekend"*, and to *"give him split shifts, morning and night"* and *"put him in every dead class, all the shitty classes"*. The Claimant objected to this, as it was unfair to Jamie. Jamie was a Level 2 Qualified gym instructor with a year of experience working in the gym. The Claimant suggested that Jamie should be paid a Gym Instructor hourly rate, which is slightly less as a Qualified Level 3 Personal Trainer, as Jamie was already doing the role in which he was qualified. The Respondent replied, *"Why would I pay him if he's already working for free?"*. The Respondent made it clear that was the end of the discussion.

vi. On 7 November 2022, the Claimant discussing with the Respondent and his wife about him cutting her hours to 15 hours a week. Alleging discrimination, whistleblowing, harassment and victimisation complaints.

b. In accordance with *Cavendish Munro Professional Risks Management Ltd -v- Geduld [2010] IRLR 38*, did the Claimant disclose information?

c. Did the Claimant believe the disclosure of information was made in the public interest?

d. Was that belief reasonable?

e. Did she believe it tended to show that:

i. A criminal offence had been, was being or was likely to be committed?

ii. A person had failed, was failing or was likely to fail to comply with any legal obligation?

iii. A miscarriage of justice had occurred, was occurring or was likely to occur?

iv. The health and safety of any individual had been, was being or was likely to be endangered?

v. The environment had been, was being or was likely to be damaged?

vi. Information tending to show any of these things had been, was being or was likely to be deliberately concealed?

f. Was that belief reasonable?

Detriment

34. Did the Respondent do the following things:

a. She was mocked on the on 13 October 2022, 22 October 2022, and 2 November 2022 about being cold.

b. She was forced to work in cold conditions throughout her employment.

c. On 5 November 2022, the Respondent informed her that her hours would reduce from full-time, but to 15 hours a week (but he had just hired a new full-time member of staff);

d. In the discussion in the Respondent ‘s home on 7 November 2022, the Claimant aired all her grievances again, the Respondent became aggressive and demanded she immediately vacate the property. The Claimant retreated to her bedroom. While she hid in her bedroom, the received alerts that the Respondent had removed her as admin of the business Facebook page; blocked her on social media; removed her login for managing the Rota; removed her HR access. She was afraid for her safety. She stayed in her room until the Respondent and his wife had both

gone to work the next day. A friend came to be with her the next day and helped her pack. The Respondent has sent her intimidating messages. She was made homeless, and is currently in hiding from the Respondent, and is afraid of him. She seeks permission of the Tribunal not to disclose her current address to the Respondent.

e. She was automatically unfairly dismissed from her job.

f. The Respondent removed her access to the gym and refused to allow her to collect her personal belongings in the gym, and the house. When she attended the Gym with a friend to collect her personal belongings, he called the Police on her again. These items are valued at around £500, and sentimental value, and consist of: an acupuncture mat; pillow; bag; 2x massage balls red & black; 2x dog bowls; Shoe box full of tools / accessories /DIY; Framed photo of her and her partner; new U.S.B stick in white box; White board with competition info; Cerberus Loadable handles x2; Grey foam floor mats x4; Mirafit Slamball 25kg; Pro-fit Slamball 25lbs; 2x silver handle attachments; Yoke J-cups x2; Foam roller blue; Duck walk; Grip trainer thick handle; Sandbag 150lbs; Strength register blue weighted bag; Hang padded arm attachments x2; Pink large bucket; Rainbow large flag; White tray with bees on (in house);

g. The Respondent kept £2,500 of gym equipment, claiming ownership by means of the Personal Trainer Contract the Claimant was pushed to sign, without having read or agreed its terms.

35. By doing so, did it subject the Claimant to detriment?

36. If so, was it done on the ground that she made a protected disclosure?

Failure to provide Written Statement of Particulars of Employment

37. Did the Respondent fail to provide the Claimant with a statement of employment particulars?

a. The Respondent maintains that the Claimant was self-employed, and, in any event, it provided the Claimant with a Service Agreement on 11 October 2022.

38. If the Tribunal finds in favour of the Claimant in respect to a claim which proceedings relate, would the Claimant be entitled to:

a. The minimum amount equal to two weeks' pay; or

b. The higher amount equal to four weeks' pay.

Remedy

39. What financial losses has the discrimination/detrimental treatment caused the Claimant?

40. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

41. If not, for what period of loss should the Claimant be compensated?

42. What injury to feelings has the discrimination/detrimental treatment caused the Claimant and how much compensation should be awarded for that?

43. Has the discrimination/detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

44. Is it just and equitable to award the claimant other compensation?"

Documentation

5. The parties had helpfully liaised in providing a joint file of documents paginated 1-278 (J1-278). There was also produced a supplementary file of documents for the claimant being paginated 1-47 together with a memory stick containing voice mail messages (48) . In the course of the hearing there

was produced without objection one further document numbered (49) (C1-49).

The Hearing

6. At the Hearing evidence was given by the claimant; Anna Milligan who had been a friend of the claimant for approximately 5 years; Rachel Cutler, the claimant's partner; the respondent and Tracey Douglas, the respondent's spouse.

7. From the documents produced, relevant evidence led and admissions made the Tribunal were able to make findings in fact on the issues raised. Many factual matters were in dispute and so there is some inevitable rehearsal of evidence in the findings and conclusions.

Findings in Fact

8. At the date of the hearing the claimant's occupation was that of self employed personal trainer. Until around September 2022 the claimant lived in Aberdeen and carried on business as a dog walker. The claimant competed in "strong woman competitions" and was clearly accomplished having gained several prizes and trophies in that respect (J197/198). In 2022 she undertook the qualifications to become a personal trainer.

9. The claimant was a close friend of Tracey Douglas who she had known from her time living in Shetland around 2009. From around 2019/2020 the friendship between the claimant and Tracey Douglas had become closer. The claimant was "maid of honour" at the wedding of Tracey Douglas to the respondent in October 2021. Tracey Douglas is a chemistry teacher working full time at a secondary school but at weekends or during school holidays would attend competitions with the claimant from time to time. She would also look after the claimant's dog (Daphne) when the claimant might travel to attend competitions. Messages passing between claimant and Tracey Douglas in September 2022 were examples (J154/156).

10. The claimant came to know the respondent through her friendship with Tracey Douglas. From around July 2022 discussion took place with the claimant and the respondent regarding the claimant being involved in the business of personal training.

11. The respondent had set up a business known as “Future Gym” which invited membership on a monthly basis. Members were able to attend the gym premises for exercise using the usual range of exercise equipment and weights. Members were also able to attend a range of fitness/exercise classes taken by personal trainers. Members were able to book 1:1 training with those personal trainers. Around beginning October 2022 fitness classes and personal training sessions were taken by the respondent and three other trainers. Members were also able to attend a Yoga class and had access to massage therapy from a qualified masseuse.

12. Some administrative support was provided to the respondent by his friend “Neil” who was employed by a financial institution and who helped out from time to time particularly on documentation as the respondent was dyslexic. The respondent instructed an accountant to “do the books” and provide financial advice.

13. The administration of membership was mainly conducted online. Members were provided with a key fob to gain access to the premises. The detail of classes which members could attend was advised online with the facility to “sign up” to those classes. Until end of October 2022 the gym was open 6.30 am – 9pm on weekdays and 9am-5pm at weekends.

14. The Gym premises comprise large exercise area and other studios/rooms for exercise activity such as weight training, yoga and massage therapy with a small office (J144)

Arrangements with the claimant

15. There was dispute over the arrangements with the claimant at Future Gym which existed over the period 11 October 2022 to 7 November 2022.

16. The respondent's position was that the claimant was keen to start business as a personal trainer and he was able to assist. The model for the Future Gym business was to engage self employed personal trainers at the gym who would be able to conduct their personal training business from the gym premises. For the use of the gym premises in that business they would pay a rental of £540 per month.

17. Given the known difficulties around the establishment and conduct of the business of personal training a "buffer" or "safety net" for trainers was that they would be offered some hours at the Gym (usually between 10/15 per week) at an hourly rate (and in the claimant's case that would be of £13 per hour). There was no itemised list of matters required of the trainers in those hours. The evidence indicated the trainer would be present at the Gym in the agreed hours conducting/leading group fitness/exercise classes for members; inducting new members in use of equipment; assisting members in any queries as to the use of the equipment or demonstrating the use of equipment; dealing with any general issues which might arise; check cleaning stations were supplied with spray and wipes; load and supply key fobs to members as necessary. That "buffer" of hours assisted the personal trainers in making payment of rent and giving access to members who may wish to instruct the personal trainer in 1:1 training at the gym or elsewhere for whatever fee was agreed between the member and the trainer.

18. The "Facebook" document (J261) seeking "*self motivated personal trainers"* at Future Gym dated 28 August 2022 was seen by the claimant and outlined the requirements for those who wished to join the team of coaches.

19. Tracey Douglas was aware of the discussions as she had on occasion been present when these matters were discussed with the claimant. She advised

the claimant was keen to commence business as a personal trainer and arrangements were in line with the other trainers namely that the claimant would be a self employed personal trainer at the Gym. There would be the opportunity to work certain hours at the Gym in being present to lead group fitness/exercise classes, deal with members queries, ensure proper use of equipment and the like and but that was on a self employed basis.

20. The claimant's position was that the discussions were to the effect that she was taking on employment with the respondent in a "managerial role" as "Assistant Manager". She considered that her duties would be managing staff; managing a rota and timetable and general running of the gym. She believed this would be a "full time position of 37 hours per week". She agreed that no hours had ever been discussed and she assumed that full time meant 37 hours per week.

21. The claimant had acquired in the course of her fitness/strongwoman regime various items of equipment such as bar bells, weights and the like. She enquired by message of 7 August 2022(J6) if the respondent had "*room for all my stuff? Or somewhere to store it until we get the strength gym sorted".* Arrangements were then made for the claimant's strength equipment to be located in the gym premises with a room large enough to accommodate the various items (voicemail messages on memory stick C48)

22. The claimant also required to find accommodation in the Edinburgh area and found that difficult due to availability/cost. She requested a letter from the respondent to support her in that search by message of 25 August 2022 stating:- *"Is it possible for me to get some sort of letter of contract showing what I'll be earning? I am applying for the mid market homes"* (C10)

23. The respondent advised by voicemail that a letter had been prepared for use by the claimant and that a signed copy had been left for her. A letter was sent as an enclosure on 26 August 2022 to the claimant. An unsigned letter produced (J2790 read:-

"To whom it may concern

This is to confirm that Shauna Moar is employed full time at Future Gym in the role of Senior Personal Trainer and is paid at the rate of £12 ph as well, she will have the opportunity to earn additional income via private personal training sessions".

24. The claimant relied on this letter as setting out her "contract of employment". However as later explained the Tribunal in the whole circumstances did not consider it did reflect the true arrangement and was sent for the specific purpose of assisting the claimant in a search for accommodation.

25. In any event the letter was not required as the following day by voicemail message the respondent advised that he and his wife had been thinking about the issue of accommodation and offered accommodation in their house with the use of a room and facilities at a rental payment of £250 per month. The claimant responded to accept that offer willingly and asked if there was room for "*my stuff to store? garage maybe? We can discuss properly when I am down next week" (C10).* The reference to possessions being stored in the "garage" was a reference to possessions separate from the gym equipment which had already been agreed to be located in the gym itself.

26. The claimant was aware that as part of the arrangements she required to pay rental for use of the gym premises in her capacity as a personal trainer at the rate of £540 per month. It was recognised that the claimant would find it difficult to pay rental in the start up of the personal training business and it was arranged that the equipment could be utilised to offset rental payments. There was dispute over the particular terms of that arrangement.

27. The claimant had purchased the equipment for approximately £2,500 and put this value on the equipment. The respondent accepted that value and that the claimant could offset rental payments against that value on the basis that the equipment became the property of Future Gym. The claimant contended that she was only lending the equipment to the gym for its value of £2,500

which would be offset against rental payment for the first few months. The issue of the arrangements around the equipment featured strongly in subsequent events.

28. The respondent advised the claimant in a message of 7 August 2022 that he would arrange a uniform for the claimant. In that message (C6) he asked for sizes and that he would forward the "*FG uniform payment link".* That was forwarded on 7 August 2022 and the claimant subsequently made a payment for uniform in the sum of £212 (C7 and C11).

29. There was dispute over whether in fact the uniform had been provided. The claimant's position was that she had only received a second hand uniform conform to the message of 18 October 2022 (C32).

30. The respondent's position as explained by Tracey Douglas was that a new uniform had been ordered but when it arrived some of the garments were wrongly sized and had to be returned to be replaced. In the meantime the claimant was supplied with second hand items which were in the gym until the correct sized items arrived. Those items did arrive but not until the claimant had left the gym. In any event it was clear that part of the arrangement was that the claimant would wear a Future Gym uniform. On this issue the Tribunal preferred the clear account given by Mrs Douglas on the matter regarding certain wrong sizes being provided and the respondent requiring to go back to the supplier for the correct sized items. The uniform was left in the claimant's house when the claimant departed.

Service agreement

31. The claimant entered into a "Senior Personal Trainer Service Agreement" between herself and Future Gym on 11 October 2022. It was explained that the claimant wished to be designed as "Senior" and the respondent acquiesced. This Agreement was produced within the joint file (J130/147) and

as modified in the supplementary bundle (C13/29). The claimant signed the Agreement (J142) and Appendix 1 which relates to the Schedule of Equipment (J146) and initialled all other pages.

32. The claimant asserted that she was presented with this Agreement on 11 October 2022 when she required to take a group class within the next hour and she did not have any time to consider the terms. She was "naïve" and "trusted him as a friend" and "pressured into signing" and "he planned so not have time to read" and signed. The position of the respondent was that there was no pressure on the claimant. She was required to sign the Agreement but if there was any difficulty with the terms then an amendment could have been discussed. The evidence was that one of the other personal trainers had sought and negotiated amendments to his Agreement.

33. Tracey Douglas gave a clear account of the claimant going into the gym on 11 October 2022 to "sign some paperwork" but that her first class was not until the following day 12 October 2022 when she drove the claimant to the gym. She recalled being excited for her friend as it was her "first day".

34. The respondent could not recall any class being imminent for the claimant on 11 October 2022 when she arrived at the gym to sign the paperwork. The Tribunal did not consider that the claimant was pressurised or had deliberately been given insufficient time to consider the terms of this Agreement before she signed.

35. The Agreement contained various clauses including one regarding "*Rental Fee"* meaning *"£540 per calendar month"* being the agreed rental for the use of the premises by the claimant. The agreement on rental stated:-

> *"As per agreement to purchase gym equipment (Appendix 1) in lieu of gym rent, it is agreed that no rental fee as outlined above will be due for the months of October 2022, November 2022, December 2022 and January 2023 in lieu of payment for the equipment that will become the property of Future Gym from October 2022. From*

February 2023 onwards the gym rental fee of £540 is applicable" (J133)

36. That term had also noted "*if the senior PT leaves in the first four months ownership of the equipment (appendix1) in question will remain with Future Gym with no further obligation"*

37. The agreement was subsequently adjusted on 2nd of November 2022 with the claimant signing and dating her adjustment which indicated that the *"rental agreement to be extended to 11 March 2023".* That was also signed off by the respondent (C16). Accordingly there was an agreement that in lieu of payment of rent through to 11 March 2023 the equipment became the property of Future Gym from October 2022. The equipment was as listed in the Appendix to the Agreement (J146) which was again signed by the claimant and the respondent and the list of equipment marked "*All received"* which was initialled by the claimant.

38. Even if the claimant's position had been accepted that she did not have time to consider the terms of this Agreement when she signed it on 11 October 2022 she subsequently adjusted the term to extend the rent free period and the plain words of the clause on rent and equipment must have been apparent to her at that time. Accordingly it could not be accepted that the agreement was that the Gym only had use of the equipment and that excused rental payment for a period.

39. Also in terms of assessing whether there any pressure or manipulation at play the claimant maintained in evidence that the only time she came to realise the position on the equipment was in the first week of November and that this was the "first time I'd had the opportunity to read the Agreement*".* The Tribunal could not consider that could the case as she had been provided with a copy of the Agreement when she signed it on 11 October 2022 and so had ample opportunity to read the Agreement between then and beginning November 2022. There was no evidence that the claimant raised any issue with the respondent on the terms until after 2 November 2022 and then only on the issue of equipment.

Other terms of Agreement

40. The "*Senior Personal Trainer's Obligations"* were *to "provide Personal Training sessions in accordance with the high standards of safety and shall in any event comply at all times with the statutory legislative provisions for health and safety"* and to hold qualifications as a practitioner "*recognised by the Chartered Institute for the Management of Sport and Physical Activity (CIMSPA)"* and be recognised by CIMSPA as a "*Level 3 Personal Trainer".(*Clause 3*)*

41. The Agreement (Clause3.10) obliged the claimant to wear the "*gym's branded uniform when conducting business within the premises of the gym"* the costs being borne by the personal trainer.

42. The personal trainer was to be remunerated at £13 an hour for hours at the gym "*as agreed with the gym owner"* and be responsible for submitting a monthly invoice by the 5th of each month for the previous calendar month.(Clause 4)

43. The personal trainer was also to *"establish, operate and use best endeavours to promote and develop their business and carry it on in the premises during the permitted hours for the benefit of the public including customers and staff of the Gym's business".* There were obligations to arrive 10 minutes before a personal training session was to commence; meet and greet customers; undertake safe and effective training sessions; use the equipment provided by the gym in a safe and effective manner; be polite, friendly and respectful of gym members. A personal trainer was entitled to use fitness equipment belonging to them provided it was used safely and authorised for use by the gym owner.(Clause 5)

44. Any proposed advertising materials to promote the personal trainer's business would require to be authorised by the gym such consent *"not to be*

unreasonably withheld or delayed" and Schedule 3 of the Agreement outlined the marketing framework for the promotion of the personal trainer's business. Personal trainers were entitled to charge their own prices for personal training services to gym members.(Clause 5.8)

45. The obligations of the gym were to provide access to facilities in order that the personal training sessions could be provided and to provide access to all necessary equipment. In the event that there was an unplanned site closure that exceeded 24 hours or a planned site closure exceeding 7 consecutive days a refund of rental payment would be made on a pro rata basis.(Clause 8)

46. The personal trainer was to be responsible for all income tax and national insurance liability.(Clause 3.9)

47. In the event that the personal trainer was unable to undertake the services then "*to provide the services he agreed to undertake"* he/she could provide a suitable qualified and experienced alternative he/she deemed appropriate. The name of the alternate, evidence of qualifications and liability insurance were to be provided to the Gym owner. The personal trainer would be responsible for paying the alternate to whom they had "*delegated to provide the services*". (Clause 20)

48. The Agreement contained provisions for termination in certain circumstances by the Gym. If terminated early by the trainer or due to breach or gross misconduct a termination fee would be payable by the trainer.

49. An emergency contact sheet giving phone numbers of those who could be contacted in the event of an emergency or serious incident was attached to the Agreement.

Level 3 Certificate

50. While there was no legal requirement for a personal trainer to hold qualifications it is recommended they do so. As narrated the Agreement stated that the claimant required to be "*recognised by CIMSPA as a Level 3 Personal Trainer".* It was maintained by the claimant that she only had a "Level 2" qualification which would only allow her to take group classes. As she did not have a "Level 3" qualification she could not conduct personal training sessions and so unable to be a self employed Personal Trainer when starting on 11/12 October 2022.

51. In evidence she advised that she completed the Level 3 training course "in October" and would have been able to take on personal training from 1 November 22 and that the respondent "knew I had Level 2 and not Level 3"; and "Tracey did practical for Level 2 she didn't for Level 3" and that the screenshot/photograph of 18 September 2022 (C11) showed her and Tracey Douglas at her Level 2 completion.

52. The evidence from Tracey Douglas was that the claimant did have a Level 3 qualification as she had attended with the claimant when she passed the practical to obtain that qualification. The screenshot/photograph (C11) showed her and the claimant attending the practical assessment of the claimant for her Level 3 Certificate on Sunday 18 September 2022 with the message attached as *"passed*" (with celebratory emoji) sent to the respondent and the comment in response from the respondent as "*amazing*" (with congratulatory emoji). She was certain that was the Level 3 assessment because she had previously attended the Level 2 assessment with the claimant in June 2022 and she had returned with the claimant for the next level assessment in September 2022 which the claimant had also passed. At that time the claimant had indicated that she was ready to send in her course work and receive the Certificate. So she would have had approximately 4 weeks before commencing business at the Gym.

53. This account by Tracey Douglas was supported by the screenshot/photograph of 20 August 2022 (C8) which was entitled *"Level 3 Certificate in Personal Training"* and indicating that the course was *"92%"*

completed. The comment attached to that screenshot from the claimant to Tracey Douglas states: "*Waiting on a few things to be marked, just the programme card design and practical to do"* to which Mrs Douglas (then using her maiden name of Hunter) responds "*Yey xx".*

54. That is followed by the screenshot/photograph of the claimant and Tracey Douglas on Sunday 18 September attending the assessment (which the claimant claimed was a Level 2 assessment) with the comment "*passed".* The Tribunal did not consider it credible of the claimant to suggest that was a photograph of the Level 2 assessment completion. The screenshot/photograph (C8) clearly refers to progress in a Level 3 Certificate for the claimant and it would not be logical to consider that the claimant was attending a Level 2 assessment after she had completed 92% of the work necessary for a Level 3 Certificate.

55. Additionally on 22nd September 2022 Future Gym put up a post stating that there was "*exciting news"* of "*strong woman Shauna Moar joining the team at Future Gym as Head PT next month"* and that if any member was *"interested in booking in for a session with Shauna do get in touch".* There was then added a profile by the claimant of her background and experience in sports and fitness and on 2 October 2022 she posted a screenshot of her trophies and indicated:-

> "*Now taking bookings for a 1-2-1 personal training sessions at Future Gym in South Queensferry, and there's still a couple of spaces left for online coaching".*

56. From those matters the Tribunal concluded that it was not the case that the claimant was unable to conduct personal training when she started as a Personal Trainer at Future Gym or that the respondent and his wife knew that she could not conduct a personal training business because she had not attained Level 3 certification. The evidence showed that the claimant herself was soliciting business for personal training as from the 2nd of October 2022 and the productions (C8/C11) demonstrated that by 18 September 2022 she

had passed the practical assessment for her Level 3 Certificate and in accordance with the previous post of 20 August 2022 only had that and a *"few things to be marked, just the programme card design …"* to do. In those circumstances the Tribunal could not conclude that the claimant lacked the Level 3 certification for her to be able to commence personal training business. She advertised herself as being able to take on personal training clients. It seemed clear that the plan all along was for the claimant to be able to conduct personal training business from day one at the Future Gym premises. That also chimed with the payment of rent from day one for the use of the premises.

Claimant Responsibilities

57. It was maintained by the claimant that she had certain responsibilities in relation to management with particular reference to arranging rotas of those taking training sessions and reception duties.

58. The position of the respondent was that in October 2022 the claimant attended a competition in Paris, spent time staying with her with her partner or on holiday over the succeeding weeks. The claimant was entitled to come and go as she pleased and did so.

59. There was some lack of clarity over the claimant's movements in October 2022. The claimant advised that she intended to commence work with the respondent on 8th October 2022 but shifts "were cancelled" and stated that she commenced work with a shift on 11 October 2022.

60. However later she advised that she attended a competition in Paris for 4 days between 6th-11 October 2022 and so it would not appear she could have commenced work on the 8th October.

61. So far as commencing work on 11 October 2022 was concerned Tracey Douglas' evidence was that the claimant returned from Paris on Tuesday 11 October and went to the gym to "sign some papers" and then attend the gym

on Wednesday 12 October as her first day at the gym. That fitted the timescale of the competition with a return from Paris on 11 October 2022 as stated by the claimant. The invoice which the claimant prepared and submitted for classes taken in October 2022 (J151) contained no reference to a class being taken on 11 October 2022 as stated by the claimant.

62. She also advised that she was "away quite a lot over October – holiday, competition, away seeing Rachel" and that she worked "the hours that were left after doing these things". She explained that she had stayed at her partner's home for "4 or 5 days" and that was "say the week beginning the 17th of October". She went to stay with her partner on Friday 4 November 2022 as there had been a family gathering arranged over that weekend and was not available to take classes.

63. There was no attempt by the respondent to restrict the claimant in her time away in October or early November 2022. Her invoice (J151) indicated that she took classes on 19, 21, 22, 24, 25, 26, 27 October 2022. Given the claimant prepared the invoice for hours worked (J151) the Tribunal considered that was a reflection of the actual hours at the Gym in that period as there was a lack of clarity as to when it was that the claimant actually was available for work in the period covered by that invoice.

64. In any event that invoice was paid gross by the respondent around the end of October on a request by the claimant that she be paid early. The invoices were usually paid mid month following submission.

65. In the course of October the claimant requested a letter for benefit purposes. That letter dated 11 October 2022 (J148) stated:-

> "*To whom it may concern*
> *This is to confirm that Shauna Moar is in a self employed role of Senior Personal Trainer on a zero hours contract at Future Gym and*

is paid at the rate of £13 ph as well, she is due to pay gym rent of £540 per month to Future Gym".

66. That letter was signed by the respondent. The claimant advised that she requested such a letter around mid October when she realised that she was not "getting the hours at the gym".

Rota

67. The claimant's position was that she was taken on to do certain tasks including making up the rota for personal trainers to cover classes.

68. There was no evidence that she was put on any rota duty when she started at the gym. The evidence from the respondent was that the claimant asked in later October if she could assist in compiling the rota for classes saying that she had some experience of this and the respondent agreed.

69. The claimant then compiled a rota for November 2022. She did this towards the end of October 2022. That was done by asking the other personal trainers of their availability and then with that information putting in place the rota.

70. The claimant prepared an invoice for November based on the shifts that she had allocated to herself for November (J152/153). In the 4 week period commencing 31st October-27 November 2022 she allocated herself a total of 136 hours (being an average of 34 hours per week).

71. The Tribunal heard evidence that this required to be altered by the respondent whose position was that personal trainers at the gym would be offered 15/20 hours per week as a "buffer" towards earnings and the hours allocated by the claimant to herself were out of kilter with what could be provided. That meant that the rota prepared by the claimant was not utilised and required to be redone by the respondent.

72. By undated message accepted to be 5 November 2022 (C38) the respondent advised the claimant:-

> *"I have just done my November hours analysis vs income.*
>
> *I am sorry but your shifts are very high from next week moving forward. Could you edit them please? My accountant has said I can only give 15 hours to a PT per week. I can stretch to 18 hours up to 12th January 2022 but no more. I hate doing this, but I just can't afford more than that a week at the moment with incomings the way they are. If I could I would give you every hour going but I need to tighten things up a bit now".*

73. The respondent advised that at this time given the financial projections on numbers and income a decision was taken to close the gym on a Sunday and in weekdays have a break between 2pm-4pm each day rather than remaining open all day as before.

Administration systems.

74. The respondent had certain IT systems in place. "Gymcatch" is an online management system which members of the Gym could access and book into classes. There was also in place "Bright HR" which would display the classes to be attended by personal trainers. All personal trainers had access to these systems including the claimant.

75. The members were supplied with a fob key to enable access to the gym premises. There was no need therefore for a receptionist. Members would attend classes for which they had booked online. Occasionally the claimant may set up a fob key for a member at the reception area.

76. The premises were either opened up in the morning by the respondent or a variety of other personal trainers.

Disability Issues

77. The claimant has hypothyroidism. This was diagnosed around March 2006 (J64). She has taken Levothyroxine to alleviate the symptoms. As at the date of hearing she was on 100 micrograms of that medication per day.

78. The symptoms of the condition are tiredness, lethargy, "a feeling of brain fog"; and weight gain as well as poor tolerance to cold. The sensitivity to cold is a principal symptom for the claimant and can alter her complexion to pink/purple in the face with a similar effect to hands, lips, feet and nails. When exposed to cold conditions for lengthy periods there is an increased time for the body to regulate its temperature compared to a person who does not suffer from the condition. Where the body temperature remains cold muscle aches and pains and numbness in the hands and fingers can occur. Photographs of the claimant's hands showing the effects of the condition were produced (J55/58).

79. The claimant advised that her condition of hypothyroidism was lifelong. She advised that there was a need on a day to day basis to be warm, take her medication and plan ahead which would for example include ensuring that there was enough rest to be taken on a longer trip. The medication regulated the condition. Without the medication she advised that she would be fatigued, struggle with speech, slow down mentally with "brain fog" and be unable to articulate well and suffer weight gain. Her concern at the gym was the cold temperature would make her condition worse.

80. Tracey Douglas had been aware of her friend's condition for some time. She had not advised the respondent of the claimant's condition. The claimant stated that she had advised the respondent of this condition prior to her working in the gym without specifying the detail of that discussion. There was no record of that discussion. The claimant advised that the respondent had in place a "disappearing message" function on his phone so could not retrieve any messages on the issue but in any event it was discussed in person. She also advised that she kept medication in the bathroom in the respondent's

house. She agreed that the condition was not visible but relied on discussion with the respondent and his wife. The respondent denied any such discussion took place. He maintained he had no knowledge of the claimant's condition when at the gym.

Issues on heating

81. The claimant's position was that the gym was cold as there was no heating switched on and she queried this with the respondent. The respondent denied that had happened.

82. The claimant indicated that she first raised this on 11 October 2022 when she asked how the heating worked and was told "not to put it on as it stays off". The list of issues had this matter being raised on 13 October 2022. The claimant maintained that he was "aware of my condition" and "he laughed and said costs money and not put it on".

83. The claimant stated that she raised this issue on the majority of times she was in the Gym and tried to put the heating on herself (as others had) but had not been able to get it to work.

84. She stated that mid October "say 17 October" she had discussed the matter again when "worked at reception and the doors opened and closed and made matters worse". Again she was "mocked and laughed at" and told by the respondent that "he not feel the cold". The List of issues puts this occurrence at 19 October 2022.

85. She stated that on 2 November 2022 when "working in the office she had required to put several layers on to keep warm". She stated that she had "put heating on and his (respondent's) first response to laugh" to which she replied "that it was not funny as I have a condition and affecting my health". That day she "asked if she could keep the heating on and left a post it note on the controller to say 'please leave on' but when came back for her later shift that day the note was in the bin and the heating had been turned off

again". The claimant explained that the photo of her and her partner of 5 November 2022 (J109) showed what she would have been wearing at the Gym on 2 November 2022.

86. The further photos of her and her partner of 15 October 2022,15 April 2023 (J110/112) showed she was more "wrapped up " than her partner as did the photo of 26 October 2022 taken with her and her partner at the respondent's home (J111). Further photographs produced showed the claimant on 22 October 2022 with her dog Daphne (J59) wearing "multiple layers of clothing at work" being a picture taken by her partner; photograph of 27 October 2022 (J60) showed the claimant and her partner both wearing jackets and her partner wearing a "beanie hat" in the gym premises reception area; photograph of 27 October 2022 (J61) taken by the claimant's partner in the respondent's home after work showed claimant well wrapped up trying to "warm up my body after work".

87. On 2nd November messages were exchanged between the claimant and her partner regarding the gym being cold and that the respondent "laughed" at the claimant because of this and that the claimant "told him it's not funny I have a condition"; that the respondent indicated it must be "a Shetland thing, Tracey's the same"; that she had "put heating on but he loved switching it off"; and that the claimant had put a note on the heater saying "leave on" (J226/230).

88. The claimant's partner visited the claimant at the respondent's home quite often in this period and recalled a visit on 22 October 2022 when the claimant had raised concerns about cold at the gym and Tracey Douglas had said the heating was not turned on because of the cost and that the claimant's partner had said that the claimant had a "condition and this was making it worse". She thought this meeting was in the evening and the claimant thought that it had occurred around lunch time. The claimant's partner indicated this conversation was not long after there had been a return from Paris and that competition formed the principal part of the discussion. They had been watching TV that evening with the respondent and his wife.

89. Both the respondent and Tracey Douglas advised that there was no central heating operating in the gym. The respondent advised that there was an air conditioning unit but it had not worked. Around the gym premises there were some "little heaters" which blew out hot air. He did not have one in the office. There was one at the reception area. These could be put on if needed.

90. Subsequent to the claimant leaving the gym a post was issued to members on 14 December 2022 (J172) advising that due to it being *"extremely cold the last few days we have added some extra heaters throughout the gym and reception area so you can be more comfortable during the start of your workout".* It was stated that there had been a "*few requests for extra heating from our members during this unusual cold period* ….".

91. The Tribunal believed the respondent and Tracey Douglas that there was no working central heating in the gym and that the air conditioning unit they referred to was out of action in the period the claimant was engaged at the gym. It was possible that the claimant was unaware that the heating did not work despite any attempt to turn it on. She stated that "others had tried but not able to work the heating" The Tribunal therefore did not accept the claimant's evidence to the effect that at times she turned the heating on or that the respondent "loved switching it off" or that the respondent refused to keep heating on that the claimant believed had been turned on as it did not work..

92. The Tribunal did accept that the claimant did have an issue with cold and raised that issue with the respondent. The Tribunal were satisfied that albeit there was a difference in dates she raised the issue on 13 October 2022 and the respondent "laughed and said heating costs money" Albeit she stated that she had stayed with her partner in north of England on 17 October the Tribunal accepted the uncertainty on dates and around 19 October 2022 she had raised the issue with the respondent and that he laughed about that issue. The Tribunal accepted that the claimant had raised the issue on 2

November 2022 with the respondent again laughing about her being cold and needing to be wear extra layers.

93. The Tribunal accepted that Tracey Douglas had not disclosed to the respondent that the claimant had Hypothyroidism. The Tribunal did not accept that the claimant had told the respondent of that condition prior to her appearance at the Gym. There was no evidence spoken to by the claimant of any particular discussion. It was suggested by the claimant that the respondent would be aware of her hypothyroidism as her medication was in the bathroom at the respondent's home. The Tribunal considered that of no consequence as there was no evidence that the respondent saw or took notice of that medication or even if he had would have known known what it was for. The Tribunal were not satisfied that there was a discussion on the 22 October 2022 which would alert the respondent to the fact that he knew or ought to have known that there was a disability affecting the claimant. That discussion was social in context and it did not seem the respondent was taking active part. The Tribunal did accept that on 2 November 2022 the claimant had complained of the cold and that that the respondent had laughed and said "it must be a Shetland thing – Tracey's the same" and that she had "told him it's not funny I have a condition". That was in the messages which passed between claimant and her partner that day (J227)

Colleague Trainer JM

94. The claimant advised that around 3rd November 2022 she made a complaint about the treatment of a personal trainer in the gym JM. She queried why he was being unpaid as he was "the same as me Level 2" and did "group classes" and she did not "see why he not be paid" as he was doing more hours.

95. A voicemail was played from the respondent to the claimant at a time she was preparing the November rota advising that JM should be used to "full advantage" and that he should do as many classes as possible with particular

reference to the difficult classes/hours to cover namely early morning and "split shifts".

96. The claimant's concern was that she had been told JM was "autistic and needs support for work" and that she felt she had a duty of care to JM. She believed advantage was being taken of JM.

97. The respondent advised that for those who were not sure if personal training was a suitable career for them he offered a "training contract period" of 12 weeks. During that time the individual would not be paid but the Gym provided with experience. The period was to allow an assessment to be made. JM had in fact returned to the gym as a qualified personal trainer subsequent to the claimant's departure. The respondent described JM as an "awesome" individual.

98. An exit interview was conducted with JM (on 20 December 2022) signed by JM and the respondent which gave flattering comment about JM's time and experience at the Gym. The claimant did not consider that he would be capable of completing that form (J173) and that he had probably been "coerced". A Facebook profile of JM (J251) advised of his welcome as *"self employed Personal Trainer"* to the team at Future Gym stating he had "*recently qualified"* and giving details of his expertise and profile.

99. The suggestion from the claimant was that as a consequence of her raising an issue on JM the respondent had retaliated by subjecting her to a detriment in "cutting her hours".

Ice Baths

100. After departing from the Gym the claimant had taken on a role as an "ambassador" with a company who supplied ice baths as a cold water therapy. She would receive some commission on sales. The benefits of this therapy were to improve circulation; boost immunity; enable better sleep; and for athletes to aid recovery after working out or competing.

101. It was suggested to the claimant that she was exaggerating her symptoms of cold given that she was now engaged in that therapy.

102. The claimant denied there was any comparison between the two issues in that the submersion in cold water was brief and did not have the same impact in spending a long period of time at the gym. The process involved (J115/128) and the side effects were of no consequence as regards her condition given the different circumstances.

103. The Tribunal were satisfied that particular therapy was not a contradiction of the claimant's explanation of her symptoms as a consequence of hypothyroidism.

CCTV/Audio in Gym Premises

104. The claimant advised that the respondent had told her a story about "how he used to get rid of staff" and realised that he had "audio recording in the gym" but there was no signs to say that was happening. She was "shocked" and queried if he had a licence or that people were aware that they were being "filmed" and that they should have known about the audio recording. She indicated this took place around end October 2022. She maintained that her partner knew about this as well as the respondent "had told her". However her partner gave no evidence on that matter.

105. The respondent confirmed that he operated CCTV within the gym premises covering all areas except his office. He had notices to indicate cameras were in use on front door (J177) and on the internal door into reception area (J179) and also in reception area (J178). He denied there was any audio recording used within the premises and there was no such conversation as was claimed by the claimant regarding use of audio equipment to eavesdrop on staff. This is a matter referred to in the discussion on protected disclosures.

Discussion on Equipment

106. Various messages were exchanged between the claimant and the respondent on equipment on a date which was not clarified but was thought to take place around 2 November 2022. These messages (J222/223/224) commenced with a request from the respondent that the treatment room which was used for massage should be kept clear of equipment. The claimant indicated that certain items (wooden blocks and throwing bag) were being wrongly used on the gym floor and she would "*take it home".*

107. The respondent advised that it was the property of the gym and if *"people don't use it correctly just show them"* and that the "*blocks and throwing bag"* were on the list of equipment to become the property of the gym. The messages then go on to highlight the claimant's belief that she had not signed over equipment to the gym but it was only *"on loan"* whereas the respondent indicated that the Service Agreement meant that the equipment became the gym's equipment in lieu of rent. The messages end that there would be a "*chat about it when I'm on shift".*

108. Part of the claimant's concern was that the "wooden blocks" had been made for her by her brother and she did not regard that as being equipment that would be transferred to the gym. The respondent considered that item was on the list of equipment attached to the Service Agreement.

Events of 4/7 November 2022

109. The claimant took "holiday" by going to her partner's property over 4/7 November 2022. She was to attend a family occasion with her partner. She was not due to return until Monday 7 November. Her dog Daphne who featured in many of the Gym photographs was to remain with the respondent and his wife who had looked after her on several occasions. However there was a fall out over the arrangements for looking after Daphne on Monday 7 November 2022.

110. On the evening of Sunday 6 November 2022 the respondent and his wife recognised that there was a difficulty with care arrangements for Daphne the following day as the respondent would be in the gym on his own from around 6am and she had to attend work at her secondary school.

111. The following morning Mrs Douglas walked Daphne before going to school and "left food in the bowl" and messaged the claimant to advise that it would be necessary to leave Daphne in the house given their commitments. She had not realised that the respondent would be on his own in the gym early in the morning and it was not possible/practical to leave the dog in the office for lengthy periods.

112. Tracey Douglas explained that she had thought the claimant would be returning to the house at approximately 1pm that day. It was usual when the claimant was away seeing her partner over the weekend that she would return around 1pm. In the course of October she had spent 3 weekends with her partner. However on this occasion she had missed a message from the claimant to say that she would not be returning until 5pm that day.

113. The claimant was distressed and upset that Daphne would be left in the house all day and messages passed between the claimant and Tracey Douglas on the matter (J163/164) In evidence it was clear that the claimant considered that this was a deliberate act and no misunderstanding. The position of Tracey Douglas was that she had apologised many times about her mistake as to when the claimant was to return to the respondent's home. The claimant altered her plans to travel back to the respondent's home for around 1pm.

114. In the course of the day the claimant messaged Tracey Douglas to say that she was upset and needed to clear the air.(J235) She was in her room when the respondent and Tracey Douglas returned home. A series of messages took place on the evening of 7 November (J157/158). It appeared matters deteriorated between the parties quickly on that evening. The claimant's position was that when she spoke to the respondent and Mrs Douglas she

stated that she raised the issues of the hours and concerns over the heating and that she was being abused by the respondent over the equipment and felt trapped.

115. The evidence from Tracey Douglas was that the claimant stated she was not happy in the gym and that she wanted her equipment back. The respondent and Mrs Douglas considered was contrary to what had been agreed. The claimant stood up at one point and pointed to the respondent and Tracey Douglas saying "I need you to give my stuff back". The claimant advised that unless she got the equipment back she would kill herself. She agreed that the claimant had advised that she was being abused by the respondent. The messages (J157/158) relate to what passed between the parties at this point. It was clear that the claimant considered that she had been *"well and truly screwed over"* in relation to the Agreement which is what "*it's intended to do".* She indicated that her mental health was affected and she was not comfortable with the respondent. The matter ended with Tracey Douglas messaging the claimant to say that she could leave the *"gym keys in the kitchen and post the house keys through the letter box. We can meet up again later to figure all this out. We are all exhausted".*

116. The respondent and his wife left the house that evening and drove in the car to the gym where they sat for a while discussing these events. They then returned to the house. On their way back the respondent visited his colleague Neil who lived nearby and explained that there had been a fall out and that they considered the claimant had been aggressive towards him and his wife. As a consequence a termination letter was prepared (J165) which advised that there had been a decision taken to terminate the Agreement and as it had been terminated due to serious breach there would be a termination fee of £400 which would be deducted from a final invoice.

117. The claimant indicated she had not received that document. The claimant's position was that in any event she had decided to leave.

118. Around 10.47pm on the night of 7 November 2022 Tracey Douglas had messaged the claimant's mother as she was concerned about the claimant's behaviour (J249).

Events of 8 November 2022

119. In the evening of 7 November 2022 the claimant messaged her friend Anna Milligan seeking accommodation and her friend agreed. She agreed to assist the claimant in moving out of the respondent's property the following day. A removal van had been booked for the early afternoon and Ms Milligan met with the claimant around noon.

120. By that time the respondent had removed the claimant from the gym Facebook and other systems such as Bright HR and Gymcatch and cancelled the fob access for the claimant to the gym premises.

121. The respondent had a camera at the front door of his house and the claimant covered this with a plastic bag (J176). She considered there was also an audio recording on the doorbell and the claimant told Ms Milligan not to talk as that recording facility was available.

122. Ms Milligan advised that she assisted the claimant moving items to the garage in preparation for the removal van to arrive.

123. Before the removal van came they went to the gym in order to obtain personal possessions of the claimant from her desk and her trophies.

124. At the gym they waited in the foyer area and the respondent came to say that he would call the police. He did so using 999 number and was "told off" for doing so. The respondent then retrieved the items wanted by the claimant and handed them over and the claimant and Ms Milligan returned to the house to collect the items that had previously been taken out the house to the garage. The house was unoccupied when the claimant and Ms Milligan arrived and when they left around 4pm.

125. Ms Milligan explained that it was "ridiculous that the police be called" and had made that clear to the respondent who had indicated to the police that someone was trying to get into the gym.

Other Issues between the Parties

126. The key which had been provided to the claimant for access to the gym was not returned and this caused the respondent to message her on 9, 10 and 11 November 2022 on those issues.

127. On 18 November 2022 the claimant sent a letter to the respondent entitled "*Formal Grievance Letter – Employment as Personal Trainer"* which raised various issues on the engagement between the claimant and the respondent. It was stated that when "*we negotiated my employment it was expressly agreed that you would provide me with accommodation in your home … and you asked me to provide £2,500 worth of equipment to be used at the gym in exchange for self employment gym rent, and I was to transfer title deeds to you after 5 months whereby the equipment would be fully paid off".* She raised issues of whistleblowing; harassment and victimisation and stated that she had received no "*written notice of termination of my Service Agreement with Future Gym therefore that Agreement has not ended and you are in continuing breach of contract".*

128. She requested that the various matters should be investigated by an external consultant.

129. By letter of 23 November 2022 (J171) the respondent advised that the claimant was self employed under Service Agreement to provide services and there was no recourse to a grievance procedure and that there had never been a Contract of Employment. In any event the allegations and claims of

whistleblowing were without foundation and any suggested coercion into signing the Service Contract was false.

130. Tracey Douglas advised that she required to make a complaint to the police about false allegations she considered were being circulated by the claimant. The police had spoken with Tracey Douglas but had not taken any action on the matter as the allegations were made anonymously. (J174).

Present Occupation of Claimant

131. The claimant had taken up her role as an ambassador for the ice bath company in March/April 2023 from which she received a small income of 10% of sales.

132. She indicated that she had obtained Level 3 qualification in December 2022 at which time she was able to take up self employed personal training commencing from January 2023 and that had "gone very well since". She had not been entitled to any benefits due to her partner's income in the period since leaving Future Gym.

Submissions

133. The Tribunal was grateful for the submissions made and no disrespect is intended in making a summary.

For the Claimant

134. It was submitted for the claimant that she was employed by the respondent conducting classes for members and that on a full time basis until she had attained her Level 3 Certificate.

135. She had paid for a uniform which she required to wear. She sought accommodation and received a letter which confirmed her earnings and

status. That letter was presaged by the audio message from the respondent regarding a letter being available for her.

136. She was offered accommodation in the respondent's property at £250 per month and when she started at the gym she still required to attain her Level 3 Certificate due to course work.

137. In the audio messages their was reference to "her" equipment and the arrangement was that the equipment was to be stored by the respondent and used in the gym. The claimant trusted the respondent.

138. She was not given time to read the Service Agreement. In any event she assumed that this was for the personal training services and not for the employment at the gym pending her being able to undertake personal training. At no time did the claimant trade. She acted at the direction of the respondent and did shifts as required. Accordingly she was an employee.

139. If not an employee then she was a "worker" as defined within the Employment Rights Act 1996. Reference was made to the case ***of Uber BV and others v Aslam and others*** UKSC2019/0029. In that case it was considered that the conduct of parties required to be considered and in terms of the Judgment of Lord Clark account should taken of the relevant bargaining together with all the other circumstances. It was submitted that the factors in the ***Uber*** case (pages 91/95) were satisfied in that the respondent in this case had control over the rate of pay; control over what hours were available; control over the Agreement which was put to the claimant who had no chance to consider the terms; control over cut in her hours; and in passing hours to others in place of the claimant.

140. All this meant that the claimant was in the position of a "worker" as defined and so had a case under the Equality Acts.

141. While it was maintained that acts prior to 19 October 2022 were out of time in this case there was a continuing act of discrimination in relation to heating

within the gym which had been raised on 2nd November 2022 and again on 7 November 2022 which meant the discrimination claim was in time.

142. It was submitted that the evidence showed that the claimant was a disabled person as that is defined. She had a lifelong condition which affected her at all material times in this engagement. That had an adverse effect on her day to day activity and reference was made to the Impact Statement which had been submitted to the Tribunal and the evidence of the claimant.

143. It was clear that the respondent's wife knew of the condition and was highlighted to the respondent by the medication which was in the shared bathroom and by conversation with the claimant and her partner over her "condition".

144. It was submitted there was direct discrimination because of this protected characteristic by the incident on 13 October 22 with the respondent saying that the heating stayed off as it cost money; on the 19 October 2022 by comments made to the claimant about wearing extra layers; the claimant being mocked on 2 November 2022 for being cold; and on 2 November 2022 after the claimant turned on the heating and asking the respondent to leave it on which was not allowed.

145. The less favourable treatment for the claimant was her sensitivity to the cold which did not affect others.

146. On discrimination arising from disability the respondent had ignored the request to leave the heat on or to heat the premises to a reasonable degree given the known sensitivity to cold.

147. There was a failure to make reasonable adjustments in not putting heating on for the claimant. That was to her disadvantage. It would have been reasonable for the respondent to have heated the premises appropriately.

148. As was noted in the evidence extra heating was in fact provided in December 2022 for members who complained about the cold. That was an adjustment that could and should have been made for the claimant.

149. The claimant was also harassed by being mocked about being cold on 13 October 2022; 22/23 October and 2 November 2022. That was unwanted conduct relating to her disability and had the effect of creating a degrading, humiliating and offensive environment for her.

150. On victimisation reference was made to the acts of 13 October, 22/23 October and 2 November 2022 around lack of heating. Separately the claimant raised issues regarding JM on 3 November 2022.

151. As a consequence of doing that she was mocked and had her hours cut the same week that another personal trainer was taken on at the gym; she was made homeless; told that the police were being advised; refused access to the gym; met with a refusal to have belongings returned valued at £500; and refused return of the gym equipment.

152. It was submitted that a protected disclosures had been made on 11 October with the claimant complaining that there was no lone working policy, no induction or no fire evacuation procedure or first aid protocol established; on 24 October 2022 with the claimant advising that it was not legal to be recording conversations in the gym; on 2 November 2022 by questioning the legality of the respondent taking her equipment illegally and her being deceived; on 3 November 2022 by raising the position of JM who was not being paid and taken advantage of.

153. On 7 November 22 she had complained about her hours being cut to the respondent and his wife and alleged discrimination on account of disability, whistleblowing, harassment and victimisation.

154. There was a failure to have safe working conditions in the gym and that was in the public interest. Seeking that JM be paid was in the public interest.

Effectively stealing equipment from the claimant was also in the public interest.

155. There were various detriments as a consequence in that the claimant was mocked; forced to work in cold conditions; had reduced hours; told to leave her accommodation; being afraid for her safety; being removed from access to the gym.

156. She was automatically unfairly dismissed and unable to have return of belongings in terms of the items listed at C40,

157. These were detriments regarding the making of protected disclosures.

158. There had been a failure to provide a written statement of employment particulars. The Service Agreement was tailored for a personal trainer role and not the role occupied by the claimant which was that of employee. In that respect the claimant should be awarded 4 weeks' pay.

159. Loss was assessed in accord with the Schedule of Loss at J48. It would be a matter for the Tribunal to determine the appropriate date when interest would run on an award for discrimination. It was submitted that the claimant was suicidal at the time she was "sacked" with injury to feelings put at an upper *Vento* award of £30,000.

160. In respect of the detriment for making protected disclosures an award £30,000 should be made..

161. In the evidence reference had been made regarding shifts not invoiced over 31 October/4 November amounting to £162.50. There were also sums due for working on 11 and 12 October 2022 which had not been invoiced.

162. There had been a loss of income to the claimant between 7 November-January 2023 assessed at £455 per week being 35 hours per week at £13 per hour.

163. It was also appropriate to consider an uplift due to failure to apply the ACAS Code.

164. Additional expense was assessed at £212 for the uniform the claimant had been forced to pay for but which had not been supplied and the hire of a removal van at £375.

For the Respondent

165. It was submitted that a striking feature of the case was the very short period of services by the claimant which had amounted to this expansive claim.

166. In this case a Service Agreement had been signed on each page by the claimant. It was clear what the arrangement was and reflected what had been discussed. The evidence was that another personal trainer had been able to make amendments to such a Service Agreement. In this case there was no misunderstanding by the claimant who had signed each page and it reflected the intentions of the parties before entering the Agreement. This was a clear document understood by both parties. The time for rent free period was extended to March 2023 by agreed adjustment and the claimant had signed that adjustment. It was clear she understood the position.

167. It was submitted that in this case the claimant was a self employed person under the guidelines within ***Uber v Aslam***.

168. In this case the claimant was not in a worker relationship. She was an independent provider of services and was not subordinate to the respondent.

169. The claimant was not required to perform any hours in the gym. She was free to go to competitions, stay with her partner or go on holiday without restriction.

170. She was in charge of the rota as she had requested.

171. The whole intention was that she was able to use the gym in gaining clients to train and move them away from class sessions.

172. Rent was to be offset against the equipment which was not a manipulative matter but simply to assist the claimant in the rental payment.

173. The letter at J129 of 26 August 2022 had not been signed by the respondent. It was not clear from the evidence what the purpose of that letter was but seemed to be for the claimant to be able to find accommodation. It was not evidence of employment and could not be utilised as the defining document which was the Service Agreement. That letter was produced for a different purpose to assist the claimant to be able to obtain rented property. It should be discounted as forming the basis of an employment relationship.

174. It was disputed that the claimant's condition complied with the requirement to have a substantial adverse effect to be a disability. The only obvious effect was the claimant required to wear warm clothing. In terms of taking long walks the claimant required to be careful which was not a substantial adverse effect.

175. In any event the respondent had no knowledge of the disability. While Mrs Douglas knew of the condition due to her friendship with the claimant that had not been passed on to the respondent and his position was that he had no recollection of any such condition being explained to him. Both the respondent and his wife denied that there was any identification of what condition the claimant had in the discussion at the respondent's home on 22nd of October 2022.

176. It was submitted that any matters before 19 October 2022 were time barred unless it was just and equitable to extend time.

177. The claimant complained that around 11/12 October she had not been shown any lone working policy but the respondent pointed to the emergency contact

hours within the Service Agreement; that the claimant had been provided with a panic button; that she was shown the routine in the event of fire. In any event none of these matters should be considered because of time bar.

178. Similarly the request on 13 October regarding heating should be disregarded because of time bar.

179. All the direct discrimination incidents had been denied by the respondent. In the premises there was no heating system so very unclear what requests were actually made by the claimant. She had not been laughed at or mocked because of her medical condition. The evidence did not show that the claimant had been treated unfavourably because of disability.

180. On discrimination arising from disability again there was no knowledge of disability of the claimant. In any event unfavourable treatment had not been shown as others were affected by any lack of heating and were unable to turn on the heating.

181. So far as reasonable adjustments were concerned again the claimant could simply apply extra layers of clothing to keep warm and there was no need for the reasonable adjustment sought. Again the respondent denied any conversation regarding the necessity for heating.

182. The alleged discussion on 22nd October 2022 in the respondent's home was not a protected disclosure. The allegation apparently was that there was a discussion of the difficulty by the claimant to keep warm which would not amount to a protected disclosure.

183. In so far as harassment was concerned the claimant asserted that she repeatedly said she was cold but there was no convincing timeline given of any of these complaints. In any event the matters complained of as harassment were not related to her condition.

184. It was submitted that the complaint of victimisation lacked merit.

185. So far as detriment was concerned the editing of the claimant's hours was due to financial cost and the need to be fair to others.

186. The reason for the breakdown in the relationship and termination of the arrangement at the Gym related to the fact that the claimant's dog was being left alone in the respondent's property and the issue of the equipment. Those formed the reasons for the argument that developed on 7 November 2022

187. The claimant had her trophies returned and other personal items from the gym. Whether it was right for the respondent to call the police these items were handed over.

188. The respondent had not refused to return her belongings. There was no difficulty in them being returned but the claimant did not wish to collect them from the respondent's house. She was free to do so.

189. So far as the gym equipment was concerned the Service Agreement makes it clear what was to be the position in that respect.

190. On the issues of whistleblowing there was no evidence that the claimant had the Agreement "pushed on her". There was no evidence that she had to sign every page but she did so and she understood the Agreement. Particularly when she had then made amendment some time later.

191. There were clear notices regarding the use of CCTV. The concern on audio did not appear to be because of any data protection issue but because the respondent was able to overhear.

192. The use of the gym equipment by members was brought about by a realisation that the equipment was not the claimant's and not because of a concern that it may not be used safely.

193. There was no evidence that JM was autistic. The voicemail to put JM on shifts that others not want was not evidence of autism. He was under a training contract and could be utilised under that contract. In any event it was disputed that there was any disclosure of information but simply allegations regarding JM and no disclosure in law.

194. So far as detriment was concerned it could not be a detriment to ask the claimant to reduce hours because there were no hours guaranteed. There was a commercial decision taken by the respondent about the use of hours in the gym and it was not because the claimant had made any disclosure.

195. It was stated that the respondent became aggressive and asked the claimant to leave his home because of these alleged disclosures. Mrs Douglas had given evidence that the respondent was sitting saying nothing during this conversation and she was very credible in that. Mrs Douglas was upset about the complaints from the claimant that she had not heard before against her husband. That turned into complaints aggressively put and it was clear that the claimant living in the respondent's home beyond that time was not going to be a possibility. The following day she collected her trophies and left.

196. In any event any compensation or remedy relating to uniform and equipment or possessions were not matters for this forum.

Discussion and Conclusions

The Relevant Law

Employee Status

197. Section 230(1) of the Employment Rights Act 1996 (ERA) defines "*employee"* as "*an individual who has entered into or works under, or, where the employee has ceased, worked under a contract of employment".*

198. Section 230(2) of ERA provides that a *"contract of employment"* means a "*contract of service or apprenticeship, whether express or implied and (if it is expressed) whether oral or in writing".* The purpose of the definition is to distinguish between individuals dependent upon an employer for their livelihood on the one hand and self employed individuals or independent contractors on the other. The definition seeks to distinguish between those who are paid to do the job and those who are paid to get the job done

199. In that respect the courts have recognised that in the majority of cases the determination of an individual's employment status would depend not only on written documentation but also on an investigation and evaluation of the factual circumstances in which the work was performed. That would involve establishing where the terms of the contract are to be found; what the terms of that contract were; how to characterise the relationship that those terms give rise to (***the Ministry of Defence HQ Defence Dental Service v Kettle*** EAT0308/06; ***James v Greenwich London Borough Council*** [2007] ICR 577; ***Clark v Oxfordshire Health Authority*** [1998] IRLR 125).

200. The courts have advised that the issue should be approached by examining a range of relevant factors and "*consider all aspects of the relationship no single factor being in itself decisive and each of which may vary in weight and direction and having such balance to the factors as seem appropriate to determine whether the person was carrying on business on his own account"* (***O'Kelly and others v Trusthouse Forte Plc*** [1983] ICR 728).

201. While all factors should be considered some are relevant to almost every situation coming under the concept of "*an irreducible minimum"* without which it would be all but impossible for a contract of employment to exist (**Nethermere (St Neots) Limited v Gardiner and another** [1984] ICR 612; **Carmichael v National Power Plc** [1999] ICR 1226).

202. Those factors would be whether a worker agreed to provide his own work and skill in return for remuneration; whether the worker agreed expressly or impliedly to be subject to a sufficient degree of control for the relationship to

be one of master and servant; whether there were other provisions of the contract consistent with it being a contract of service.

203. Control would require that the ultimate authority over the purported employee in the performance of his or her work rests with the employer. Indirect control which might exist by virtue of an employer's right to terminate the contract if the worker failed to meet the required standards of skill, integrity and reliability would not be by itself sufficient. Some element or more direct control over what the worker does is needed.

204. Mutuality of obligation is usually expressed as an obligation on an employer to provide work and a corresponding obligation on the employee to accept and perform the work. If there is no mutuality of obligation between the parties then it is highly unlikely that there will be a contract of employment in existence. The parties must be under some obligation towards each other (***Cheng Oiuen v Royal Hong Kong Golf Club*** [1998] ICR 131; ***Stringfellow Restaurants Limited v Quashie*** [2013] IRLR 99).

205. Also freedom to do a job either by one's own hands or by another is inconsistent with a contract of service although a limited or occasional hour of delegation may not be (***Express and Echo Publications Limited v Tanton*** [1999] ICR 693); to be contrasted with ***MacFarlane and another v Glasgow City Council*** [2001] IRLR 7.

206. The parties' stated intentions as to the status of their working relationship in law may be a relevant factor but it is always necessary to look at the substance of the matter.

Status as a Worker

207. ERA sets out the definition of a "worker" designed to be more inclusive than the term "employee". Section 230(3) of ERA states that a worker is:-

"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 to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

208. This extension allows a person who is not an employee nevertheless to qualify for certain rights as a "worker". Or as it has become known a "limb (b) worker". Under ***Sejpal v Rodericks Dental Limited*** [2002] IRLR 752 tests such as "mutuality of obligation" and the like are no substitute for the plain wording of the statutory definitions and so a structured approach should be followed being:-

"(a) A must have entered into or worked under a contract (or possibly, in limited circumstances … some similar agreement) with B; and

(b) A must have agreed to personally perform some work or services for B.

However, A is excluded from being a worker if:-

(a) A carries on a profession or business undertaking; and

(b) B is a client or customer of A's by virtue of the contract".

209. The delineation of the "worker" category has been considered by the Supreme Court (***Pimlico Plumbers Limited v Smith*** [2018] IRLR 872; ***Autoclenz Limited v Belcher*** [2012] UKSC41; ***Uber BV v Aslam*** [2021] IRLR 47).

210. Essentially the Supreme Court advised that a Tribunal should be able to look behind contractual documentation to the reality of the relationship. The Court advised that the question was whether a claimant fell within the definition of a "worker" in the relevant statutory provisions so at to qualify for rights irrespective of what had been contractually agreed. (para 69 of **Uber**)

211. It was stated (para 85/86of **Uber**) that even where there is a formal written agreement there is no "*legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that the terms set out in a contractual document represent the parties' true agreement just because an individual has signed it".* That did not mean that the terms of any written agreement should be ignored. As was stated *"The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other".*

212. In the ***Uber*** case the picture was one of a system tightly controlled by Uber for its benefit with little input from the drivers.

Disability Status

213. Section 6 of the Equality Act 2010 provides a definition of "disability" as follows:-

> *"(i) 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".*

214. Section 212(1) of the Equality Act 2010 provides that "substantial" means more than minor or trivial.

215. Schedule 1 of the Equality Act gives further details on the determination of a disability. For example Schedule 1 para 2(1) provides that the effect of an impairment is long term if it has lasted for at least 12 months, is likely to last for at least 12 months, or is likely to last for the rest of the life of the person affected.

216. Paragraph (5) provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to correct it and but for that, it would be likely to have that effect. "Measures" includes in particular medical treatment.

217. The Tribunal must take into account statutory Guidance on the definition of Disability (2011) ("the Guidance") which stresses that it is important to consider the things that the person cannot do, or can only do with difficulty (B9). This is not offset by things that the person can do. That was confirmed in ***Aderemi v London and South Eastern Railway Limited*** [2013] ICR 391. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This include work related activities such as interacting with colleagues using a computer, driving, keeping to a timetable etc (the Guidance D2-D7).

218. On the issue of knowledge of disability it is necessary that the employer knew or could reasonably have been expected to know that the employee in question was a disabled person.

Direct Discrimination

219. Section 13(1) of the Equality Act provides that an employer directly discriminates against a person if it treats that person less favourably than it treats or would treat others and the difference in treatment is because of a protected characteristic.

220. It is not always possible to separate the 2 issues and in some cases "*the less favourable treatment issue cannot be resolved without at the same time deciding the reason why. The 2 issues are intertwined*" (***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337)

221. Direct discrimination is rarely blatant. Such claims present special problems of proof. For that reason the burden of proof rules applied to claims of unlawful discrimination in employment are more favourable to the claimant than those that apply to claims brought under most other employment rights and protections. Once a claimant shows *prima facie* evidence from which the Tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of discrimination, the Tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate – s136 Equality Act.

222. In order to claim direct discrimination under section 13 a claimant must have been treated less favourably than a comparator who was in the same or not materially different circumstances as the claimant. A successful direct discrimination claim depends on a Tribunal being satisfied that the claimant was treated less favourably than a comparator because of a protected characteristic. It is for the Tribunal to decide as a matter of fact what is less favourable. The fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment.

223. A claimant who simply shows that he/she was treated differently than others in a comparable situation will not, without more, succeed with a complaint of unlawful direct discrimination. EA outlaws less favourable not different treatment and the two are not synonymous. A complaint of direct

discrimination will only succeed where the Tribunal finds that their protected characteristic was a reason for the claimant's less favourable treatment. In that connection a discriminator's motive and intentions are irrelevant It has been said that the best approach to deciding whether allegedly discriminatory treatment was "because of" a protected characteristic is to focus on the reason why, in factual terms, the employer acted as it did.

Discrimination arising from Disability

224. By virtue of section 15(1) of the Equality Act 2010 "*a person (A) discriminates against a disabled person (B) if*:"-

> "● *A treats B unfavourably because of something arising in consequence of B's disability and*
>
> ● *A cannot show that that the treatment is a proportionate means of achieving a legitimate aim"*

225. If an employer can establish that it was unaware that the claimant was disabled it cannot be held liable for discrimination arising from disability.

226. To succeed a claimant must establish:

> (a) That he or she has suffered unfavourable treatment;
>
> (b) That that treatment is because of something arising in consequence of his or her disability

227. That raises 2 questions of fact namely what was the relevant treatment and was it unfavourable to the claimant (***Lothians v Trustees of Swansea University Pension and Assurance Scheme*** [2018] UKSC65).

228. There is no requirement that the disabled person has to establish less favourable treatment than that experienced by a comparator.

229. The *"something*" that causes the unfavourable treatment need not be the main or sole reason but must at least have a significant (more than minor or trivial) influence on the unfavourable treatment and so amount to an effective reason or cause for it (***Pnaiser v NHS England*** [2016] IRLR 170).

230. In relation to the defence of proportionate means then there is a need to attempt to balance the prejudice to the employee for something arising out of disability against the need to show a legitimate aim. An employer would need to engage with the legitimate aim.

Harassment

231. The general definition of harassment as set out in section 26(1) of the Equality Act 2010 applies to the protected characteristic of disability. A person (A) harasses another (B) if:-

> "● *A engages in unwanted conduct related to a relevant protected characteristic – s26(1)(a); and*
>
> ● *The conduct has the purpose or effect of (i) violating B's dignity or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B – s26(1)(b)".*

232. The 3 essential elements of harassment are (a) unwanted conduct; (b) which has the proscribed purpose or effect and (c) which relates to a relevant protected characteristic.

233. The claim of harassment under s26 does not require a comparative approach. The individual needs to establish a link between harassment and the protected characteristic. In order to decide whether any conduct has either of the proscribed effects (purpose or effect) a Tribunal must consider

both whether the victim perceives themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). If the individual does not perceive their dignity to have been violated or an adverse environment created then the conduct should not be found to have that effect (the subjective question). The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them then it should not be found to have done so.

234. It is also the case that the context of a remark remains important and the Tribunal should be sensitive to the hurt that can be caused by offensive comments but not to encourage a "*culture of hypersensitivity or the imposition of a legal liability in respect of every unfortunate phrase".*

235. A claim based on purpose requires an analysis of the alleged harasser's motive or intent. Where a claim simply relies on the effect of the conduct in question the perpetrator's motive or intention (which could be entirely innocent) is irrelevant. The test in that regard has the subjective and objective elements to it.

236. The conduct must be *"related to a relevant protected characteristic".* Whilst the view of a complainant that the conduct in question is related to the protected characteristic is relevant it is not determinative. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 it was stated that a Tribunal needs to "*articulate distinctly and with sufficient clarity what feature or features of the evidence or facts found have led it to the conclusion that the conduct is related to the characteristic as alleged".* It is necessary to find some identifiable reason for the conduct to have been related to the characteristic relied upon.

237. Section 83(2) provides that for the purposes of Part 5 of the Equality Act (which deals with discrimination in employment) employment means (so far

as relevant here) "*employment under a contract of employment, …. or a contract personally to do work".*

Protected Disclosure

238. The framework for the protection of those who make protected disclosures is contained within Part IVA of ERA. Section 47B confers a right on workers not to be subjected to any detriment on the ground that they have made a protected disclosure. The right is conferred upon a "*worker*" and section 43K of ERA includes an individual defined by section 230(3) of ERA and in addition certain other categories of worker, which would not be relevant in this particular case, such as agency workers; home workers; National Health Service practitioners; trainees.

239. The right is not to be subjected to a detriment in terms of section 47B and it is necessary to take a structured approach to the making of a disclosure being (1) the need to be a disclosure; (2) the need to be a "*qualifying"* disclosure and (3) done in a manner set out in sections 43C-43H of ERA.

240. Section 47B does not apply where "*the worker is an employee and the detriment in question amounts to dismissal within the meaning of Part X".* Protection provided against dismissal is at section 103A of ERA which provides for automatic unfair dismissal if *"the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure".*

241. A disclosure can be to someone who is already aware of the matter for example an employer who is complicit in the alleged infringement. Such a disclosure requires to contain information namely facts other than mere allegation although the dividing line can be sometimes difficult to determine. The test is to provide sufficient information to qualify and whatever is alleged to be protected disclosure must in itself passed the sufficiency test.

242. Again the detriment must be "*because of*" that act and the key issue is to determine the real reason for the detriment and to establish what reason did he or she have for dismissing or treating the claimant in an adverse way.

243. To qualify a disclosure must be believed to be in the public interest; that belief must be reasonably held and must show one of the matters set out in paragraphs (a)-(f) of section 43B of ERA.

244. Information disclosed need not actually be true. That may be important in an assessment of whether a belief was reasonably held but it need not be factually correct. There is no requirement that the belief be made in good faith but can be important as regards remedy.

245. The disclosure requires to be what could reasonably be believed to be in the public interest and factors which might be relevant are (1) the number in the group whose interests are served; (2) the nature of those interests and the extent to which they are affected – the more important the interests the more likely to be in the public interests; (3) the nature of the wrongdoing and if deliberate more likely to be in the public interest and (4) the larger or more prominent the wrongdoer the more likely it would be in the public interests.

246. So far as identifying detriment is concerned where there are a number of disclosures separately identified then each failure should be identified; the basis upon which each disclosure is said to be protected and the qualifying nature addressed; the source of the legal obligation asserted; whether the public interest is made out; identity of the detriment and the date that occurred.

247. The issue of detriment should be judged broadly as to what a reasonable worker would view as a detriment and for the detriment to be on the *"ground of"* the disclosure then that disclosure must be a material factor for the treatment.

248. On the issue of the "*reason why*" an employer can be exculpated if it shows on the balance of probability that the act was not on the ground of the protected act namely that did not materially influence the treatment of the whistleblower.

Failure to provide Statement of Written Particulars

249. In terms of section 1 of ERA where a worker begins employment with an employer the employer shall give to the worker a written Statement of Particulars of Employment which contain certain items.

250. Section 38 of the Employment Act 2002 applies to proceedings before an Employment Tribunal relating to any claim by a worker under the jurisdictions listed in Schedule 5 of that Act. That would include discrimination in work cases and detriment for making a protected disclosure.

251. Where an Employment Tribunal finds in favour of the worker in those situations then an Employment Tribunal may make an award of the minimum amount (2 weeks pay) or on the higher amount (4 weeks pay) if it considers it just and equitable in all the circumstances to do so. That does not apply if there are exceptional circumstances which would make an award or increase unjust or inequitable.

Time Bar

Discrimination

252. The general rule is that a complaint of work related discrimination must be presented within the period of 3 months beginning with the date of the act complained of (s123(1)(a)). However conduct extending over a period is to be treated as done at the end of that period (s123(3)(a)).

253. Much of the case law and time limits in discrimination cases centres on whether there is continuing discrimination extending over a period of time or a series of distinct acts. Where there is a series of distinct acts the time limit

begins to run when each act is completed whereas if there is continuing discrimination time only begins to run when the last act is completed. This can sometimes be a difficult distinction to make in practice.

254. In this case the salient date as to whether or not an act complained of is in time or not is as stated in the Joint List of Issues 19 October 2022. If the acts complained of are prior to that date then it would be necessary to rely on either a continuing act of discrimination taking place beyond that date or that it was just and equitable to extend time.

255. In considering whether there was a continuing act a Tribunal should consider whether the substance of a claimant's allegations is an ongoing situation or a continuing state of affairs as distinct from a succession of unconnected or isolated specific acts. A Tribunal should look at the substance of the complaints in question as opposed to the existence of a policy or regime and determine whether they can be said to be part of a continuing act for which an employer is responsible.

Protected Disclosure

256. There was no issue made that time bar operated in respect of any claim of detriment as a consequence of making a protected disclosure.

Definition of "Worker" and Related Expressions

Equality Act 2010

257. In the case of ***Pimlico Plumbers Limited*** the Supreme Court noted that *"on its face section 83(2)(a) of the Equality Act defines "employment" in terms different from those descriptive of the concept of a "worker" under section 230(3) of the Act (Employment Rights Act) and under Regulation 2(1) of the Regulations (Working Time Regulations) ….."*. However it was stated *"this distinction has been held to be one without a difference"* and at paragraph 14 of the Judgment gives reasons why that conclusion is reached.

Making protected disclosure under ERA

258. The standard definition of "*worker*" in s230(3) of ERA is taken as the starting point in the definition of a worker in section 43K(1) of ERA for the purposes of the protected disclosure provisions. This section includes individuals who are not covered by section 230(3) ERA but who fall into different categories as specified at s43K(1)(a)-(d). However it is not considered that the claimant would fall within those categories in the particular facts of this case and that her status should be considered in terms of "limb b" of section 230 of ERA.

259. It is therefore considered as was put in **Pimlico Plumbers** that it is *"conceptually legitimate as well as convenient .."* to equate the definition of a *"worker*" in section 230(3) of ERA with that of "*employment*" in section 83(2)(a) of the Equality Act and the definition of a worker within section 43K(1) of ERA for the purposes of ascertaining whether the Tribunal has jurisdiction on those complaints.

260. As stated the complaint of failure to be provided with a statement of employment particulars requires the individual to have the status of a worker which would be defined in s230 of ERA as being an employee or "limb b" worker.

Conclusions

The Status of the Claimant

261. The conclusion of the Tribunal was that the claimant was not an employee under s230 of ERA and did not fall within "limb b" of that section.

262. In the search for the true extent or expectations of the parties the Tribunal accepted the respondent's evidence that the claimant was looking to set up business on her own account as a personal trainer. The Tribunal did not consider that the claimant had been offered the position of "Assistant Manager" or the like to assist the respondent in the business of the gym. The evidence showed there was no need for an Assistant Manager as such. There were minimal administrative tasks to be dealt with which would occasion the necessity for an Assistant Manager and when the claimant

arrived at the gym no such tasks were asked of her or provided to her. Neither was there evidence that the claimant made complaint that no tasks were being allocated to her. The arrangements for remuneration as invoiced by the claimant contained no reference to any hours spent on administrative tasks in October 2022.

263. The Tribunal preferred the evidence of the respondent that the discussion which took place was for the claimant to be able to conduct her own business as a personal trainer and pay rent to the respondent at the agreed rate of £540 per month for the use of the gym premises to enable that business to be conducted. The Tribunal that to be an expense of the business. It was accepted that the respondent recognising that the business of a personal trainer was not easy to establish would provide a “safety net” or “buffer” in giving the claimant the opportunity to provide services at the Gym. The offer by the respondent to the claimant was for services at the Gym in being present to lead group exercise/fitness classes; attending to requests from members in the use of equipment; demonstrating the use of equipment to new and other members and the other matters outlined at paragraph 17. The services would be for 10/15 hours per week at a particular hourly rate. That also enabled the claimant to have access to members to provide 1:1 training sessions. In that respect the Tribunal took the view that the respondent was acting as a business customer in contracting for the services of the claimant as a personal trainer.

264. The Tribunal rejected the proposition that the claimant was only self employed in any services that may be provided in 1:1 training. The Tribunal considered that the true intent and meaning of the arrangements between the parties was that the claimant wished to commence business as a self employed personal trainer. The Tribunal considered that the services provided at the Gym were not separate but part of that undertaking with the respondent in the position of a customer or client of the claimant in that respect.

265. That model was in line with other personal trainers who were contracted for services. In this assessment the Tribunal had the following considerations in mind.

266. The claimant displayed no attempt when arriving at the gym to work full time as she alleged was the arrangement. In the month of October 2022-she took part in weightlifting competition, took holiday and spent time away with her partner. There was no restriction put on her in working any particular hours or being available at any particular times. There was no evidence that the claimant would ever be under any obligation to attend the Gym on any particular days or hours. She was able to come and go as she pleased. An example is the claimant messaging Tracey Douglas on 6 November 2022 (J157) indicating that she wished to cancel a milk order as she was to be *"coming and going loads between now and Xmas.."* In the arrangements at the Gym there was no indication that the claimant had been offered and undertook a full time position at the gym. The practice was quite the opposite.

267. In the services provided by the claimant there was no supervision or control by the respondent as to how those services were performed. There was an obligation on the claimant to wear a uniform when performing the services at the gym. That uniform was not supplied by the respondent but paid for by the claimant. The fact that the claimant made the purchase of that uniform was an indication to the Tribunal that this was an expense necessary to enable her to conduct her business in providing training services.

268. There was no obligation on the claimant to perform any hours of services for the respondent. The services requested of the claimant depended on her availability and whether she was prepared to accept the services offered. The respondent could not insist on the claimant being available for the provision of services at any particular time and the claimant could not insist on an offer being made for services.

269. The Tribunal did not accept that the arrangement with the claimant for providing a rota was part of any contractual obligation to provide personal services. The Tribunal accepted that the claimant volunteered to make up a rota of those who wished to undertake services for the respondent. The Tribunal did not consider that the discussion with the claimant included an obligation that she would perform that administrative task. There was no evidence that in the preparation of that rota she was paid or to be paid.

270. The way in which that rota was made up confirmed to the Tribunal that there was no obligation on any personal trainers to provide services to the gym in being present at the Gym and taking fitness classes. The evidence was that the claimant in preparation of a rota at the end of October 2022 asked the individual personal trainers for their availability and then slotted in personnel to a rota. Whether or not personal trainers were able to provide the services to the gym depended on their availability. It was up to the personal trainer himself/herself to accept or not accept the tasks. That rota could be accessed through ”an app” changed either by the individual cancelling or by the respondent.

271. Also on the issue of the rota the Tribunal were of the view that the claimant had in effect sought to suit herself in the distribution of approximately 34 hours per week to herself. The Tribunal did not regard the message from the respondent around beginning November 2022 (C38) as being a “cut” in hours. The Tribunal accepted the evidence that the claimant had weighted the rota to provide her with more hours than was equitable/affordable. That occasioned revisal of the rota by the respondent. There was no guarantee of any hours for the claimant to work so there could be no “cut”.

272. The Tribunal considered the terms of the unsigned letter of 26 August 2022 which was provided to the claimant (J129). In the view of the Tribunal this was given in response to a request from the claimant to assist in the search for accommodation. The Tribunal were of the view that the respondent was seeking to be as helpful as possible in that respect in assisting the claimant in obtaining accommodation given the competitive and expensive market.

The Tribunal did not regard it as being reflective of the true nature of the discussion with the claimant on arrangements which would be in place as regards her venture into business on her own account. It did not appear the letter was used as the issue of accommodation for the claimant was resolved by the respondent and his wife offering accommodation within their home which was accepted by the claimant. Neither did the Tribunal consider the separate letter of 11 October 2022 (J148) given for benefits purposes was significant in the assessment of the true intent and meaning of the arrangements.

273. The claimant invoiced the respondent and was paid gross without any deduction of tax or national insurance. When asked the claimant advised that she assumed the respondent would be responsible for such matters and that she expected a payslip. The Tribunal did not find that to be credible in the circumstances.

274. The Agreement stated that the claimant required to hold a certificate as a *Level 3 Trainer".* Despite the claimant's assertion that she did not have a "Level 3" Certificate and that "the respondent knew that" that did not tally with the evidence. As explained the documents and the evidence from Tracey Douglas, gave a compelling account, that the claimant having completed 92% of the necessary requirements for a Level 3 Certificate on 20 August 2022 (C8) completed the practical at a session which was attended by Tracey Douglas on 18 September 2022 (being a session the claimant claimed was for level 2). The evidence was that the respondent considered on good grounds the claimant had a Level 3 Certificate. If she did not because she had not completed any paperwork then that was not known to the respondent on 11/12 October 2022 or indeed concerned the claimant as she advertised to members her availability to conduct the business of personal training on 2 October 2022 either in person or online(J266).

275. There was no restriction on the claimant seeking to offer her services to any third party including any competitors of the respondent either in person or online.

276. The cases of ***Uber BV*** and ***Autoclenz*** direct attention to the true nature of the agreement rather than to the terms of a contract which may have been cleverly crafted to exclude an individual from being a "worker" as defined. However in this case the contractual terms chimed with the reality of the arrangement.

277. In the first instance the Tribunal did not accept that the claimant had been manipulated into signing the Services Agreement which was produced. The claimant's position was that she did not really know what she was signing and was rushed into the matter. That did not accord with her initialling every page. Neither did it accord with her being able to take away a copy when she would have ample time to read the contract and make representation about any particular terms which she did not understand. She claimed that there was a class that she required to take within an hour of her arrival on 11th October 2022 but no charge was made for any class on that date which she herself prepared (J151). Credible evidence from Tracey Douglas was that she had taken the claimant to her first session at the gym on 12th October 2022 and the contract signed the previous evening without the urgency of a class. Neither did it accord with the claimant making an amendment to the term regarding rent and equipment and there being no evidence she either objected in principle to that term or to any other term not being a reflection of her understanding of the arrangement.

278. Also there was evidence that one of the other personal trainers was able to discuss and negotiate amendment to the Service Agreement which was utilised by the respondent. It was not the case that there was presented a "take it or leave it" document which was non negotiable.

279. The accommodation made on rental/equipment was that equipment would be taken in lieu of rental payment over a period of months. That was a term which was amended to increase the rent free period.. The claimant's position was that she did not understand the term to be that the equipment became the property of the respondent, but there was a rent free period because the

gym was able to make use of the equipment. The difficulty with that proposition is that there is no dubiety on the terms of the particular clause which the claimant clearly either at the time of signing or thereafter could absorb particularly when amended.. Neither did the proposition that it was only use of the equipment which was being given in exchange for a rent free period sit easily with her evidence that she valued the equipment at £2,500 and it was that value which was used to estimate the rent free period. There was no valuation made of the equipment by the respondent. It would appear he accepted what value the claimant put on the equipment and utilised that value in assessing the rent free period. There appeared to be no deception as was maintained by the claimant at a later stage. In any event the issue of the equipment (which did loom large when the parties fell out) was not an aid to an assessment of whether or not the claimant was truly in business on her account rather than a "worker".

280. The contract is headed "Senior Personal Trainer Rental Agreement" and contains details of the rent to be paid to Future Gym and states that the personal trainers' "obligations" are to "provide personal training sessions …" in a manner which ensures safety and compliance with statutory provisions for health and safety; to hold a Level 3 Personal Trainer Qualification and not to provide services to anyone under the age of 18 unless appropriate checks have been conducted. The obligation was to work in line with the gym's operational standards covering areas such as cleaning and environmental conditions; not to do anything to invalidate insurance; comply with any recommendations of the gym's insurers and any competent statutory or other authority concerning fire or other safety precautions; to comply with rules and regulations imposed by the gym at any time for the efficient management and or functioning of the building or the premises and not to do anything which might cause nuisance to the gym or neighbours; not to use the premises except for the provision of personal training sessions; to indemnify the gym against liabilities in respect of injury caused by the personal trainer's use and occupation of the premises and to indemnify the gym against any VAT; and be responsible for all income tax liabilities and national insurance and similar contributions in respect of "*his or her fees".*

281. For remuneration it was stated:-

> "*The Senior Personal Trainer shall be remunerated £13/hour for hours at the gym as agreed with the gym owner". The Personal Trainer was also responsible for submitting a monthly invoice "by the 5th of each month for the previous calendar month to the gym owner".*

282. The Personal Trainer was to establish, operate and use their best endeavours to promote and develop their business and was to carry it on in the premises during permitted hours being the opening hours of the gym. There were certain obligations to arrive in time, provide services in a safe manner, use the equipment provided by the gym in a safe and effective manner and to be polite, friendly and respectful of all gym members when on the gym floor.

283. The Personal Trainer was able to undertake marketing activities. Personal training clients at the gym required to be Gym members and with fees as agreed between the personal client and the personal trainer. Insurance was required to be kept in place.

284. There were provisions on termination of the Agreement on certain events occurring. In the event there was early termination of the Agreement by the Personal Trainer then there was a liability to pay an early termination fee. There was also liability for a termination fee in the event the Agreement was terminated by the gym due to gross misconduct of the Personal Trainer or breach of the Agreement. The Agreement was to have a termination date of 12 weeks from commencement. This was at odds with Clause 2 which advised that the Agreement would come into force on the commencement date and continue for an initial term of 6 months.

285. There is provision for the use of a substitute were the Personal Trainer unable to undertake the services. The Personal Trainer had no restriction on who would substitute for the services provided the substitute was suitably

qualified and experienced with appropriate insurance. If a substitute was to be used the Personal Trainer was responsible for paying the substitute to provide the services.

286. The Tribunal considered these provisions were consistent with the claimant operating business on her own account. The provisions regarding safe working, insurance, being polite and considerate, complying with statutory regulation, not causing a nuisance and the like were in line with provisions which might be reasonably asked of any independent contractor coming to work provide services for a customer at their premises. It was not considered that it was possible those provisions made the claimant in some way subordinate.

287. There was no obligation on the gym to provide hours of work to the claimant. As stated the understanding with the claimant was that she would have the opportunity to work 10/15 hours a week in the gym in providing services to the Gym. She could take that offer up or not as the case may be. While it clearly suited the respondent to have classes taken by the personal trainers, and the personal trainer to assist members; and it suited the personal trainers in being remunerated for hours of work there was no obligation either to offer work or for any offer to be accepted in the arrangements made, in the practice at the Gym or in the Agreement. Essentially the claimant, along with other trainers, was able to fix any hours of work to suit her own personal convenience rather than to meet the interests of the Gym.

288. The contract set up by the oral arrangements as reflected in the Agreement did not demand personal service by the claimant given that she could supply a substitute of her own choosing in terms of the Agreement but separately and more fundamentally the claimant was carrying on the business of a personal trainer and by virtue of the contract the respondent was a client or customer in the services provided. The Tribunal did not then consider that the claimant was a “limb b worker” as defined.

Employment Status

289. Neither did the Tribunal consider that the claimant was an employee of the respondent and that for the same reasons. In any event none of the complaints made would require the claimant to be an employee rather than a "worker." The obligation to provide a written statement is for the provision of such a statement to a "worker" as defined. As narrated the other claims in terms of discrimination and detriment by making a protected disclosure are available to a "worker" as that is understood in terms of section 230(3) of ERA.

Conclusion

290. The Judgment then is that the Tribunal have no jurisdiction on the claims made which require to be dismissed.

Other Issues

291. Having heard the evidence on other issues however the Tribunal thought it should briefly indicate what would likely have been their view had they had jurisdiction in the case.

Disability

292. On the issue of disability status the Tribunal would likely have found that the claimant was a disabled person as defined in section 6 of the Equality Act 2010. The claimant has a physical impairment of hypothyroidism. She was diagnosed in 2006 and has a lifelong condition.

293. The symptoms include fatigue, sensitivity to cold, weight gain, low mood and depression along with muscle aches and pains.

294. The claimant takes medication which raises the level of thyroid hormone in the body to counter the symptoms.

295. In assessing whether the impairment would have a substantial adverse effect on the claimant's ability to carry out normal day to day activities regard should be had to the condition without measures taken to counteract the symptoms. In that circumstance the Tribunal would accept the claimant's evidence that her sensitivity to cold would worsen along with chronic tiredness, the propensity for muscle ache and pain and exacerbate low mood and depression. The Tribunal accepted that the claimant missed time at secondary school on account of those symptoms prior to diagnosis and medication being prescribed In those circumstances the Tribunal considered that there would be a substantial (more than minor or trivial) adverse effect on the claimant's ability to conduct day to day activities. Her concentration would be affected as would her ability to take part in social activity and general day to day tasks due to low mood, chronic tiredness and fatigue. Had there only been a sensitivity to cold or as it was put by the claimant's GP in the letter of 14 March 2023 (J103) that *"some patients can have poor tolerance to cold due to this condition"* the Tribunal would not likely have found disability as there was no real evidence of any substantial adverse effect on day to day activities. The claimant spoke of a need to wrap up and keep warm and plan ahead in cold conditions and in long walks.

Knowledge of disability

296. On the issue of knowledge of the respondent of disability the Tribunal found this a difficult issue. There was no indication by way of visual evidence; the claimant's inability to perform any particular function; medical evidence; disability related benefit claim; or the like to suggest the claimant may be disabled. The photographs produced of hands being discoloured were not taken in the relevant time period and none of the photographs of the claimant at the Gym showed that effect. The fact that Tracey Douglas knew of the condition of hypothyroidism is not evidence that the respondent knew of that condition. The Tribunal did not find evidence that the respondent knew of her hypothyroidism prior to being at the Gym because she had told him; that medication in the bathroom at his home would alert him to that possibility. Many people complain of the cold in a workplace and elsewhere. The fact

that there was no heating in the Gym would make that complaint more likely. Simply complaining of the cold would not in the view of the Tribunal be sufficient for an employer to be reasonably expected to know that an employee had a disability.

297. The Tribunal were conscious that the Code of Practice on this issue would suggest that an employer should do what they can *"reasonably be expected to do to find out if a worker has a disability".* It is also stated that what is reasonable depends on the circumstances and is an objective assessment. The Tribunal were not likely to consider that there was enough in the assertions made by the claimant up to 2 November 2022 that the respondent knew or ought to have known of disability.

298. The Tribunal considered that the reference by the claimant on 2 November 2022 to the cold affecting her health as a consequence of her condition in combination with previous complaint would be a circumstance for him to be put him on enquiry to find out more and ascertain if there was a disability.

299. However the knowledge could not reasonably have been expected to be imputed to the respondent immediately. Some enquiry, consideration and assimilation of the information would have been necessary before the respondent could know or have been reasonably expected to know of likely disability. In the view of the Tribunal it would not have taken long in getting information from the claimant and assessing the position and so would likely find that by 3 November 2022 the requirement would have been fulfilled.

Direct Discrimination

300. EA defines direct discrimination generally as less favourable treatment "*because of a protected characteristic"* (s13). To be treated less favourably necessarily implies some element of comparison. The claimant must have been treated differently to a comparator or comparators be it actual or

hypothetical. There must be no material difference between the circumstances relating to each case.

301. In this case the issue that concerned the claimant was the cold in the gym. There was no case put of any other symptoms affecting the claimant in the relevant period. It is necessary for an employer to have actual or constructive knowledge of disability for this claim (**Gallop v Newport City Council** [2014] IRLR 211) and in this case would be from 3 November 2022. There was no complaint in the List of Issues of any discriminatory actions on 3/4 November 2022 being the claimant's last days at the Gym.

302. In a direct disability discrimination case section 23(2) of EA 2010 provides that the abilities of the claimant and the comparator are relevant circumstances and so should not be materially different. This has the consequence that if the claimant's disability has an adverse effect on their ability to do their work then how they are treated is to be compared with how the employer would treat someone with a similarly impaired ability to do the work (eg ***Garcia v The Leadership Factor Limited*** [2022] EAT19) In this case there was no direct comparator who was sensitive to cold and who the claimant could say was treated more favourably. Neither was there any evidence that a non disabled hypothetical comparator who was sensitive to the cold would have been treated more favourably than the claimant.

303. In any event causation is required and the Tribunal were not likely to consider that any treatment of the claimant was because of her disability. It could find not find any evidence actual or inferred that the reason why no heating was provided to the claimant was because of her disability.

Discrimination because of something arising in consequence of disability

304. Section 15 of EA deals with the prohibition from discrimination arising from disability. In such a case it is necessary that a person discriminates against a disabled person if the disabled person is treated unfavourably because of something arising in consequence of that disability and it cannot be shown

that the treatment is a proportionate means of achieving a legitimate aim. The section does not apply if it is shown that the alleged discriminator did not know and could not reasonably have been expected to know that (the disabled person) had the disability". That has been stated to raise two simple questions of fact namely what was the relevant treatment and was it unfavourable to the claimant. In this situation there is no requirement that the disabled person has to establish "less favourable" treatment than that experienced by a comparator. The section is aimed at enabling a disabled person to make out a case of experiencing a detriment which arises because of their disability and so is focused on making allowance for disability.

305. In this case the unfavourable treatment would be the claimant being "laughed at" by the respondent because of her complaints about cold and requiring to wrap up with layers of clothing or an omission to provide heating which placed her at a disadvantage. That would be unfavourable treatment which arose in consequence of her disability.

306. However the claimant left the Gym on 4 November 2022 and never returned. There was no evidence of being mocked or laughed at on 3/4 November 2022 or what hours the claimant was in the Gym or whether she was leading classes and so not affected by the conditions in the Gym. In the list of issues there is no complaint of any incident on 3 or 4 November 2023. The Tribunal would however have considered that the cold would likely persist on those days and so the lack of heating should have been addressed. In that way this complaint may likely have succeeded but only in that very short periodof time.

Failure to make reasonable adjustments

307. In this case the Tribunal were likely to find that the PCP would be the that the premises were not heatated. Again knowledge of her disability is required (para 20(1) of Schedule 8 to EA). In that respect it is necessary to know not only that the person has a disability but also that he/she is likely to be placed

at the substantial disadvantage referred to in the first, second or third requirement of the section. Again the Tribunal considered that it would have been reasonable to have knowledge by 3 November 2022. The substantial disadvantage would be the sensitivity to cold due to hypothyroidism. The failure to make reasonable adjustment would have been the failure to make arrangement for some heating by means of portable heater or the like. That is the same issue as in the claim of discrimination arising from disability.

Harassment

308. In harassment no justification is possible and no comparator is needed. The claim involves unwanted conduct which is related to a relevant characteristic (in this case disability) and has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive atmosphere for the complainant or violating the complainant's dignity.

309. Accordingly a respondent can be liable for the "effect" of the conduct complained of without reference to any "purpose". Even if the conduct has had that proscribed effect it must also be reasonable that it did so.

310. In this matter the Tribunal accepted that on occasion the claimant would complain about cold and the respondent would "laugh at her for feeling the cold". She suggested that she was being "mocked" and the Tribunal could understand that it could be construed from the comments made. There was also the suggestion that the claimant was being laughed at because she was "well wrapped up" as distinct from the respondent in shorts and a top. There would not appear to be a requirement to be aware of the disability. Such a claim can be successful even if the alleged harasser knows that the harassed does not have the protected characteristic (**English v Sanderson Blinds** 2008 EWCA 1421)

311. The Tribunal could accept that this unwanted conduct would have the effect of creating an offensive atmosphere or violating the claimant's dignity. The Tribunal would consider that conduct was "related" (being a very broad

concept) to the claimant's disability as she would not have been complaining or been wrapped up had she not had hypothyroidism which occasions sensitivity to cold.

Remedy

312. However the Tribunal did not consider the finding on harassment would likely merit a large award given that the comments were not malicious or intended to have the proscribed effect or that there was knowledge of disability until 3 November 2022.

313. The same would be true on the conclusions under discrimination arising from disability and failure to make reasonable adjustments given the issue is the same under each head of claim and the short time period involved from 3 November 2023.

Victimisation

314. For a victimisation complaint to be successful it is necessary that a person (A) victimises another person (B) if A subjects B to a detriment because:-

- B does a protected act or
- A believes that B has done or may do a protected act

315. The protected acts are listed at section 27(2) of EA and are:-

- Bringing proceedings under the Equality Act
- Giving evidence or information in connection with proceedings under EA
- Doing any other thing for the purposes of or in connection with EA
- Making an allegation (whether or not express) that A or another person has contravened this Act

316. The Tribunal considered that the only ground upon which a victimisation complaint could be made out was for the claimant to show that she had made *"an allegation (whether or not express) that A or another person has contravened"* EA and did not consider it likely that would be the case.

317. There was no indication that the claimant had made that allegation (whether express or implied) and neither was there evidence to satisfy the Tribunal that any action by the respondent was on the ground that the claimant had made any such allegation.

318. The List of Issues provided advises that the protected act would relate to the claimant on 3 occasions complaining about the lack of heating in the office affecting her health and wellbeing. However the Tribunal considered that fell short of the definition of a protected act. The claimant was not alleging contravention of EA.

319. The additional issue raised was of the claimant complaining to the respondent about the treatment of JM who had "*additional support needs due to autism".* Again this fell short in the Tribunal view of any allegation that the respondent had contravened EA. The claimant knew nothing of the individual circumstances. She stated that she had been "told of JM's condition". There was nothing to suggest that he was autistic. The suggestion was that she was "shocked" about the treatment of JM but no allegation was made that there had been contravention of EA.

320. In any event the Tribunal were satisfied that the claimant was not subject to a detriment as detailed in the List of Issues because the claimant had done or was likely to do a protected act. The respondent had no reason to suspect disability until 2 November 2022 and had no concern about any EA issues prior to that time. On that day any allegation he had "mocked" the claimant by laughing at her being wrapped up and cold was before he was told she had a "condition" and no issue under EA was in his mind. He was aware of the arrangements made with JM and his capabilities and the Tribunal accepted that he did not subject the claimant to any detriment as a result.

321. In any event the Tribunal did not consider the respondent “cut hours” or the like given the terms of the arrangements; made her homeless by forcing out of house, telling that called police and that could not come back as not accord to facts ; keeping personal items as she was free to collect; and so no detriment. The respondent did keep gym equipment but considered could do so in terms of the contract; the respondent did remove access to Gym because of the fallout on 7 November 2022 and the source of that did not relate to the alleged protected acts but claimant’s erroneous belief on hours and equipment and treatment of Daphne.

322. The Tribunal were not likely to find that the claimant was subject to a detriment because of a protected act.

Time bar

323. On those findings in respect of the discrimination claims the Tribunal would likely consider no time bar operated in the claim of discrimination arising from disability and failure to make reasonable adjustments as no incident prior to 19 October is relied upon. In respect of harassment the tribunal would consider the act of 2 November 2022 was part of a continuing act which would allow the earlier acts to be in time.

Protected Disclosures

324. It was claimed that a number of qualifying disclosures as defined in section 43B of ERA were made by the claimant.

Complaint

That no "lone working" policy; no induction; no fire evacuation procedures shown; no first aid procedures; no supply of uniform.

325. In respect of this matter the Tribunal did not consider there was any disclosure. As indicated the Tribunal were not of the view that there was a shift taken on 11 October. The evidence from the claimant of her attendance on 11 October 2022 was that she "thought get some induction but not get" and "not aware of computer etc". There was no evidence that she complained or made a request for such to be provided. In evidence she indicated that she was not given any "lone working policy" but there was no evidence that she requested or complained about that. The agreement that she signed had an "emergency contact sheet". There was no evidence of any issue being raised about non supply of a uniform. If she was to teach a class then she had qualified both Level 2/Level 3 as a Personal Trainer. She indicated that Level 2 enabled her to teach group classes. The photograph (J59) shows the claimant seated beside the first aid box in the gym office. The Tribunal did not consider there was any complaint made about these issues. There could then be no qualifying disclosure.

Raising concerns on 24 October 2022 as to legality of recording and filming

326. The evidence was that notices were displayed in certain areas regarding the use of CCTV within the premises (photographs at J177/178/179) and so any such disclosure could not be qualifying.

327. The evidence was there was no audio recording in the gym premises. The claimant referred to a conversation with the respondent where she alleged he had made use of recorded conversation to "get rid of staff" and she "realised that there was audio recording in the gym and there were no signs". She said she was "shocked at this story and queried if he had licence or individuals "knew being filmed" and this was around the end of October 2022.

328. The extent of this matter would appear to be a query as to whether or not the respondent had a licence for audio recording. There was no identification of

which of the matters in section 43B(a-f) ERA made any such disclosure qualify for protection. Merely asking whether an individual has a licence for a particular activity did not suggest to the Tribunal that information was being supplied that a criminal offence was being committed or likely to be committed or there was a failure to comply with a legal obligation.

On 2 November claimant complained that her equipment was being used unsafely and the legal implications for her but the respondent said it was his equipment and she had to let members use her equipment

329. The exchange of messages on this matter (J222/224) would appear to commence with the respondent finding gym equipment in the *"treatment room*" and wishing it to be placed on the gym floor; the claimant then advising that certain equipment should not be on the gym floor and "*people wrongly using*" and she will "*take it home";* the respondent advising that the gym now own this equipment in terms of the agreement on rent and that he was wishing to keep the kit on the gym floor so gym members could use it.

330. This highlights the claim by the claimant that she considered the equipment was still hers. In any event she states that she was going to "*label the blocks as nobody knows how to use them or what they are for so meantime keep them off the floor to avoid accident or injury please- will sort tonight"* to which the respondent indicates that it is in fact the gym equipment but "*no stress"* So he acquiesces in her labelling the blocks and keeping them off the floor to avoid accident or injury. In those circumstances the Tribunal did not consider this was a disclosure qualifying in terms of s43B(a-f) ERA . The end result of this exchange does not disclose risk to fail with a legal obligation or that the health and safety of any individual was likely to be endangered.

On 2 November 2022 the claimant queried the legality of the respondent taking her equipment and felt she had been deceived

331. Given the claimant had signed the Agreement stating that the equipment was to be the property of the gym in clear terms she could not reasonably have believed that she was being deceived. In any event this would be an issue of personal interest rather than having wider public interest application.

Complaint on 3rd November 2022 of the treatment of JM who "had additional support needs due to autism"

332. The claimant did not know the arrangements with JM. The Tribunal could make no determination as to whether JM was autistic or not. There was no evidence to indicate that was the case. The claimant's position was that she had been told he was autistic. She thought that unfair advantage was being taken of JM in being asked to take all the difficult shifts and a number of hours because he was not being paid. Again there was no identification of which part of section 43B(a-f) was being breached.

333. The Tribunal considered that it was not likely this matter would be categorised as a qualifying disclosure. It would seem at best an allegation that advantage was being taken of JM. The claimant did not know the circumstances of the engagement of JM.

On 7 November 2022 the claimant discussed with the respondent and his wife about "cutting her hours to 15 hours a week; alleging discrimination; whistleblowing; harassment and victimisation complaints

334. This is a very general claim. As indicated the claimant was never guaranteed any hours in accordance with the findings of the Tribunal and so there could be no "cut". The finding is that, if taken up, the offer of hours in the gym was at best around 15 and so the complaint would appear to be in accordance with the arrangements. Otherwise the discussion on 7 November 2022 in the view of the Tribunal related to the equipment and the claimant's belief that she had been deceived in that respect; and the treatment of Daphne. The Tribunal did not find any issues of discrimination, whistleblowing, harassment and victimisation were raised at that time.

335. In any event the Tribunal would likely be of the view that none of the detriments listed in the issues occurred as a consequence of any of the alleged protected disclosure being made. There was a breakdown in the relationship between the parties and the issues which were the cause were the hours the claimant could work in the gym; the equipment (being the claimant's view that she had been "screwed over" in that respect); and the treatment of Daphne. Of those issues the Tribunal considered equipment and the treatment of the claimant's dog were the dominant reasons why the relationship broke down and not as a consequence of any of the alleged protected disclosure being made (even if found to be protected).

Written Statement of Employment Particulars

336. Clearly if the claimant was a worker as defined under section 230 of ERA then she was entitled to an initial Statement of Employment Particulars which she did not receive. That would have led to an award.

Other Issues

337. The issue of the equipment and its ownership loomed large in the issues for the Tribunal. That issue appeared to the Tribunal to require to be resolved in a separate forum. Whatever view was taken of the issues listed the Tribunal would have no jurisdiction to deal with that contractual matter.

338. It was regretfully clear to the Tribunal at the hearing that relations between the parties had completely broken down. It may be that given the decision in the case some accommodation can be reached over equipment and other items stated to be awaiting collection but the Tribunal could make no order in that respect.

Employment Judge: **J Young**
Date of Judgment: **27 August 2023**
Entered in register: **28 August 2023**
and copied to parties