



EMPLOYMENT TRIBUNALS

Claimant

Ms Samantha Churchman

v

Respondent

Frazier & Deeter UK LLP

Heard at: London Central Employment Tribunal (by Cloud Video Platform)

**On: 27th, 28th, 29th & 30th June 2023 by CVP
27th, 28th July 2023 in Chambers by CVP**

**Before: Employment Judge Gidney with members,
Ms Lopez-Barillas and Ms Jones**

Appearances

For the Claimant: Mr Salter, Counsel

For the Respondent: Mr Mellis, Counsel

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant's claim against Confluence Tax LLP is dismissed upon withdrawal by the Claimant.
2. The Claimant's mental impairment of anxiety and depression qualifies as a disability, as defined by s6 Equality Act 2010 ('EqA').
3. The Respondent had actual knowledge of the Claimant's disability from 17th June 2021.

4. The Claim under s15 EqA (discrimination arising from disability) is upheld.
5. The Claim under s27 EqA (victimisation) is upheld.
6. The Claim under s20-21 EqA (failure to make reasonable adjustments) is upheld in part.

REASONS

Background and Preliminary Matters.

1. The Claimant was employed by the Confluence Tax LLP as a Tax Associate from 4th March 2021. On 15th November Confluence Tax LLP merged with the Respondent. The Claimant's employment transferred to the Respondent and she remained employed by the Respondent until her dismissal on 19th November 2021, some 4 days later. She had 8 months service. She was paid her notice in lieu on the termination of her employment. She notified ACAS of a dispute on 6th December 2021 and obtained an ACAS Early Conciliation certificate on 22nd December 2021. The Claimant presented her Claim Form on 11th February 2022 [11-32]¹.
2. During the initial discussions with the parties about the case at the start of the first day, the Tribunal identified two issues. Upon the conclusion of that 'housekeeping' session, both parties were instructed to consider the issues and state their position after the Tribunal's reading time.
3. The first issue related to identifying the correct Respondent. The Claimant's Claim Form named three Respondents. Frazier & Deeter UK LLP, Frazier & Deeter LLP, and Confluence Tax LLP. By letter dated 26th May 2022 the Respondent's solicitors wrote to the Tribunal asking for Frazier & Deeter LLP to be removed from the proceedings as it is not a legal entity. By further correspondence dated 1st November 2022 the Respondent's solicitors confirmed that Confluence Tax LLP merged with Frazier & Deeter UK LLP on 15th November 2021 and that accordingly the Confluence Tax should be

¹ Numbers in brackets refer to pages within the trial bundle.

removed as Respondent. This issue remained unresolved at the start of the hearing. Mr Mellis, the Respondent's Counsel, accepted that Frazier & Deeter UK LLP was the Claimant's employer at her effective date of termination. Accordingly, the Claimant withdrew her claim against Confluence Tax LLP, and that claim was dismissed by the Tribunal on withdrawal.

4. The second issue related to how the agreed List of Issues described one of the two provision, criterion or practices ('PCPs') relied on for the Reasonable Adjustments claim. The 2nd PCP was described as 'the disciplinary policy'. It contained standard provisions as to the giving of notice of disciplinary hearings, the provision evidence in advance and the right to be accompanied. However, it was clear that the Claimant's case was that none of those provisions were followed. Indeed, the Respondent asserted that as the Claimant was probationary at the time, the disciplinary policy did not have to be followed. As such it seemed that the Respondent had decided in the Claimant's case not to follow the Policy. Accordingly, the correct PCP was not 'the disciplinary policy' but 'the practice of failing to follow the disciplinary policy for probationary employees'. The Claimant thus applied to amend its PCP to reflect that. The Respondent, that had always understood the Claimant's case to be that the policy was not followed, and had pleaded a defense to that claim at paragraph 20 of the Grounds of Resistance [64] (that it did not have to follow it by reason of the Claimant's status as probationary employee) consented to the amendment so that the List of Issues accurately reflected the dispute between the parties. Accordingly, we granted the amendment.

The Evidence.

5. We were provided with an agreed bundle of documents, running to 406 pages. In addition, and during the course of the hearing, we were provided with the Respondent's Employee Handbook, containing the Respondent's disciplinary policy, which ran to 89 pages. We heard evidence from the Claimant, by way of witness statements provided for herself and her husband, Graeme Churchman.

On behalf of the Respondent we heard evidence from Asma Aslam, Tax Manager and the Claimant's Line Manager, Emma Dahm, Marketing Director and Colin Hailey, Managing Partner. Mr Hailey and Ms Dahm are married.

6. We were assisted by and are grateful to Counsel instructed by both parties. They provided us with the following agreed documents: Chronology of Events, Pre-Reading List and Trial Timetable. No skeleton arguments or written closing submissions were provided, however Counsel provided full oral submissions, of which a careful note was taken.

The Claimant's Disability.

7. By an email dated 13th July 2022 [221] the Respondent's solicitor wrote to the Tribunal in the following terms:

'We write to inform the Employment Tribunal that following the submission of additional medical evidence by the Claimant in the above case, the Respondent accepts that the claimant was a disabled person for the purposes of Section 6 Equality Act 2020 at the material time, on the grounds of her anxiety and depression'.

8. Accordingly it was not necessary for us to determine the disability issue. That said, we did read the Claimant's Impact Statement [97-102]. She has remained under the care of her GP for depression since 2009, she has received CBT counselling and prescribed medication. The illness comes in bouts or waves, sometimes she feels better, sometimes not. The concession on disability was sensibly made.

Knowledge of the Claimant's disability.

9. The Respondent's knowledge of the Claimant's disability remained an issue between the parties at the outset of the hearing. It is recorded in the final version of the List of Issues [240].

10. On 17th June 2021 Emma Dahm sent an email to Asma Aslam and Colin Hailey [283] in the following terms:

'Hi, Asma, Colin.

***Do not discuss with anyone outside this group**.*

I spoke with Gaynar, our HR consultant, today. This is a summary of the discussion. Now that Sam has come forward with a mental health condition, this is officially classed as a disability. This is acknowledged as a disability in law. So the next steps are to have a chat with Sam and discuss what reasonable adjustments we as a firm can make for her. This is also a legal term. And the 'reasonable' is important. We cannot be expected to accommodate costly adjustments. For example, that would not be classed as reasonable. Let's set up a call with Sam to discuss how we can help her gain more understanding what our needs are and how they can reasonably met by the firm we needed to ensure. We are doing everything to make sure she has a safe working environment and the support she needs.'

11. During submissions, and in the face of such evidence, the Respondent's Counsel conceded that the Respondent had actual knowledge of the Claimant's disability from 17th June 2021. Whilst there were indications that actual or constructive knowledge might have preceded 17th June 2021, no claims of disability discrimination pre-date that point. Accordingly we accept and found that the Respondent had actual knowledge at all material times. We would have made that finding had the concession not been made.

The Issues.

12. Counsel had agreed the Issues that we were to determine. The most recent version of the Issues appears within the Agreed Bundle at [240-243]. We have recited the Liability Issues (excluding 'knowledge of disability' as that Issue was resolved during the hearing) below:

Discrimination Arising From Disability (s15 EqA)

- 12.1 Did the Respondents treat the Claimant unfavourably?

12.1.1 The Claimant relies on her dismissal.

12.2 Was the reason for the Respondent's unfavourable treatment of the Claimant because of something arising in consequence of her disability?

12.2.1 The Claimant contends the unfavourable treatment arose from her previous sickness absence and need for reasonable adjustments.

12.2.2 The Respondents contend that it dismissed the Claimant because it had lost trust and confidence in her to be an open and honest employee and to be reliable.

12.3 Can the Respondents show that the treatment was a proportionate means of achieving a legitimate aim?

12.3.1 The Respondents contend that the treatment was a proportionate means of achieving a legitimate aim on the basis that it was reasonable to expect the Claimant to comply with reasonable instructions in relation to her attendance at the office.

12.3.2 The Claimant contends that there were other means available to the Respondents to accommodate the effects of her condition that could have been implemented before terminating her contract including (a) facilitating discussions with the Claimant regarding the adjustments sought; or (b) having discussions with the Claimant about her attendance.

Victimisation.

12.4 Did the Claimant do a protected act?

12.4.1 The Claimant relies on an email sent to Ms Dahm on 24th September 2021 requesting an adjustment in her working practices to help manage the effects of her condition.

12.5 Did the Respondents subject the Claimant to any detriments?

12.5.1 The Claimant contends that she was subject to a detriment when the Respondents terminated her contract of employment on 19th November 2021.

12.6 If so, was this because the Claimant did a protected act and/or because the Respondents believed the Claimant had done, or might do, a protected act?

12.6.1 The Claimant contends that her contract was terminated because she did a protected act. The Claimant contends that her request for adjustments was specifically referred to in the letter dismissing her.

12.6.2 The Respondents contend that the Claimant was dismissed because it had lost trust and confidence in the Claimant to be an open and honest employee and to be reliable.

Failure to make reasonable adjustments (s20-21 EqA)

12.7 Did the Respondent apply a Provision, Criterion or Practice ('PCP') and, if so, what was the PCP?

12.7.1 The Claimant contends that the Respondents applied the PCP of requiring trust and confidence to be maintained between employer and employee. In the alternative, the Claimant relies on the Respondents *not following*² disciplinary policy as a PCP.

12.7.2 The Respondents dispute that requiring trust and confidence to be maintained between employer and employee as alleged by the Claimant amounts to a PCP. The Respondent further contends that the PCPs are irrelevant in the Claimant's circumstances as there was no requirement to follow the Respondent's disciplinary policy.

² Added by consent during clarification of the issues.

12.8 If this PCP was applied, did it put the Claimant at a substantial disadvantage in comparison to non-disabled persons?

12.8.1 The Claimant contends that the PCPs put her at a substantial disadvantage. The disadvantage to which the Claimant was put was her dismissal and an exacerbation of her condition.

12.9 Did the Respondents know or ought they to have known that the Claimant was likely to be put at a substantial disadvantage by that PCP?

12.9.1 The Respondents deny that it should have known or ought to have known that the Claimant was likely to be put at a substantial disadvantage by the alleged PCP.

12.10 Did the Respondents fail to take such steps as were reasonable to avoid the disadvantage?

12.10.1 The Claimant contends that reasonable adjustments that the Respondents could have made in order to avoid the substantial disadvantage include but are not limited to: (a) warning and consulting with the Claimant about the prospect of dismissal; (b) giving sufficient notice of any meetings regarding termination of employment; and (c) allowing the Claimant to be accompanied in any meetings where her employment was likely to be terminated.

12.10.2 The Respondents deny that the above are reasonable adjustments because it had lost trust and confidence in the Claimant to be an open and honest employee as result of her actions.

The Findings of Fact.

13. We have not recited every fact in this case or sought to resolve every dispute between the parties. We have limited our analysis to the facts that were relevant to the Issues that we were tasked to resolve. We made the following findings of fact on

the basis of the material before us, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts.

14. As stated, in 2009 the Claimant was diagnosed with anxiety and depression. The condition is unpredictable and causes the Claimant to experience intermittent severe depressive episodes during which time she is unable to meet her activities of daily living and become socially withdrawn.
15. On 4th March 2021 the Claimant commenced employment with Confluence Tax LLP in the role of Tax Associate on a part time basis, pursuant to a contract of employment dated 15th March 2021 [257]. On 1st June 2021 the Claimant switched over to full time hours, on the same contractual terms as before. Confluence Tax LLP was a small sized specialist tax firm that merged with the Respondent on the 15th of November 2021. The Respondent is an accounting firm which provides tax, audit and accountancy services. Clause 2.2 of the Claimant's contract of employment stated that the first three months of the Claimant's employment (i.e. until 4th June 2021) would be a probationary period, during which time her employment could be terminated on one week's notice. Her performance would be monitored and her probation could be extended. She would be notified in writing upon the completion of her probationary period. The Clause did not disapply the Respondent's disciplinary policy during the probationary period. Clause 18.1 confirmed that the employee is subject to the Firm's disciplinary procedures as set out in the staff handbook.
16. The Respondent has a staff handbook that contains all of the various policies governing its employment relationship with its staff. Its Schedule 8 contains its disciplinary policy and the relevant extracts state [R29]³:

- '1.1 *This procedure is intended to help maintain standards of conduct and performance and to ensure fairness and consistency when dealing with allegations of misconduct or poor performance.*
- 1.3 *This procedure applies to all employees regardless of length of service. It does not apply to agency workers or self-employed contractors.*
- 3.1 *We will give you written notice of the hearing, including sufficient information about the alleged misconduct or poor performance and its*

³ The Policy was not included in the original trial bundle. The handbook was admitted into evidence as [R1-89].

possible consequences to enable you to prepare, who will normally be given copies of all relevant documents and witness statements.

- 3.2 *You may be accompanied at the hearing by trade union representative, or a colleague will be allowed reasonable paid time off to act as your companion'.*

17. Pursuant to the Claimant's contract, her probationary period ended on 4th June 2021. We were not provided with any evidence that it had been extended. As already stated on 17th June 2021 there was an internal communication between Emma Dahm, Asma Aslam and Colin Hailey. After acknowledging that the Claimant was disabled by her condition the email set out Emma Dahm's initial view on the Claimant's adjustments request. On the issue of not wishing to speak to strangers (including new clients) Ms Dahm said *'We will at some point need to ask how she will handle clients as hers is very much a client facing role. This is clearly stated in the job description.'*
18. On 26th July 2021 Asma reported back to Emma that the Claimant had asked for Wednesdays off for a month, so that the week may not appear too long to her and, if she became anxious about taking calls, being able to put a 'do not disturb' status on her telephone system. The Respondent agreed to these adjustments for a month trial period, with the Wednesdays not worked to be treated as annual leave.
19. The Claimant called in to self-certify days when she was too ill to work on 10th August and 8th, 9th, 10th and 13th September 2021. In respect of 13th September 2021 absence Ms Dahm said to the Claimant *'You're clearly poorly so we cannot allow you to work. Just let us know when you are feeling better'* [302]. To Asma Ms Dahm said, *'we don't have any choice but to assign that piece of work to another associate. If SC then comes back, perhaps she can work together with the other associate on it. We cannot let down clients and we have deadlines to meet. So the best placed person is to complete each piece of work to ensure deadlines are met'* [300]. The Claimant was then signed off for depression from 17th September until 30th September 2021 [307]. Page 2 of the Fitnote contained the following explanation of what 'you are not fit to work' means:

'You are not fit to work': Your health condition means that you may not be able to work for the period shown. You can go back to work as you as soon as you feel able to and, with your employees agreement, this may be before your fitness runs out.'

20. During that period of sickness absence, on 24th September 2021 the Claimant emailed Emma Dahm [308-309]. The Claimant asked if she could return on a part-time basis during the period she was signed off work. Ms Dahm refused the Claimant's request [308], considering herself, erroneously, to bound by the fitnote given by the Claimant's Doctor. She noted that the GP did not mention a phased return to work and clearly stated that she was signed off until the 30th September. She concluded, therefore, that that was the return date that they would work too. Ms Dahm was cross examined on the definitions section of the Fitnote (quoted above) in order to establish that the Fitnote did not preclude the Claimant returning to work early. Ms Dahm said that she did not realise that was possible, and had never read the definitions section of a Fitnote. We accepted her evidence on that point.
21. The Claimant's email of 24th September 2021 [308-309] is important because the Claimant now relies on it as a protected act, as defined by s27(2)(c) EqA namely '*doing any other thing for the purposes of or in connection with this Act*' (the **EqA**). The Claimant asserts that in the email she asked for reasonable adjustments to be made to remove or reduce the disadvantage posed by her disability. The relevant passage stated:

'I have had time to fully understand what I have the most difficulty with, which is client emails for the most part. I really enjoyed the actual work and was wondering if I could take more of a background role in the company and not contact clients directly myself. I'm happy to draft emails and to send to others to send. I really struggle with sending them myself and what the reply might be. I'm sure over time I will get better with this, but I think it will be months rather than weeks. I understand this might add a little to others workload, but I think this small change will make a drastic difference to my mental health and in turn, my attendance. I'm hopeful my work in general is good enough for this to be considered.'

22. On 1st October 2021 there is an exchange between Ms Dahm and the Claimant in which Ms Dahm does discuss a phased return to work, as the Claimant's October Fitnote for 'Low Mood' [313] had suggested this. On the issue of other Tax Associates sending out the Claimant's work, Ms Dahm said in evidence [ED24]⁴:

'I was rather alarmed by this e-mail because the role was outward facing, although we could put measures to remove her from having telephone contact with clients, she now appeared to be asking for other members of staff to send emails which she had drafted'.

23. Emma Dahm's alarm was, it seems, shared by Mr Hailey. He said in evidence [CH3-4]:

'[3] On 25th of September 2021, during her sick leave, we received her request asking us whether she could return part time and take more background role and have no direct contact with clients.

[4] We were becoming increasingly concerned that the Claimant was wishing to dilute her role to the point that her role would become meaningless by having no client contact at all'.

24. Accordingly, Emma Dahm responded to the Claimant, stating:

'The primary role of the tax associate is to provide client advice as confirmed in the job description. While the company is prepared to make adjustments to your working arrangements, we do not believe it is reasonable for you not to undertake any client facing duties as this is not the nature of the role you were appointed to undertake and it would be unreasonable to expect the other tax associate's to send out your work in their name and deal with the clients responses. ... Moreover I am afraid that there is not a role at Confluence that does not involve some form of client contact. ... In view of the above, I'm afraid we cannot agree with your proposal, as client contact is a fundamental part of your role and indeed the business as a whole'.

25. The Claimant replied by stating:

'think you misunderstood me. I didn't mean for other tax associates to send emails on my behalf, it was more for the help from whoever was giving me the work and who the main point of contact was. I also only envisaged this being

⁴ Refers to witness initials and paragraph number.

temporary with support from the team I am sure that my confidence would have increased again. I completely understand it is part of the job role, but I was only asking for help with it temporarily.'

25. The Claimant's request for others to send emails on her behalf and her subsequent clarification that she only meant whoever was giving her the work and/or the main point of contact for the client, was relied on by the Respondent as an example of, at best the Claimant changing her position and, at worst, dishonesty on her part for seeking to deny what she had previously asked for. We recognise that the Claimant was suffering from anxiety and depression during this period. We feel that the Claimant was not as clear as she could have been, both in her original request and her clarification of it, and that Ms Dahm's confusion over what was being sought was to some extent understandable. However, we reject the assertion that the Claimant was either changing her position or being dishonest. We conclude that the Claimant had meant '*could either the client's main point of contact, or the manager who had given her the work, send her work out on their email*'. She did not mean '*could that be done by any other tax associate*'. We conclude that the Respondent unfairly relied on the request and clarification as the Claimant either changing her position or being dishonest.
26. On 4th October 2021 Emma Dahm completed a Occupational Health Referral form for the Claimant. In it Ms Dahm made it clear that the Claimant had a client facing role and that no adjustment could be considered which reduced this aspect of the Claimant's role [320-323]. In an email dated 8th October 2021 the Claimant commented on the referral stating '*I have read through referral and it greatly upsets me that you think of me in this way*'.
27. On 20th October 2021 Asma Aslam reported an improvement, stating that she could see positive effects on the Claimant, whom she noted had volunteered to be on a client call and had shown some productivity.
28. On 21st October 2021 Occupational Health reported on the Claimant [337-342]. The report recommended flexibility and understanding on the

Respondent's part in terms of managing the Claimant when she had 'bad days'. On the issue of whether the Claimant was fit to attend a disciplinary hearing the report advised the following adjustments were reasonable to make:

To be given sufficient notice of the meeting.

To be sent any paperwork pertaining to the meeting in advance, for example an agenda and relevant policy.

To be given time to take a break during the meeting if they become distressed.

To be allowed someone to accompany them if this was permitted in company policy.

29. In his evidence Mr Hailey told us that it had been agreed that staff who normally worked on a Thursday would come into the office rather than work from home to meet the new owners on 18th November. He said that it had come to his attention that the Claimant had not attended the office, leading him to investigate the reason why **[CH6-7]**. We have not seen any evidence of an agreement that staff should come in on Thursdays, and certainly no instruction to. About as high as the evidence gets on this is an email dated 1st November 2021, ahead of the merger between Confluence Tax and Fraser & Deeter, when Emma Dahm emailed all Confluence Tax employees. The subject line stated, 'Thursday meetings with Malcolm'. The email said:

'Re: meeting the F&D [Fraser & Deeter] guys on Thursday, who's able to be in the office and who isn't? The F&D guys would like to do a general question session, probably in the team meeting slot then meet individually with as many of you as possible during the day. If you could let me know a yes or a no please, I'll update Malcolm. You'll have to meet them sometime'.

30. This email falls short of an instruction or even an agreement that employees would come in. It strikes us as no more an enquiry as to who is able to come in or who cannot. It falls considerably short of a management instruction, or that the need to attend was mandatory. The Claimant was dismissed by the Respondent because they considered her exchanges with the Respondent on 18th November 2021 regarding her reason for not attending the office demonstrated dishonesty / unreliability on her part. It is therefore necessary to

consider the evidence on this carefully. On that day the Claimant messaged her line manager Asma Aslam via Microsoft Teams at 8:44am. The following exchange took place:

'[SC to AA at 8.44] Morning Asma. I had a temperature last night. I didn't think it was wise for me to go into the office. I feel fine now. Do I need to tell anyone? Thought best if I just work from home today. I really don't want to talk to Emma.'

'[AA to SC at 8.44] Ok, can you call me?'

31. The Claimant's mobile telephone call logs **[347]** reveal that the Claimant then called Asma Aslam at 8.45am (the next minute after the message exchange) for 2 minutes and 36 seconds. The parties accepted that the mobile phone number called (ending 503082) was Ms Aslam's phone. Ms Aslam account of this is contained in her witness statement [AA11]:

'[AA11] I received an early morning WhatsApp message from the claimant informing me that she had a temperature, was not feeling well, so I advised her to take the day off sick. I then received a message around 8:15am that she did not need a sick days. She was feeling better and was capable of working'.

32. We do not accept this evidence. Ms Aslam could not produce the early morning WhatsApp. She then suggested it was a telephone call at 7am. However, the Claimant's call logs reveal no call at that time. Furthermore the 8.15am message starts *'Morning Asma, I had a temperature last night ... I feel fine now'*. This suggests that it was the first communication of the day, not a continuation of an earlier discussion. We reject Ms Aslam's evidence of a 7.00am communication, be it by telephone or message. Accordingly we find that there was no contradiction or change of position between the exchange at 8.15am and the purported exchange at 7.00am because we find that there was no exchange at 7.00am. We accept the Claimant's evidence on this, as it appears in paragraph 35 of her statement **[SC35]**.
33. The next message was from Asma Aslam to the Claimant at 9.24:

'[AA to SC – 9.24] Sam, just spoke with Emma and informed her that you are about to work from home. Emma feels that it is breaching law and that you should be off sick today.'

34. The Claimant's mobile phone records reveal she called Asma Aslam again at 9.26am for 3 minutes 31 seconds. Emma Dahm then picked up the conversation by email **[364-366]**:

'[ED to SC at 9.29am] Asma mentioned you were too poorly to come in today, so please don't work at home. As always, if you're too ill to be here, you cannot work.'

'[SC to ED at 10.14am] There appears to have been a miscommunication. I am not too ill to come in at all, merely being responsible due to COVID having recently been in contact with my niece just before she tested positive for COVID. I figured it would be safer for everyone to continue to work from home today.

I told Asma with enough time so I could come in if needed, but I feel I didn't make it clear that I was staying at home for the sake of others.

I shall continue to work from home today. As I am not sick and perfectly able to do so, so please do not mark me as sick.

If you really need me to come into the office, I will, but I feel this will be going against government COVID guidelines.'

35. The Claimant emailed Jonathan Clark of Frazier Deeter at 10.56 on 18th November 2021. She said, *'sorry I was unable to come into the office today. I've had COVID symptoms after seeing my niece, who then tested positive for COVID and I didn't think it was wise to come in'*. Mr Clark replied *'Sorry not to meet you in person, but probably a wise call staying at home if you've had COVID symptoms'*. The emails between Ms Dahm and the Claimant then continued in the afternoon of 18th November:

'[ED to SC at 2.48pm] We received the message that you had a temperature and that you are unable to come in today.

'[SC to ED at 3.52pm] As you can see it was just a misunderstanding. Had I actually been ill this morning I would have called Colin as discussed previously. I didn't think going in today was mandatory and I was just letting someone know why I wasn't going to be there. At least I managed to sort out some of my emails today. See you in the morning.'

36. As already indicated, we find that there was no instruction to staff to be in the office that day and that attendance was not mandatory. An enquiry had been made as to who would be in, no more. At 3.57pm the Claimant emailed Asma Aslam and said:

'I really didn't want another sick day as discussed with you. I really wanted to sort my inbox out and thought it was such a waste of a day when I had so much work to do, as thinking about it, it would have only made me more stressed tomorrow. Sorry if you think I don't trust you. I do. I just feel that I had so much work to sort out that would have affected my mental health further down the line for no reason'.

37. Ms Aslam forwarded the Claimant's response to Ms Dahm who replied on 23rd November in the following terms: *'Thanks Asma. That makes three different versions of why she didn't want to come in'.*

38. It appears that Colin Hailey then commenced an investigation into the exchanges. On 19th November 2021 he asked Asma Aslam for a brief summary of her discussions with the Claimant on 18th [369]. Asma replied at 12.12pm on the 19th November [368] and her reply is important:

'Colin.

Please see below as requested.

7:00am - Sam informed that she has a temperature and not feeling well to which I advised her to take it off as sick.

8:15am - Sam informed me that she would not need a sick day as she is feeling better and is capable to work.

9.20am - (after Emma's formal e-mail) she said that she has a temperature in the morning and she forgot to tell me that she had met somebody with COVID and was scared to spread it.

9:15am today - she called to tell me that she is better and had finished the work as promised. She was aware that she had caused confusion and was apologetic.

It is your an Emma's decision at the end. However, may I please request if it is at all possible that you could revisit the decision around termination.

Perhaps give her a strict warning instead of termination. ... I would be very grateful if you can please think again, but if not, you know better and have far more experience in it. I think a strict warning may have a better impact.'

39. We find as a fact that Asma understood that the Mr Hailey and Ms Dahm had already taken the decision to terminate the Claimant's employment by the time Asma's timeline had been received. No other interpretation of the final paragraph of her email is permissible, given what she said.
40. On 19th November 2021 Colin Hailey wrote to the Claimant, terminating her employment with immediate effect [370]. Mr Hailey recited the timeline he had been given by Asma Aslam and concluded by saying:

'As you know, our merger took place this week with Fraser and Dieter. Staff who normally work on a Thursday were expected to attend the office. You failed to do so. I have no reason to believe that Asma's recollection of her conversation with you is incorrect and that you later changed the reason for your absence from the workplace.

Having reviewed the above events and in light of the previous incident in relation to a misunderstanding of the beginning of October about the duties you're prepared to undertake in your role, I'm afraid that the firm has lost trust and confidence in your ability to be a reliable employee. Therefore, with regret, I've decided to terminate your employment with immediate effect, pursuant to clause 13 of your contract of employment.

41. Both Emma Dahm and Colin Hailey gave us some insight as to the rationale behind their decision to dismiss the Claimant in their evidence [CH10] and [ED38, 41, 42]:

'[CH10] I considered that she was not telling the truth and that she had decided that she was not coming into the office and I wasn't prepared to accept that there had been a misunderstanding. Therefore, regrettably, I believed the relationship had broken down and I decided to terminate her employment.

[ED38] I felt that she had not been honest and open with us, and in reality she had decided that she would walk from home.

[ED41] Colin and I discussed the matter after receiving Asma's e-mail about the sequence of events, and we decided that we no longer had trust and confidence in the Claimants ability to be reliable and to be perfectly frank we did not feel that she was being open and honest with us. In view of this, we believe there's no basis upon which we could continue working with her as we're a small business or inspect our employees to be straight with us.

[ED42] We were not prepared to put up with an employee who was not being truthful with us'.

42. The Claimant told us in evidence of the impact upon her of her dismissal. She said **[SC41]**:

'The dismissal letter caused me to suffer from a panic attack in the early hours of the 20th of November 2021. I was admitted to Cambridge Hospital. Spent all day Saturday in hospital being monitored for a possible heart condition as a direct result of the dismissal.'

43. The Claimant appealed her dismissal by letter dated 22nd December 2021 **[375]**. She reiterated that she had did not misled or lie and made the point that she had never been given the opportunity to defend herself. She stated that Ms Dahm had discriminated against her because of her disability, but recognised that it would be difficult for Mr Hailey to investigate that as he was married to Ms Dahm. The Claimant asked Asma Aslam if she had any updates on the progress of her appeal.

44. Ms Aslam replied to say she had no updates. On 25th November 2021 the Claimant emailed Mr Hailey to express her disappointment at not having had a response to her appeal. The Claimant messaged Asma on 4th December 2021. She said:

'Was just wondering if you would be able to tell me if Emma or Colin had discussed my coming back at all. Not sure if you're aware, but I had appealed the firing. They literally get it by e-mail at 6:30 PM on that Friday. No call or discussion or anything. Sorry about that. I just wanted to see if they were doing anything or hoping I would go away before I take this further.'

45. Still having not had a response the Claimant followed that up with another chaser on 6th December 2021. Mr Hailey responded later that day **[381]**. In his response he dismissed the Claimant's appeal. He did not afford the Claimant the opportunity to take part in any investigation. He did not afford her a disciplinary hearing. When she appealed against his decision to dismiss her, he appointed himself as appeal officer, and then dismissed her appeal against his own decision to dismiss her, without an appeal hearing. He stated that, in his opinion, the Claimant had provided three different reasons for not wanting to come into work on 18th November 2021, namely:

- 45.1 She was too ill to attend work;
 - 45.2 She was well enough to work but might have contracted Covid;
 - 45.3 She wanted to sort out her inbox.
46. We do not accept that the Claimant's exchanges on 18th November 2021 suggested a change of position, let alone dishonesty on her part for the following reasons:
- 46.1 There was no communication at 7.00am;
 - 46.2 In the first communication the Claimant expressly stated she was fine, not unwell;
 - 46.3 We accept the Claimant's evidence that the reference to having a temperature was made because it was a well-known early symptom of Covid.
 - 46.4 This is entirely consistent with the Claimant opining that it was not wise to come into the office: this was not because she was too ill to work, it was because she did want to risk spreading Covid.
 - 46.5 Ms Dahm was completely wrong to treat the reason given for not attending work as being too poorly to work.
 - 46.7 The Claimant quite properly corrects Ms Dahm on that issue. This is consistent with the reason provided by the Claimant from the outset and is not a change of position or dishonest.
 - 46.8 The Claimant's communication with Jonathan Clark is entirely consistent with Covid being the reason for her non-attendance.
 - 46.9 The Claimant's request to work from home to sort out her inbox was made because she could work but was isolating due to a possible Covid infection. There were no grounds to expect the Claimant to sign off work.
47. Accordingly the conclusion that the Claimant had provided three conflicting reasons for not attending the office that day (due to illness, due to self-isolating and due to wishing to sort out her inbox) was utterly misconceived. Mr Hailey supports his dishonesty conclusion in connection with 18th November exchanges by referring to '*the previous incident in relation to a*

misunderstanding of the beginning of October about the duties you're prepared to undertake in your role'. This is a reference to the Claimant asking tax associates to sign the Claimant's emails for her, and Mr Hailey's perception that she had changed her position or lied on that issue as well. For the reasons stated above we do not believe that the Claimant did either. Accordingly we reject that as a secondary dishonesty finding. We reject that unreliability and dishonesty was the reason relied on by the Respondent for dismissing the Claimant. In the absence of that explanation we need to establish what the actual reason for dismissing her was.

The Law.

48. **Discrimination Arising from Disability.** The relevant statutory provisions from the **EqA** are as follows:

15 Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

49. The employer must put the employee at a disadvantage and it must happen because of something arising in consequence of the disability. The process involves (i) identifying the treatment, (ii) identifying the 'something that has arisen' in consequence of the disability and (iii) determining whether the treatment was unfavourable **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2014] UKEAT/0397/14.
50. What caused the unfavourable treatment requires consideration of the minds of alleged discriminators and thus that the reason which is said to arise from disability be more than just the context for the unfavourable treatment. There need only be a loose connection between the unfavourable treatment and the alleged reason for it, and it need not be the sole or main cause of the

treatment, though the reason must operate on the alleged discriminators' conscious or unconscious thought processes to a significant extent (**Charlesworth v Dronsfield Engineering** [2016] UKEAT/0197/16).

51. The employer will have to justify the treatment as a 'proportionate means of achieving a legitimate aim'. The legitimate aim should be legal, should not be discriminatory in itself and must represent a real objective consideration. The approach to s15 was set out in **Pnaiser v NHS England** [2016] IRLR 170, at para 31, by Simler P. as follows:

'(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. ... The "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant. ...

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'.

(i) ... it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

52. In determining whether the treatment complained of was a proportionate means of achieving a legitimate aim the EHRC Employment Code (para 4.26) construes 'proportionate' as '*appropriate and necessary in all of the circumstances*'. The burden lies squarely on the employer. In **Hardy & Hansons plc v Lax** [2005] ICR 1565 it was said that part of the assessment of justification entails a comparison of the impact upon the affected person as against the importance of the aim to the employer. It is not enough that a

reasonable employer might think the treatment justified. The Tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of the aim. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim **Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice** [2017] UKSC 27.

54. **Failure to make reasonable adjustments.** Sections 20-21 of the **EqA** provides as far as relevant:

20(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

20(2) The duty comprises the following three requirements.

20(3) The first requirement is a requirement, where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

21 (1) A failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments.

22 (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person”.

55. Provision, criterion and practice were considered in **Ishola v Transport for London** [2020] ICR 1204. A 'PCP' did not apply in every case of unfair treatment. The Tribunal's task is to set out the nature, effects and extent of the alleged substantial disadvantage and assess it objectively. In other words, it must consider why the PCP puts the Claimant at the alleged disadvantage and ask itself what specific thing is it about the PCP that puts the Claimant at the alleged disadvantage. The comparator is merely someone who was not disabled **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR 216. They need not be in a like for like situation, but should be identified by reference to the PCP, so as to test whether the PCP puts the Claimant at the substantial disadvantage.

56. In **Environment Agency v Rowan** [2008] IRLR 20, the EAT restated guidance on how an Employment Tribunal should approach such a complaint, saying that tribunals must identify:

*“(a) the provision, criterion or practice applied by or on behalf of an employer, or;
(b) the physical feature of premises occupied by the employer;
(c) the identity of non-disabled comparators (where appropriate); and (d) the nature and extent of the substantial disadvantage suffered by the claimant.”*

57. **Victimisation**. Section 27 of the **EqA** states:

‘27(1) A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act.

27(2) Each of the following is a protected act (c) doing any other thing for the purposes of or in connection with this Act.

58. The primary object of the victimisation provision is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so. It is for the Claimant to prove the incidents of unfavourable or detrimental treatment and the reason for them. Causation is central to this determination. In **Aziz v Trinity Street Taxis Ltd** [1988] IRLR 204, Lord Justice Slade has held: *“If the necessary causal link is to be established, it must be shown that the very fact that the protected act was done by the complainant ‘under or by reference to’ that legislation [the EqA], influenced the alleged discriminator in his unfavourable treatment of the complainant”*. We were reminded by Counsel for the Respondent that unreasonable treatment is not necessarily discriminatory treatment **Griffths-Henry v Network Rail** [2006] IRLR 865.

59. The alleged discriminator does not need to be wholly motivated by the complainant's behaviour in carrying out a protected act. It is sufficient if it is a predominant or principal reason for the treatment **Nagarajan v Agnew** [1994] IRLR 61, EAT. Where there is more than one motive in play, all that is needed is that the discriminatory reason should be of sufficient weight **O'Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615, CA.

Our Conclusions.

60. We shall set out our conclusions by reference to the List of Issues that we are to determine, dealing firstly with the s15 EqA claim.

S15 EqA (Discrimination arising from disability)

- 60.1 The Respondent dismissed the Claimant from her employment. This was unfavourable treatment.
- 60.2 We find that the reason for the unfavourable treatment was the belief held by both Ms Dahm and Mr Hailey that (i) the Claimant's absence was becoming harder to manage, and (ii) the Claimant's role was client facing and that any attempt to resile from that was unacceptable to them. This arose out of the Claimant's temporary request for either the client's main point of contact, or the manager who had given her the work, send her work out on their email. This was a reasonable adjustment to remove disadvantage posed by the Claimant's anxiety and depression. As such it was something that arose out of her disability. Her absence also arose out of her disability. We have rejected the Respondent's assertion that she was dismissed because they had lost confidence in her ability to be honest. The first part of the s15 **EqA** claim is made out.
- 60.3 The justification defence fails. We find that there was no reasonable instruction that the Claimant attend in the office on 18th November 2021. There was no more than an enquiry as to who would be in. The aim relied on by the Respondent did not apply in the circumstances of this case. Furthermore the Claimant was dismissed for dishonesty, a different reason all together. Whilst having honest employees would be a legitimate aim, dismissing without any fair investigation would not be a proportionate means of achieving that aim. There is no basis at all in which dismissal without any investigation, or disciplinary hearing, or appeal hearing could be a proportionate means of achieving the aim of instructing employees to attend the office, or expecting honesty. A proportionate means would have required reasonably establishing the

reason for wishing to stay at home and whether dishonesty could reasonably be established. The Respondent failed to do either. The s15 claim succeeds.

S27 EqA (Victimisation).

- 60.4 In our judgment the Claimant's email of 24th September 2021 [308-309] qualifies for the protection offered by s27(2)(c) **EqA**. In it the Claimant asked for reasonable adjustments to help remove the disadvantage posed by her disability of anxiety and depression. That is '*doing any other thing for the purposes of or in connection with this Act*' (the **EqA**).
- 60.5 The Claimant relies on her dismissal as detrimental treatment. It plainly was detrimental to the Claimant and the Respondent accepts that it did dismiss her on 19th November 2021.
- 60.6 We find that the principal reason for the dismissal was the Claimant's request for adjustments. The request is specifically referred to as a reason to dismiss in the dismissal letter, which states '*Having reviewed the above events and in light of the previous incident in relation to a misunderstanding of the beginning of October about the duties you're prepared to undertake in your role, I'm afraid that the firm has lost trust and confidence in your ability to be a reliable employee*'. We have referred above to the alarm and concern expressed by both Ms Dahm and Mr Hailey in their own witness statements at the prospect of having to employ a member of staff who had requested adjustments to the requirement to be client facing. Ms Dahm relied on the Claimant's job description [328] and its various references to the role being client facing as a justification for refusing the Claimant's adjustment request. We have no doubt that this reasonable adjustments request was a step too far for Ms Dahm and Mr Hailey and that they resolved that she could not remain an employee. We are reinforced in this view when we consider the reasons for dismissal contended by the Respondent. We have already rejected the dishonesty reason. The Respondent also asserts that they dismissed the Claimant due to a loss of trust that the

Claimant can be reliable. Maybe they did, however the unreliability to which they refer manifested itself in the Claimant's request for adjustments. Accordingly, this claim is upheld.

S20-21 EqA (Failure to make reasonable adjustments)

- 60.7 The first PCP relied on by the Claimant is misconceived and we reject this part of her Claim. The PCP was the requirement of requiring trust and confidence to be maintained between employer and employee. We find that this is, of course, a PCP. However, it is more than that, it is the cornerstone of every employment relationship. We do not think that any adjustments to this requirement (i.e. a degradation of trust and confidence) would be reasonable, or necessary to remove any disadvantage posed by anxiety and depression. There was no suggestion that such an impairment may cause an employee to be dishonest, such that an adjustment to maintaining trust and confidence could be proposed. This claim fails and is dismissed.
- 60.8 The second PCP was the practice of not following the disciplinary policy for probationary employees. We find that the Respondent did apply this policy generally and to the Claimant. The disciplinary policy, as we have already observed above required (a) written notice of the hearing, (b) sufficient information about the alleged misconduct to enable you to prepare, (c) given copies of all relevant documents and witness statements, and (d) the right to be accompanied. The Respondent denied the Claimant all of the above. Its practice of not applying the disciplinary policy to probationary employees is contradicted and outlawed by the disciplinary policy itself, which states '*this procedure applies to all employees regardless of length of service*'. Furthermore the Claimant's three month probationary period ended in June, when her request to move from part time to full time hours was agreed. This, in our view, marked the end of her probationary period. This means that even if the Respondent had a legitimate PCP of not applying the protections offered by a disciplinary policy to probationary employees (we find no such PCP was legitimate given the wording of the disciplinary policy itself) it could not have applied to the Claimant, who, on any analysis

was no longer, and no longer being treated as, a probationary employee. There was no legitimate basis at all for disapplying the disciplinary policy.

60.9 Disapplying the protections offered by the disciplinary policy put the Claimant at a substantial disadvantage compared to non-disabled employees. Aside from making a fair dismissal impossible, it exacerbated her condition. We accept the Claimant's evidence that *'the dismissal letter caused me to suffer from a panic attack in the early hours of the 20th of November 2021. I was admitted to Cambridge Hospital. Spent all day Saturday in hospital being monitored for a possible heart condition as a direct result of the dismissal.'*

60.10 We find that the Respondent did know, but did not care, that the Claimant was likely to be put at a substantial disadvantage by disapplying the protections offered disciplinary policy. We reach this conclusion because the Occupational report that the Respondent obtained on 21st October 2021 (less than one month before the Claimant's dismissal) specifically directed that the Claimant would need notice of any hearing, documents and evidence in advance and the right to be accompanied as adjustments to any disciplinary process [337]. Those recommendations by Occupational Health were ignored. We also determined that they ought to have known that someone who had asked for the adjustments to accommodate her stress and anxiety that the Claimant had asked for, would be put at a substantial disadvantage by simply being dismissed by letter without a process.

60.11 The Respondent made no adjustments to its practice of disapplying the disciplinary policy at all. The Claimant contends that reasonable adjustments that the Respondents could have made in order to avoid the substantial disadvantage include but are not limited to: (a) warning and consulting with the Claimant about the prospect of dismissal; (b) giving sufficient notice of any meetings regarding termination of employment; and (c) allowing the Claimant to be accompanied in any meetings where her employment was likely to be terminated. All of these adjustments were reasonable and

could easily have been implemented. The Respondents deny that the above are reasonable adjustments because it had lost trust and confidence in the Claimant to be an open and honest employee as result of her actions. As we have already found that was not the real reason the Claimant was dismissed. It could not have been as there was no legitimate basis for reaching that conclusion. It was a 'sham' reason, adopted in haste to justify the dismissal of an employee whom Ms Dahm and Mr Hailey no longer wanted to employ, because of her disability. That is why the Respondent adopted this PCP, because any sort of fair disciplinary process would have revealed the 'dishonesty' justification for dismissing the Claimant as a false reason.

61. For all of the reasons stated above:

- 61.1 The Claim under s15 EqA (discrimination arising from disability) is upheld.
- 61.2 The Claim under s27 EqA (victimisation) is upheld.
- 61.3 The Claim under s20-21 EqA (failure to make reasonable adjustments) is upheld in part.

Employment Judge Gidney
06/10/2023

Sent to the parties on:
06/10/2023

For the Tribunal: