



## EMPLOYMENT TRIBUNALS

**Claimant:** Ms Zalejska

**Respondent:** Cameo Consultancy (Recruitment) Limited

**Heard at:** Reading Employment Tribunal

**On:** 28 and 29 September 2023

**Before:** Employment Judge Annand  
Ms Tufts  
Mr Juden

### Representation

**Claimant:** Ms Zalejska  
**Respondent:** Mr Hurd, Counsel

## RESERVED JUDGMENT

1. The Claimant's claim for direct disability discrimination under sections 13 and 55 of the Equality Act is well-founded and succeeds.

## REASONS

### Introduction

2. The hearing on 28 and 29 September 2023 was listed for two days to decide the Claimant's claim of direct disability discrimination. The claim has a complicated procedural background, which is set out below. The Claimant was representing herself, suffers from depression, and conducted the hearing in her second language. We were provided with a bundle that ran to 168 pages and a witness statement for Ms Loveland for the Respondent. The Claimant did not provide a witness statement, but it was agreed that the email she sent to the Tribunal on 29 August 2023 (p89-90 of the hearing bundle), a written document she had emailed to the Tribunal and the Respondent (p99-100), and what she had written in the original Claim Form (p34) would stand as her witness statement. We heard oral evidence from the Claimant

and Ms Loveland on the first day of the hearing. On the second day of the hearing, we heard the parties' submissions in the morning, and reserved our judgment.

**Factual background**

3. The Respondent is an employment business which provides agency workers to hirers for temporary and permanent assignments. Ms Loveland is a Senior Recruitment Consultant and has worked for the Respondent since 2015. We heard evidence from Ms Loveland that the company consists of three employees.
4. On 14 January 2022, the Claimant was formally registered with the Respondent. As a part of the registration process the Claimant was asked "Do you have any health issues or a disability relevant which may make it difficult for you to carry out functions which are essential for the role you seek?" The Claimant answered, "No" (p146). When cross examined, the Claimant said she did not mean that she did not have a disability, only that it did not impact on her ability to work.
5. In January 2022, the Claimant started working in a temporary role for a company called Karcher. This was a role she was placed in by the Respondent. On 16 February 2022, the Claimant emailed Ms Loveland to say she was not happy in the role, and she felt she was being treated differently than her British colleagues. She subsequently decided to leave the role.
6. On 6 June 2022, Ms Loveland emailed the Claimant asking if she would be interested in a temporary role in Banbury paying £11.00 per hour. She said the role was full time and involved, "General administration, some minute taking, record keeping, and updating database." She noted the role was for three to six months (p149). The next day, the Claimant emailed Ms Loveland to say she was interested in the role.
7. The role was with Principal Medical Limited and was based at Banbury Cross Health Centre. Principal Medical Limited is an organisation which is run and owned by GPs who bid for and supply healthcare services. It has approximately 285 members of staff and has contracts to deliver services to a range of NHS and surgery premises. The Claimant is also a patient registered at Banbury Cross Health Centre.
8. The Claimant was asked to have a telephone interview with Ms Nichols who worked for Principal Medical Limited at that time as the Business Support and Complaints Manager. The telephone interview took place on 9 June 2022.
9. On 9 June 2022, Ms Loveland emailed the Claimant to confirm her temporary role as "Temp Administrator" with Principal Medical Limited (p151). The start date was 13 June 2022, the hours were 8.30am to 4.30pm Monday to Friday and the assignment was due to last 12 weeks.
10. The Claimant was to be paid by the Respondent. She was required to submit a time sheet each week.

11. On 13 June 2022, the Claimant started in the temporary role. Everything went well for the first two days. Ms Loveland said in her witness statement she received positive feedback from the Claimant and Principal Medical Limited on 13 and 14 June 2022.
12. On 15 June 2022, the Claimant was being trained by a colleague. She was having some difficulty taking the card details from a patient over the phone. The colleague then took the phone from the Claimant and proceeded to take the card details. The Claimant's evidence to the Tribunal was that the colleague said to the patient on the phone that the Claimant had become "over-stressed" and referred to her as "panicking". The Claimant felt it was unprofessional for her colleague to have made these comments to the patient about the Claimant, even if she was still being trained. The Claimant's version of events is supported by the document at p108 of the bundle which was an account she gave the following day when she had a mental health assessment in hospital. She is recorded as saying, "Yesterday she was on the phone with a customer when her work colleague who was training her took the phone and told the customer that her colleague was panicking and unable to continue. She asked her colleague why she had [blank] it as it makes her look like a bad person."
13. The Claimant found the atmosphere in the office was unpleasant after this incident had occurred, and so she decided to speak to her manager, Ms Nichols, about it. The Claimant emailed Ms Nichols, asking to speak with her, and later they had a discussion.
14. When speaking to Ms Nichols, the Claimant explained what happened with the telephone call, and then relayed that she had previously had some difficulty at work in 2018. She went on to say that she suffered with her mental health, has depression and anxiety, and said she took medication. The Claimant gave evidence to the Tribunal, which we accepted, that the Claimant became very upset and began crying when she was talking about her mental health difficulties, and not when describing what happened on the phone when she was attempting to take a patient's payment details. The Claimant's evidence was that her hands were shaking, she was crying, and she felt very embarrassed. She said she started apologising for being upset. She said she told Ms Nichols that she had suffered with depressive episodes, during which she struggled to eat and shower (p34). We accepted the Claimant's evidence that she only became very upset when talking about her mental health difficulties, rather than when explaining the situation that arose with her colleague, because the Claimant was able to participate in the Tribunal hearing in the main in a calm and professional manner, but when she was describing the history of her mental health difficulties to the Tribunal, she became upset and tearful. She apologised and explained she felt embarrassed discussing it.
15. The Claimant's evidence was that at first, she wanted to stay at work on 15 June 2022 and continue working that day, but then she agreed with Ms Nichols that she should go home for the day. They agreed the Claimant would contact her GP and Ms Nichols asked the Claimant to call her later that day and let her know if she wished to return to work the next day. The Claimant left work and returned home.

16. Shortly thereafter, she received a phone call from Ms Loveland terminating her assignment. That evening she took an overdose of anti-depressant medication and sleeping tablets, and the following day she attended the Accident and Emergency Department (A&E) on the advice of her GP.
17. During the morning of 15 June 2022, after the Claimant had left the Health Centre, at around 11.07am, Ms Loveland called Amber Jones, who was the HR administrator working at Banbury Cross Health Centre for Principal Medical Limited. She was then put through to Ms Nichols. Ms Loveland was returning a missed call she had received from Principal Medical Limited. In the bundle of papers provided to the Tribunal, there was a transcript of the call between Ms Loveland and Ms Nichols because Principal Medical Limited record their phone calls (p127-131). Ms Loveland confirmed in her witness statement that the transcript was accurate.
18. In the phone call, Ms Nichols told Ms Loveland that there had been “a bit of a sorry situation this morning”. Ms Nichols explained she had received an email from the Claimant saying she would like to have a chat. She said they did that, and the Claimant became extraordinarily distressed, was in floods of tears, and disclosed lots of information about the problems she had in her previous employment, and that she had to leave because of it. Ms Nichols told Ms Loveland that the Claimant was worried that history would repeat itself. Ms Nichols said, “she went into lots and lots of detail about the problems clinically with her mental health” (p128), to which Ms Loveland responded, “Oh right”.
19. The transcript shows the conversation continuing as follows (J is Ms Nichols, and K is Ms Loveland):

J: And she just wasn't-she's not well enough to be here, I'm afraid, Karen.

K: Oh I'm sorry.

J: And she agrees that that's the case, and so she's gone home and she's going to ring her GP.

K: Okay, aww.

J: But she's gone home not very well at all actually

K: Okay

J: Erm I'm not really- well I've just come up to have a chat to HR now about what that means going forward actually but I would be concerned professionally about her resilience for this particular role because a lot of it is dealing with unhappy patients.

K: Okay, okay.

J: And I think it could be tricky going forwards

K: Okay

J: Yeah.

K: So, has she sort of said that she doesn't want to- how did you leave it with her- obviously you've -

J: No so- obviously we couldn't have a proper conversation because she was in- she was just in floods and floods of tears Karen, I'm afraid.

K: Aww okay

J: You know, she was inconsolable so she couldn't have carried on the day here- she wanted to get home as well -

K: Okay.

J: Erm- so it was really sad because actually Monday and Tuesday went absolutely fine.

K: Yeah, because she said how kind everyone was

J: yeah

K: In fact, I spoke to her this morning and- literally because I have got some, I need some documents from her and she said 'no, I'm really enjoying it', so

J: Yeah

K: So obviously something's triggered something hasn't it, by the sound of it?

J: She just had a- there's a call, you know- one of the calls that she was doing with a colleague that didn't go very well and that colleague had to take the call over

K: Right.

J: And that was enough actually, to erm, to trigger what happened.

K: Okay.

J: So, I need to have a chat with Amber now about it, but erm, yeah, you know- but even before I've had that chat with Amber I've said that I'd be worried about her continuing with us really- given that

K: Okay, you'd like her to- I was going to say, you'd like her to finish with you tod- well, finish with you this morning – yeah?

J: I think that would be best, not only for us but for her too because I don't think she's very well Karen, at all.

K: No.

J: Yeah, and I think she would share that information with you as well. She definitely isn't

K: Yeah. Okay, okay. I mean, what I'll do then is I'll- I will be very gentle obviously with how I deal with her, I'll give her a call and I'll have a chat with her and say, "oh crikey, I've just heard from [inaudible] you know, and you know". I might leave it maybe a little bit and call her in about an hour maybe- let her get home and

J: I think though, she was going to try and get an appointment straight away and she was talking about wanting to change- she disclosed, and I didn't prompt at all- she disclosed that she's taking some strong anti-depressant medication and some anti-anxiety medication

K: Right

J: And she is thinking about changing that. Erm-that medication

K: Okay.

J: To something else because she doesn't feel very well

K: Because I'm not sure if she has a partner or anything, this is the problem because I don't know her. I know it's a temp obviously, and I've met her and everything, but I don't know her.

J: Well, she just said to me that she doesn't. She lives alone, and she really does want a job and she wants to work, and she's abso- she's really, really lovely, yeah and I think, she told me that she really needs the money and everything and obviously I feel dreadful. But for her, as well as us, I don't think that this is the right environment for her really because we're dealing with complaints

K: Because its quite stressful.

J: Yeah, it's really, it is. And also, it's patient facing and so the people that she would be liaising with also aren't feeling very well

K: And it will bring everything home, won't it?

J: I think so, so it would be a worry. In terms of protecting her really, Karen, too I really don't think it would be sensible.

K: Of course, no, I understand that.

J: Yes, because she's a lovely girl.

K: So, what I'll do- she may come to that conclusion herself by the sound of it anyway.

J: To be honest, I wouldn't be half surprised if he has, I really wouldn't at all. She said she doesn't feel well enough to work, certainly not today, so I'm not sure, see how you get on. But she went away

K: Okay.

J: -Saying that she was going to make a GP appointment, yep.

K: So, I will speak with- I'll speak with Magdalena today and see what she says, but obviously I will gently say that I have had a chat with you, we just think with- that the environment isn't quite right for her and then I'll find something more easy and straightforward when she is ready.

J: Okay.

K: I think that is probably best thing.

20. After the phone call terminated, Ms Loveland sent a text message to the Claimant at 11.22am saying she had spoken to Ms Nichols, and she wanted to check the Claimant was ok and asked her to call.
21. When she did not receive a response to her text message, Ms Loveland telephoned the Claimant at around 11.30am. The Claimant's evidence was that Ms Loveland called her to tell her that the assignment was terminated. The Claimant said Ms Loveland informed her of this without having carried out any investigation, meaning that she did not have a conversation with the Claimant about what had happened, and she did not ask the Claimant about her health, or whether she felt she was fit to return to work the following day.
22. Ms Loveland's evidence was that she relayed Principal Medical Limited's decision to terminate the Claimant's assignment to the Claimant. In paragraph 20 of Ms Loveland's witness statement she wrote, "I then spoke with Magdalena via telephone to communicate Banbury's decision and relay the reasoning for such in that due to the nature of the role it was not the right environment for her and Banbury suggested that the assignment terminate that day. In response, Magdalena provided me with her version of events and stated that she felt stressed by the role itself. She seemed content that I would continue searching for an alternative role for her. I made this phone call once Magdalena had a chance to return home and followed up with her by way of an email [page 154]."
23. In respect of who was the decision maker, the Claimant said that Ms Loveland called to tell her that the decision had been "taken and agreed" by the Respondent and Principal Medical Ltd to terminate her assignment (p66). The Claimant claimed that the reason she was given was her mental health condition (p66).
24. The Tribunal accepted the Claimant's evidence that it was communicated to her by Ms Loveland that it had been a joint decision made between Principal Medical Limited and the Respondent. This is consistent with Ms Loveland having indicated to Ms Nichols when they spoke that she would present the decision to the Claimant as a joint one. The transcript shows Ms Loveland said, "I will gently say that I have had a chat with you, we just think with- that the environment isn't quite right for her" (Emphasis added). (p131)
25. Ms Loveland's evidence in her witness statement was that under the terms of business, Principal Medical Limited was able to terminate the assignment. She noted in her witness statement that Clause 11 of the terms of business

states “Any of the Hirer, the Employment Business or the Agency Worker may terminate an Assignment at any time without prior notice and without liability”. Clause 10.1 of the terms of business states “If the Hirer reasonably considers that the services of the Agency Worker are unsatisfactory, the Hirer may terminate the Assignment either by instructing the Agency Worker to leave the Assignment immediately, or by directing the Employment Business to remove the Agency Worker”.

26. In response to questions asked by the Tribunal, Ms Loveland confirmed that she had received training on the Equality Act. She said she had a qualification in recruitment which covered employment law. When asked by the Tribunal if she would terminate an assignment for any reason, she referred to paragraph 17 of her witness statement, which stated, “Following receiving such an instruction, I will contact the worker, when they are typically no longer on site, and explain the assignment has been terminated and confirm the reasons from our client. If the assignment is in process and we feel that there is a consideration for the client or worker to continue before termination has been decided upon by either party and through open discussion with both parties regarding where improvement, training, or support can be implemented, we will aim to work with both parties to find a solution to suit them. This however is based upon both parties being in agreement and given the instruction received from Banbury, this would not have been possible.”
27. When asked by the Tribunal what she understood her obligations to be if a company asked her to terminate an assignment for an obviously discriminatory reason (an example was given of a company that had expected to be sent a man, had been sent a woman, and they had called to say they wanted to terminate the assignment because they did not want a woman), Ms Loveland responded that she would challenge the company. She said she would make it clear to the company that they could not discriminate, and she would say she had provided a worker who she felt had the skills to do the role. When asked why she had not done that in this case, Ms Loveland’s response was that Ms Nichols had explained the situation, and how stressed the Claimant had become, and Ms Loveland had concluded from the discussion that they had, that Ms Nichols had decided to terminate the assignment, because of the issue that had happened on the Wednesday, and due to the nature of the role, and concern for the Claimant, and so she had done what was asked of her.
28. There was a dispute between the parties about the extent to which the Claimant’s role required her to deal with patients, including those who may be unhappy. The Claimant’s evidence was that her role was not “patient facing”, mainly involved data entry and that her manager, Ms Nichols, was the person who would deal with any patients who became upset or unhappy. The Respondent’s position is that the role did involve dealing with patients, including those who were potentially unhappy. The Tribunal noted that the role description which Ms Loveland sent to the Claimant before she started made no reference to dealing with patients or complaints from patients. The Tribunal did however accept that there may have been times in the role when she was required to speak with patients. The Tribunal however did not find this evidence to be particularly relevant or persuasive. As noted above, the Tribunal accepted the Claimant became very upset when describing to her manager her mental health problems. There had not been any incidents



where the Claimant had become very upset when dealing with a patient. We did not consider that the fact that the Claimant had become upset when talking about her very personal mental health history indicated she would have difficulties in other aspects of her role, including dealing with patients.

### **Procedural history**

29. On 22 June 2022, the Claimant contacted ACAS for early conciliation purposes regarding the Respondent. The ACAS early conciliation certificate was issued on 26 July 2022. The Claimant submitted a Claim Form against the Respondent on 12 September 2022. The Claim Form referred to Ms Loveland as the Respondent, although the ACAS certificate was in the Respondent's company name. The claim was assigned claim number 3311585/2022.
30. In June 2022, the Claimant also started proceedings against Principal Medical Limited. Ms Nichols was named on the Claim Form as the Respondent, although reference was also made to Principal Medical Limited. The claim was assigned claim number 3307191/2022. Principal Medical Limited submitted a Response on 4 August 2022.
31. In the Claimant's Claim Form against the Respondent, she brought claims of unfair dismissal and disability discrimination. The claim for unfair dismissal was struck out by Employment Judge Ord on 12 October 2022 as the Claimant had not worked for the Respondent for two years.
32. On 7 November 2022, the Respondent submitted a Response to the Claimant's claim form. The Response noted that the Respondent was aware the Claimant had brought a claim against Principal Medical Limited (case no. 3307191/2022) and asked for the claims to be consolidated.
33. On 31 January 2023, there was a case management hearing held by Employment Judge Cotton. The case management hearing was listed to deal with case number 3307191/2022, which is the claim the Claimant brought against Principal Medical Limited. The claims had not been consolidated at that point and therefore the Respondent was not present or represented at that preliminary hearing.
34. At that hearing, Employment Judge Cotton confirmed there had been a discussion with the Claimant about her claim and whether she was pursuing a claim under section 15 for discrimination arising from disability or just a claim of direct disability discrimination under section 13 of the Equality Act. The Claimant had confirmed that she was just bringing a claim for direct disability discrimination. The less favourable treatment set out in the List of Issues was "on 15 June 2022, the Respondent arranged with the recruitment agency for the claimant's assignment with them to be terminated" (p63). The correct identity of the respondent in that claim was agreed as being Principal Medical Limited, rather than Ms Nichols. The Claimant was ordered to provide disclosure of her medical records by 28 February 2023. The final hearing was listed for 28 and 29 September 2023 at Reading Employment Tribunal.

35. On 23 June 2023, Employment Judge Gumbiti-Zimuto held a telephone preliminary hearing with the Claimant, the Respondent and Principal Medical Limited. The claims (3311585/2022 and 3307191/2022) were consolidated. The final hearing remained listed for 28 and 29 September 2023. Principal Medical Limited applied for an unless order regarding the service of medical documents and an impact statement, and that application was granted. The Claimant was ordered to provide that information by 7 July 2023.
36. On 17 July 2023, the Respondent and Principal Medical Limited applied for a joint unless order.
37. On 28 July 2023, the Respondent applied for an unless order. In the application, it noted the Claimant had provided some medical evidence, but not an impact statement.
38. On 23 August 2023, Employment Judge Shastri-Hurst struck out the Claimant's claim against Principal Medical Limited for failure to comply with the unless order made at the hearing on 23 June 2023. Further orders were made in respect of providing documents to the Respondent including providing an impact statement by 7 September 2023.
39. On 29 August 2023, the Claimant sent an email which set out her objection to Employment Judge Shastri-Hurst's decision (p89-90). She gave some details of her mental health in that email.
40. On 8 September 2023, the Respondent wrote to the Tribunal asking that the Claimant's claim against the Respondent also be struck out.
41. On 22 September 2023, Employment Judge Shastri-Hurst refused the Respondent's request to strike out the Claimant's claim. She found the Claimant had sufficiently complied with the order to provide an impact statement when she had sent her email of 29 August 2023 (p89-90).
42. Shortly before the hearing, the Respondent applied to convert the final hearing to a preliminary hearing to determine the issue of whether the Claimant was disabled at the relevant time within the definition set out in section 6 of the Equality Act. On 27 September 2023, that request was declined by Employment Judge Anstis.
43. When the hearing started, the Respondent proposed that we heard the evidence regarding disability first, and then reach a decision on that issue as a preliminary matter. The Tribunal decided not to follow that approach. This was because firstly, the Claimant would have to give evidence twice, and it was apparent that she was nervous and anxious during the hearing, and secondly, there was a greater risk the hearing would go part heard without the Tribunal having heard all the evidence.
44. At one point in the hearing, Mr Hurt, Counsel for the Respondent, suggested that the less favourable treatment alleged against the Respondent was the failure to investigate the incident on 15 June 2022. The Tribunal indicated that from our reading of the Case Management Orders, the less favourable treatment had previously been clarified as being the termination of the assignment which the Claimant alleged was a decision made by the

Respondent and Principal Medical Limited. The Respondent had evidently prepared the case on this basis as well, as the Respondent's evidence related to this allegation.

### **The medical evidence**

45. The Claimant provided her GP records and evidence she had obtained from when she was admitted to A&E on 16 June 2022.
46. The Claimant's GP records show that on 14 December 2021, the Claimant had seen her GP. There is a reference to the Claimant being offered: "Emotional and psychosocial support and advice." The notes record, "anxiety and poor sleep. Situation: [the Claimant] states that for the past 1 month that she has had poor sleep, anxiety attacks and low mood triggered by her work situation. [The Claimant] has tried OTC nytol, taking 3 per night but didn't find these helpful as only slept for 2 hours. Long hx of sleep disturbance when stressed. Background: No psychiatric diagnosis. Medication: No psychiatric medication at this time. Risk: No thoughts of harm to self or others disclosed at this time. Recommendation LN to request that AD medication is initiated. LN to request a prescription of promethazine to aid sleep..." (p124).
47. The Claimant was prescribed anti-depressants, 50mg Sertraline per day, and sleeping tablets (promethazine), and signposted how to access therapy through the NHS.
48. On 20 January 2022, the Claimant spoke to her GP by telephone. In the notes, it was recorded that the Claimant was complaining of low mood/depression "since over 1 year" (p122). There are references to poor motivation, poor sleep, and poor concentration. The notes record: "sertraline helped initially with anxiety thought beginning to work then ran out..." The impression was "Mixed anxiety and depression". The medications section of the Claimant's GP recorded show that she was prescribed Sertraline again (p118).
49. On 15 June 2022, the Claimant saw her GP again. The notes record, "Was at work – had a breakdown today – temping job – has been sacked she has just been told as she has been suffering from depression." It notes, "has thought about taking an overdose", "took 3 sertraline to try to calm herself not to end her life". The GP noted she felt she needed assessment from the Crisis team and so advised that she present herself to A&E for assessment there. The Claimant said she would attend A&E that evening. The Claimant's medication was increased to 100mg Sertraline "daily as of tomorrow". The GP also referred the Claimant to the Mental Health Team. She noted: "She has been doing temp work and has been struggling with depression for a couple of years taking sertraline 50mg daily. Today she took 3 extra not to kill herself but to try to calm herself but it has not worked and now she feels she wants to end it all."
50. The Claimant attended A&E as advised by her GP. A Letter from Oxford University Hospitals NHS Trust, dated 17 June 2022, recorded "Patient gives a history of depression since 2018 was on sertraline 50mg once daily but her symptoms were not well controlled with it. Is facing financial burden and struggling to find a job. Recently got temporary job. Was at work when she

had an argument with her colleague. Met her manager and tried to explain that she reacted due to her mental health status. When she home, got a call from her saying that she had been fired. This triggered her symptoms and patient felt she should end her life” (p103).

51. An EPDS Proforma completed on 16 June 2022 whilst at hospital, noted: “She reported that she had been struggling with dysthymia for a long time, but the depressive symptoms got worse in 2018. She reported that she had a job where she was bullied, and it impacted on her mental health....” Further on it states: “[The Claimant] started crying and told her manager that in 2018 she was badly treated in the past including racism...” (p108). Under the heading ‘Mental health history’ it notes “depression”.
52. Under the heading ‘Personal History and Current Social Circumstances’, it is noted, “In 2018 she did a temporary job as a reception, but she was treated bad – staff shouting and saying things about her to the recruitment agency.” Under ‘Mental State Examination’, it is noted, “Mood - Nervous, unstable, no [blank], unable to see future. Appetite – reported that her appetite is [blank], sometimes she eats well and sometimes she does not eat well... Insight – she reported she has a history of low mood, depression and she was really hurt when she lost her job after she trusted her manager to tell her about her mental health.”
53. Under the heading, ‘Impression/Formulation’ it noted, “36 year old woman who presented to A&E with struggling to cope and taking an overdose of Nytol and Sertraline following losing her job. Clinical, presentation is consistent with acute stress reaction on the background of depressive symptoms. No evidence of immediate risk to self and willing to get help.” (p110)
54. The Claimant’s GP records show on 18 November 2022, the Claimant had a telephone consultation. The problem is recorded as “Mixed anxiety and depressive disorder.” It is noted that she does not think the anti-depressants are working. There is reference to having “memory issues, sleep issues, tearful” and suicidal thoughts sometimes (p114).
55. On 22 November 2022, the Claimant had another telephone consultation with her GP. The notes record, “Issues memory and really bad sleep” and “feels really bad as when she was not taking sertraline.” (p113)
56. On 5 July 2023, the Claimant had a further telephone consultation with her GP. The notes record, “Recurrent depression (review)”. There is reference to ongoing low mood, memory, low concentration, shaking hands and “ruminating suicidal thoughts for years.” The Claimant is recorded as wanting to increase her medication. The recommended dose of sertraline was increased to 150mg per day (p112), although the Claimant explained to the Tribunal that she takes 200mg per day now.

### **The issues for the Tribunal to decide**

57. The issues for the Tribunal to decide are slightly different to the List of Issues set out by Employment Judge Cotton as some of the issues related only to the claim against Principle Medical Limited. The issues for the Tribunal therefore can be summarised follows –

- a) At the time of the alleged discriminatory act on 15 June 2022, did the Claimant meet the definition of disabled set out within section 6 of the Equality Act?
- b) Was the Claimant subjected to less favourable treatment when her assignment ended on 15 June 2022?
- c) Was the Claimant subjected to that less favourable treatment by the Respondent?
- d) If the Claimant was subjected to less favourable treatment was it because of her disability? The Claimant relied on a hypothetical comparator.
- e) Was the Claimant subjected to a detriment within the meaning of section 55(2)(d) of the Equality Act 2010?

### **The Relevant Law**

#### **The definition of disability under section 6 of the Equality Act**

58. Under section 6(1) of the Equality Act a person has a disability if that person has 'a physical or mental impairment' which has a 'substantial and long-term adverse effect on [the person's] ability to carry out normal day-to-day activities'. The burden of proof is on a claimant to show that he or she satisfies this definition.
59. In *Goodwin v Patent Office* [1999] I.C.R. 302 the EAT stated that tribunals should look at the evidence by reference to four different questions: 1) Did the claimant have a mental and/or physical impairment?, 2) Did the impairment affect the claimant's ability to carry out normal day-to-day activities? 3) Was the adverse condition substantial? 4) Was the adverse condition long term?
60. In *Wigginton v Cowie and ors t/a Baxter International (A Partnership)* EAT 0322/09 the EAT confirmed that these four questions should be posed sequentially and not together, although in *Sullivan v Bury Street Capital Ltd* [2022] IRLR 159, the Court of Appeal stressed that it does not amount to an error of law for a tribunal to omit to set out in its judgment the four conditions identified in *Goodwin* and deal with each methodically in turn, so long as, in substance, all relevant matters are addressed when determining whether the particular claimant was disabled within the terms of section 6(1).
61. In *Veitch v Red Sky Group Ltd* [2010] NICA 39 the court made it clear that there is no onus on the claimant to adduce medical evidence to establish each of the four conditions comprising the test of 'disability' as set out by the EAT in *Goodwin v Patent Office*: "The presence or absence of medical evidence may be a matter of relevance to be taken into consideration in deciding what weight to put on evidence of claimed difficulties causing alleged disability but its absence does not of itself preclude a finding of fact that a person suffers from an impairment that has a substantial long-term adverse effect."
62. In *Igweike v TSB Bank plc* UKEAT/0119/19/BA, His Honour Judge Auerbach observed: "[I]t is a practical fact that, in some cases of this type, the individual's own evidence may not be sufficient to satisfy the tribunal of the existence of an impairment. In some cases, even contemporary medical

notes or reports may not be sufficient, and expert evidence prepared for the purposes of the litigation may be needed. To say all of this is not to introduce either of these legal heresies [i.e. that to amount to a disability any mental impairment has to be clinically well recognised and that medical evidence is always necessary to establish that the claimant was suffering from a mental impairment] by the back door. The question is a purely practical or evidential one, which is sensitive to the nature of the alleged disability, the facts, and the nature of the evidence, in the given case.”

63. Under paragraph 2 of Schedule 1 to the Equality Act 2010, the effect of an impairment is long-term if: (a) it has lasted for at least 12 months, or (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
64. In the case of *Cruickshank v VAW Motorcast Ltd* [2002] ICR 729, the EAT confirmed that the time at which to assess the disability, and whether there is an impairment that has a substantial adverse effect on normal day-to-day activities, is the date of the alleged discriminatory act. This is also the material time when determining whether the impairment has a long-term effect - *Tesco Stores Limited v Tennant* (UKEAT/0167/19/OO).
65. In *All Answers Ltd v W* [2021] IRLR 612, the Court of Appeal confirmed that the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so a tribunal is not entitled to have regard to events occurring subsequently.
66. The government's 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) also stresses that anything that occurs after the date of the discriminatory act will not be relevant (para C4). It also states that account should be taken of the typical length of such an effect on an individual.
67. Where the issue is whether the effect is "likely" to continue for 12 months, the question is whether it "could well happen" or is a "real possibility". It is not a balance of probabilities question: *Boyle v SCA Packaging Limited* [2009] ICR 105, HL.
68. 'Substantial' is defined in section 212(1) of the Equality Act as meaning "more than minor or trivial". In *Goodwin v Patent Office*, the EAT held: 'What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty.' Appendix 1 to the Equality and Human Rights Commission (EHRC) Code of Practice on Employment (2011) states that account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that 'a person avoids doing things which, for example, cause pain, fatigue or

substantial social embarrassment; or because of a loss of energy and motivation’— para 9.

69. Appendix 1 to the EHRC Employment Code states that ‘normal day-to-day activities’ are activities that are carried out by most men or women on a fairly regular and frequent basis, and gives examples such as walking, driving, typing and forming social relationships. The government’s ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ states that it is not possible to provide an exhaustive list of day-to-day activities. However, in general, day-to-day activities are things people do on a regular or daily basis. The examples given are shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.
70. In determining whether a person’s impairment has a substantial effect on that person’s ability to carry out normal day-to-day activities, the effects of measures such as medical treatment or corrective aids on the impairment should be ignored. If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect — paragraph 5(1), Schedule 1, Equality Act 2010.
71. In determining the effects of an impairment without medication, in *Goodwin v Patent Office*, the EAT stated: “The tribunal will wish to examine how the claimant’s abilities had actually been affected at the material time, whilst on medication, and then to address their minds to the difficult question as to the effects which they think there would have been but for the medication: the deduced effects. The question is then whether the actual and deduced effects on the claimant’s abilities to carry out normal day-to-day activities [are] clearly more than trivial”.
72. In *Royal Bank of Scotland plc v Morris* EAT 0436/10 an employment tribunal upheld the claimant’s disability discrimination claim, but the EAT held that there was simply insufficient evidence before the tribunal for it to draw any conclusions on essential elements of the definition of disability, including the duration or likely duration of the claimant’s impairment. There was no evidence of serious continuing symptoms. The EAT considered that no safe inferences could be drawn from the fact that the claimant was told that he should continue with the medication for six months, as this ‘might only have been precautionary’. The EAT observed that ‘while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the [Disability Discrimination Act 1995], give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance’.

### **Employment service-providers**

73. Under section 55(2) of the Equality Act, “An employment service-provider (A) must not, in relation to the provision of an employment service, discriminate

against a person (B)— (a) as to the terms on which A provides the service to B; (b) by not providing the service to B; (c) by terminating the provision of the service to B; (d) by subjecting B to any other detriment.”

### Direct discrimination

74. Section 13(1) of the Equality Act 2010 provides that ‘A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others’.
75. In order to succeed with a claim of 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. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL, Lord Scott explained that this means that “the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class”. In *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, HL Lord Hope said with the exception of the prohibited factor, “all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator”. When making a comparison for the purposes of a direct disability discrimination claim, a tribunal must take account of how a non-disabled person with the same abilities as the claimant would have been treated: *Stockton on Tees Borough Council v Aylott* [2010] ICR 1278 CA, following *High Quality Lifestyles Ltd v Watts* [2006] IRLR 850 EAT.
76. In *Shamoon v Chief Constable of the Royal Ulster Constabulary*, the House of Lords took the view that, by tying themselves in knots attempting to identify an appropriate actual or hypothetical comparator, tribunals run the risk of failing to focus on the primary question, namely, why was the complainant treated as he or she was? If there were discriminatory grounds for that treatment, then there will usually be no difficulty in deciding whether the treatment was less favourable than was or would have been afforded to others. Lord Nicholls viewed the issue as essentially boiling down to a single question: did the complainant, because of a protected characteristic, receive less favourable treatment than others? In *Stockton on Tees Borough Council v Aylott* [2010] ICR 1278, CA, Lord Justice Mummery stated: “I think that the decision whether the claimant was treated less favourably than a hypothetical employee of the council is intertwined with identifying the ground on which the claimant was dismissed. If it was on the ground of disability, then it is likely that he was treated less favourably than the hypothetical comparator not having the particular disability would have been treated in the same relevant circumstances. The finding of the reason for his dismissal supplies the answer to the question whether he received less favourable treatment”.
77. In *Gould v St John’s Downshire Hill* [2021] ICR 1, EAT, Mr Justice Linden commented: “The question whether an alleged discriminator acted “because of” a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the “reason why” question and the test is subjective... For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a “significant influence” on



the decision to act in the manner complained of. It need not be the sole ground for the decision... the influence of the protected characteristic may be conscious or subconscious.”

78. The EHRC Employment Code makes the point that the motive or intention behind the treatment complained of is irrelevant (para 3.14). It is not a defence for an employer faced with a claim under section 13 to show that it had a good reason or a benign motive for discriminating (*James v Eastleigh Borough Council* [1990] ICR 554, HL).

### Decision making

79. In *Reynolds and ors v CLFIS (UK) Ltd*, Dr Reynolds claimed that her consultancy arrangement had been ended because of her age. The decision to terminate the arrangement was made by senior manager, Mr Gilmour. However, the Employment Tribunal found that he had been influenced by a presentation given by Mr McMullen and Mr Newcombe. In the presentation a number of deficiencies had been identified in the service provided by Dr Reynolds. The Tribunal found that the principal reason for the termination was the employer’s unhappiness with the service that Dr Reynolds provided, rather than her age. In reaching this conclusion they considered only Mr Gilmour’s mental processes. The Court of Appeal held that there was no error by the Tribunal in only considering Mr Gilmore’s motivation. The Tribunal’s findings showed only that Mr Gilmore reached his decision as a result of information provided by others, but it was not a decision that was made jointly with others. If the decision to terminate Dr Reynolds’s contract had been made jointly by Mr Gilmore and others, the Tribunal would have had to consider the motivation of all those responsible, since a discriminatory motivation on the part of any of them would be sufficient to taint the decision. The Court accepted that there might be cases where it was difficult to distinguish the two situations. It was noted at paragraphs 32 and 33:

“The logical starting-point must be the challenge raised in the Respondent’s Notice to the ET’s finding that Mr Gilmour was the sole decision-maker. If this were in truth a case where the decision to terminate the Claimant’s contract had been made jointly by Mr Gilmour and others the Tribunal would have had to be concerned with the motivation of all those responsible, since a discriminatory motivation on the part of any of them would be sufficient to taint the decision.

As to that issue, I agree with Singh J that the ET’s finding is unassailable. Mr Pitt-Payne submitted that the findings of fact at paras. 9.22-9.24 of the Reasons (see para. 18 (1) above) showed that Mr Gilmour, Ms Deeks, Mr McMullan and Mr Newcombe were all parties to the decision. I cannot accept that. The findings in question show only that Mr Gilmour reached his decision as a result of information provided, and opinions expressed, by Mr McMullan and Mr Newcombe, both in the Bristol presentation and in later discussions with Ms Deeks which (it is to be inferred) she reported back to Mr Gilmour. That is not the same as them being parties to the decision. Supplying information or opinions which are used for the purpose of a decision by someone else does not constitute participation in that decision. There may be cases where it is difficult to distinguish between the two situations, but the Tribunal was fully entitled to treat this case as one where Mr Gilmour did

indeed make the relevant decision on his own. That would be clear enough even if one had regard simply to the sequence of events which it found, but there is in fact the additional point that Mr Gilmour made it clear in his evidence that because of the Claimant's eminence and long service the decision to terminate her contract was a matter for which he had to take sole responsibility: Mr McMullan had, as we have seen, not even recommended it."

80. In *Commissioner of Police of the Metropolis v Denby* EAT 0314/16 an Employment Tribunal found that a male Chief Inspector in the Metropolitan Police Service (MPS) had been directly discriminated on grounds of sex against in the course of the MPS pursuing disciplinary action against him. In the EAT, Mr Justice Kerr commented that the ratio of the Court of Appeal's decision in *Reynolds v CLFIS* is simple. He noted "where the case is not one of inherently discriminatory treatment or of joint decision-making by more than one person acting with discriminatory motivation, only a participant in the decision who is acting with discriminatory motivation is liable. An innocent agent acting without discriminatory motivation is not liable. Thus, where the innocent agent acts on "tainted information" (...) i.e. "information supplied, or views expressed, by another employee whose motivation is, or is said to have been, discriminatory", the discrimination is the supplying of the tainted information, not the acting upon it by its innocent recipient." (para 52). The Tribunal had heard evidence from DCI Sumner that he was the sole decision maker. While they rejected that, the Tribunal clearly found that he took part in the decision. Influence over him by two colleagues was not exerted in a gender-neutral manner; it occurred in the setting of a culture perceived as hostile to women, illustrated by such matters as men clad only in towels, the under-representation of women and alcohol at work.

81. In *University Hospital of North Tees and Hartlepool NHS Foundation Trust v Ms L Fairhall* UKEAT/0150/20/VP, His Honour Judge Auerbach commented:

"35. There may be circumstances in which people other than the decision maker are involved in the decision making process. Such other people might advise, or even be instrumental in persuading the decision maker to take the decision. If a person charged with taking a decision whether to dismiss (the dismissing officer) decides to dismiss at the behest of another person who wishes the employee to be dismissed for a prohibited reason, in circumstances in which the dismissing officer knows what they are doing, including that they are being asked to dismiss for the prohibited reason, there is no conceptual difficulty in finding that the prohibited reason was adopted by the dismissing officer. For example, if a manager tells the dismissing officer that an employee should be dismissed because she or he has made protected disclosures, and the dismissing officer does what they have been told, the making of the protected disclosures will be the reason why the dismissing officer decided to dismiss, in the sense of being the reason operating in his or her mind, notwithstanding that it may have been put there by someone else. There may be a number of people behind the scenes who have input as advisers or superiors who make it known to the decision maker that they want an employee to be dismissed because of the protected disclosures she or he has made; if the decision maker goes along with the plan the involvement of the instigators does not prevent a tribunal drawing a clear inference that, whatever its precise origin and development, the reason

for dismissal operating in the mind of the decision maker was of a prohibited kind”.

82. In *Alcedo Orange Ltd v Ferridge-Gunn* [2023] EAT 78, the EAT there held that an employment tribunal erred in finding that a pregnant employee’s dismissal was discriminatory when it was unclear whether the business owner, who was the eventual decision-maker, acted alone or in concert with the employee’s line manager, and thus whether the actual decision to dismiss was motivated by her pregnancy. The employee asserted that the line manager had a significant influence on the business owner’s eventual decision to dismiss, allegedly for poor performance. In such circumstances, the case ‘cried out’ for an analysis of whether this was a decision by a sole decision-maker, a decision by a sole decision-maker influenced by others, or a joint decision. At paragraph 4, His Honour Judge Taylor noted:

“There may even be cases in which the identity of the decision maker is never established, possibly because the employer seeks to obscure the decision making process, but it is still appropriate to draw the inference that whoever made the decision was motivated by the claimant’s pregnancy. But the employment tribunal should wherever possible set out clearly who made the decision to dismiss and, if more than one person was involved in the decision making process, what their roles were.”

### **Burden of proof**

83. Section 136 of the Equality Act provides, in essence, that where a claimant proves facts from which a tribunal could conclude in the absence of an adequate explanation that the respondent has unlawfully discriminated against the claimant (a ‘prima facie case’), the tribunal must uphold the complaint unless the respondent proves that it did not discriminate. If a claimant establishes a prima facie case of differential treatment from which a tribunal could properly draw an inference that the treatment was because of one of the protected characteristics or because of a protected act, then it will be for the employer to prove that there was some other ground for the treatment.
84. In *Martin v Devonshires Solicitors* [2011] ICR 352, EAT, the EAT recognised that if a tribunal can make positive findings as to an employer’s motivation, it need not revert to the burden of proof rules at all. This point was later endorsed by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054, SC. However, in *Gay v Sophos plc* EAT 0452/10, the EAT noted that it is good practice for a tribunal to address the issue of the burden of proof.

### **The Tribunal’s conclusions**

#### **Did the Claimant meet the definition of disabled set out within section 6 of the Equality Act?**

85. The Tribunal concluded at the time of the alleged discriminatory act, on 15 June 2022, the Claimant did meet the definition of disabled set out within section 6 of the Equality Act.

86. The Tribunal was careful in reaching its decision to only consider the medical evidence, and the Claimant's evidence relating to her health, up the point when she received the phone call from Ms Loveland at around 11.30am on 15 June 2022. The Tribunal was careful not to take into account the overdose of tablets taken in response to the termination of her assignment or the medical evidence relating to depression between 15 June 2022 and the hearing, including the fact that her medication was further increased in June 2022 and in July 2023.

### **Mental impairment**

87. The Tribunal reached the conclusion that the Claimant had a mental impairment by virtue of having depression. We were not persuaded that she was having only 'an adverse reaction to life circumstances'. While we accepted that her mental health deteriorated in November 2021 after her uncle died, we also accepted her evidence that she had suffered from periods of depression prior to that, specifically in 2018. We considered that the medical evidence from after November 2021 was consistent with the Claimant having a mental impairment of depression. In particular, we took into account the fact that in December 2021, the GP referred to anxiety, panic attacks, low mood and poor sleep and she was prescribed anti-depressant medication as well as sleeping tablets. She was also given advice about accessing talking therapy. While the GP did not specifically record in the notes a diagnosis of depression, the treatment is consistent with someone the GP considered may have depression.
88. We also accepted the Claimant's evidence that she sought help from the GP in December 2021 because she was having what she described as "a depressive episode". She described that during such an episode she found it difficult to get out of bed, lacked the motivation to cook herself a meal, or take care of her personal hygiene.
89. Further we were persuaded that the Claimant had a mental impairment because in January 2022 the GP recorded that she was suffering with "low mood/depression for over 1 year". The GP recorded his impression as being that the Claimant had "mixed anxiety and depression". She had run out of antidepressant medication, and it was prescribed to her again in January 2022. It was recorded she had initially felt it was helping when she started taking it, but she had been unable to get a further appointment in time. The GP noted she reported suffering with poor sleep and poor concentration.
90. Overall, we considered the evidence as set out above was sufficient for us to conclude the Claimant had a mental impairment.

### **Ability to carry out normal day-to-day activities**

91. The Tribunal accepted that the Claimant's mental impairment affected her ability to carry out normal day-to-day activities. The Claimant's evidence to the Tribunal, which was consistent with what was recorded in her GP notes, was that her sleep and concentration were adversely affected. She also said that her daily hygiene routine and ability to care for herself, in terms of taking a shower and making meals, were also adversely affected.

92. When asked how she thought her condition would be without the anti-depressant medication, she said she expected she would be very bad again, and she would have negative thoughts. She said she would find it difficult to prepare meals, as she had struggled with this previously. She said she would become very worried about what people would think of her, she would retreat from social interaction, and would be worried that people would think she was arrogant.
93. The Claimant's evidence to the Tribunal was that even with her anti-depressant medication she still struggled with her concentration and her ability to remember things. Without her medication, she said that she had struggled to remember basic things and often had to leave herself notes so she did not forget to do basic daily tasks. The Tribunal accepted this evidence. It was consistent with what the Claimant had reported to her GP regarding her motivation and her ability to concentrate in January 2022.
94. For these reasons, the Tribunal concluded that in June 2022, the Claimant had a mental impairment which affected her ability to carry out normal day-to-day activities.

**'Substantial' adverse effects**

95. The Tribunal concluded that before the Claimant started taking anti-depressant medication, in December 2021, her mental impairment had a substantial adverse effect on her ability to carry out normal day-to-day activities. We accepted that her mental health became very poor in around November 2021, which is why she saw her GP in mid-December 2021 and started taking anti-depressant medication and sleeping tablets. We accepted that her motivation to carry out basic day to day tasks, such as showering and cooking a meal, was significantly reduced, such that this was very difficult for her to carry out these tasks at that time.
96. The Tribunal accepted that her condition improved somewhat when she started taking Sertraline, such that she felt able to find work and attend it in February 2022 and again in June 2022. However, we took into account that before her assignment was terminated on 15 June 2022, one of the points she raised with Ms Nichols was that she did not consider that her medication was working, and she wanted this reviewed or increased. It was later recorded at A&E, on 16 June 2022, that the Claimant said although she had started on Sertraline her symptoms were not well-controlled. The Tribunal understood this to be a reference to the Claimant's experience of taking Sertraline from December 2021 to June 2022, and therefore it was relevant to the period the Tribunal needed to consider.
97. As a result, the Tribunal accepted the Claimant's evidence that if she had not been taking any anti-depressant medication her health would have continued as it had been in November 2021, which she described as a 'depressive episode', and which consisted of her finding it difficult to get out of bed, lacking the motivation to cook herself a meal, or take care of her personal hygiene. She also was suffering with panic attacks, poor sleep, and poor concentration.

98. We concluded the impact on the Claimant's mental impairment on her normal day-to-day activities could not be described as minor or trivial, and could accurately be described as 'substantial'.

**'Long term' adverse effects**

99. First of all, the Tribunal considered if by 15 June 2022, the effects of the Claimant's impairment had lasted for at least 12 months.

100. As noted above, the Tribunal accepted the Claimant's evidence that she had suffered with periods of depression prior to November 2021, and in particular in 2018. However, the Tribunal did not have sufficient evidence relating to that period of time to be able to assess if her mental impairment at that time had a substantial adverse effect on her ability to carry out normal day-to-day activities. There were no entries in the Claimant's medical records from this period. While there were numerous references to her depression starting in 2018, when she was recounting the history of her mental health difficulties to various medical practitioners, the Tribunal did not have any direct evidence of what the impact was on her normal day-to-day activities in 2018.

101. As noted above, the Tribunal did however accept that the Claimant's depression from November 2021 onwards was sufficiently serious that it had a substantial adverse effect on her ability to carry out normal day-to-day activities. The Tribunal also concluded that the Claimant's mental health would likely have remained very poor if she had not received any anti-depressant medication from December 2021 onwards. However, this meant that by 15 June 2022, the substantial adverse effect had lasted for 7 months, and had not therefore lasted for at least 12 months.

102. The Tribunal then went on to consider if, in June 2022, it was likely that the Claimant's mental impairment would continue to have a substantial adverse effect on her ability to carry out normal day-to-day activities until November 2022. In other words, if it was "likely to last for at least 12 months". In this respect, we did not take into account the events after the Claimant received the phone call at around 11.30am on 15 June 2022, including her attendance at A&E, and we did not take into account what we knew about the development of her mental health condition from June 2022 onwards. We reviewed the situation at it was on the morning of 15 June 2022.

103. The Respondent suggested that for the Tribunal to have been satisfied that the adverse effect was 'likely' to last for 12 months, we would have needed to have been presented with expert medical evidence on this point. The cases of *Morris* and *Igweike* do not go so far as to say that a Tribunal will always need expert evidence on this issue, but we accepted that we needed to be clear that we had sufficient evidence on the 'long term effects' from the evidence we were presented with. The Tribunal was satisfied that it did have sufficient evidence to reach the conclusion that on 15 June 2022 the adverse effects of the Claimant's depression were likely to last for 12 months. This evidence came from the Claimant's medical records, the Claimant's evidence to the Tribunal about her condition, and the events of 15 June 2022 prior to when she received the phone call terminating her assignment.

104. The Tribunal took into account the entries in the Claimant's GP records from December 2021 and January 2022 and what was recorded about her mental health in those entries. We also took into account the fact that the Claimant had started anti-depressant medication in December 2021, and when it had run out in January 2022, she had wanted to start it again. The Tribunal accepted the Claimant's evidence that even on the medication, the Claimant's mental health had not stabilised, and that by 15 June 2022 she had wanted to return to her GP to see about having the medication changed or increased. By this time, the Claimant had been on the medication for over 6 months, and she evidently did not consider it was working. It certainly was not an option for her to stop taking any medication at that time and she was not taking it as a matter of habit or as a precautionary measure. The Tribunal also took into account that the Claimant, when talking to Ms Nichols about her mental health history, had become extremely upset and distressed, and her hands were shaking. We considered this was evidence which supported the Claimant with her assertion that even on the medication her mental health had not stabilised to the extent that she had hoped it would. The Tribunal had to consider what the position would have been if the Claimant had not been receiving medical treatment.
105. The Tribunal concluded that in June 2022 it was likely (meaning it "could well happen" or it was a "real possibility") that the Claimant's mental impairment would have continued to have a substantial adverse effect on her ability to carry out normal day-to-day activities until November 2022. The Tribunal was able to reach this conclusion because even after 6 months of treatment the Claimant's mental health had not stabilised sufficiently. Therefore, it is reasonable to infer that without any medication or treatment that her mental health would not have improved such that it did not have substantial adverse effect on her ability to carry out normal day-to-day activities prior to November 2022.
106. For these reasons, the Tribunal concluded that on 15 June 2022, the Claimant met the definition of disabled within the meaning set out in section 6 of the Equality Act.

**Was the Claimant subjected to less favourable treatment?**

107. The Tribunal found that the termination of the Claimant's assignment did amount to 'less favourable treatment'. It had been intended she would work for Principal Medical Limited for 12 weeks and it abruptly ended on her third day of work.
108. For the same reason, the Tribunal concluded the termination of the Claimant's assignment amounted to a detriment under section 55(2)(d) of the Equality Act.

**Was it 'because of' her disability?**

**The reason why/comparison with a hypothetical comparator**

109. The Tribunal considered the 'reason why' the Claimant's assignment was terminated. The Tribunal carefully reviewed the transcript of the phone call between Ms Nichols and Ms Loveland. Ms Nichol's reasoning can be

summarised as being her concern that the Claimant became “extraordinarily distressed” on 15 June 2022, her belief that the Claimant was not well enough to be at work, which stemmed at least in part from the Claimant’s disclosure about her mental health (“she went into lots and lots of detail about the problems clinically with her mental health... And she just wasn’t – she’s not well enough to be here, I’m afraid, Karen”) and concerns about her resilience as the role required her to deal with unhappy patients. The Tribunal found that the transcript showed that the Claimant’s disclosure about her mental health had a significant influence on Ms Nichol’s decision to end her assignment. In other words, the Tribunal concluded that the transcript showed that the Claimant’s disability was one of the “reasons why” her assignment ended.

110. The Tribunal went through the process of considering whether a hypothetical comparator, in materially the same circumstances, would have been treated in the same way by Ms Nichols. We considered the appropriate comparator was a 36 year old female temporary worker who had attended work at the Banbury Cross Health Centre, who had worked for two days without any issues, and on the third day had decided to speak to her manager after an incident with a colleague (which was factually the same as the incident that the Claimant had with her colleague) and had become very upset when describing to her manager the difficulties she had in a previous role, but who did not disclose that she had problems with her mental health or that she took anti-depressant medication or anti-anxiety medication. In those circumstances, we found it unlikely that Ms Nichols would have wanted to end the assignment at that point. We considered it was likely that she would have sent the Claimant home for the rest of the day but would have then waited to see how she was in the morning. It was the fact that the Claimant disclosed her mental health condition and the fact she disclosed she was on anti-depressant medication which made Ms Nichols doubt that the Claimant had sufficient resilience for the role and may have had difficulty dealing with unhappy patients.
111. The Claimant had not become upset or distress when speaking with the patient on the phone, and nor had she become distressed when her colleague had said to the patient on the phone that the Claimant had become overstressed. The Claimant was very clear in her evidence that it was only when she was recounting to Ms Nichols the problems that she had experienced with her mental health that she became very upset. She said she found it very difficult to talk about her mental health without getting upset and she was embarrassed that she had the problems that she did. The Tribunal found that the fact that the Claimant was upset when explaining to her manager her mental health history did not warrant the conclusion that she could not do the role, might have difficulties with patients, or was too unwell to be at work. The Tribunal concluded that Ms Nichols made these assumptions about the Claimant’s ability to carry out the role going forward once she knew that the Claimant suffered from depression and was on medication.
112. What is set out above is an analysis of Ms Nichols’ actions, and the Tribunal is primarily concerned with the actions of the Respondent. However, the Tribunal considered it was necessary to first consider whether Ms Nichols’ actions were discriminatory as this is relevant to the Tribunal’s conclusions



on decision-making, and also it will be relevant to remedy. For the reasons given above, the Tribunal considered that the actions of Principal Medical Limited amounted to direct disability discrimination when they asked the Respondent to end the Claimant's assignment on 15 June 2022.

## **The role played by the Respondent**

### Joint-decision

113. Firstly, the Tribunal considered whether this was a case of joint decision making.

114. The Tribunal looked very carefully at the transcript of the phone call. The Tribunal found that when Ms Nichols spoke to Ms Loveland to explain what had happened, she did not immediately say she wanted the assignment terminated. She hinted at this, but the language she used was tentative. She was not communicating a firm decision that had already been made. This can be seen from the following parts of the transcript –

- "... she went into lots and lots of detail about the problems clinically with her mental health ... And she just wasn't – she's not well enough to be here, I'm afraid, Karen... And she agrees that that's the case, and so she's gone home and she's going to ring her GP"
- "But she's gone home not very well at all actually"
- "Erm I'm not really- well I've just come up to have a chat to HR now about what that means going forward actually but I would be concerned professionally about her resilience for this particular role because a lot of it is dealing with unhappy patients."
- "And I think it could be tricky going forward"
- "So, I need to have a chat with Amber now about it, but erm, yeah, you know- but even before I've had that chat with Amber I've said that I'd be worried about her continuing with us really- given that"

115. The transcript shows Ms Nichols wanted to make Ms Loveland aware of her concerns about the assignment continuing, but she said she intended to speak to HR. It was then Ms Loveland who said, "Okay, you'd like her to- I was going to say, you'd like her to finish with you tod- well, finish with you this morning – yeah?". Up to that point, Ms Nichols had not said that she wanted to terminate the assignment immediately, although the Tribunal accepted that she had intended to convey the impression that she was considering ending it, but without explicitly saying so. The Tribunal understood that Ms Loveland was therefore seeking confirmation from Ms Nichols that she had understood correctly that Ms Nichols' wanted the assignment terminated with immediate effect.

116. Ms Nichols' response was, "I think that would be best, not only for us but for her too because I don't think she's very well Karen, at all." Almost immediately thereafter, and with no further discussion, Ms Loveland then says, "Yeah. Okay, okay. I mean, what I'll do then is I'll- I will be very gentle obviously with how I deal with her, I'll give her a call and I'll have a chat with her and say, "oh crikey, I've just heard from [inaudible] you know, and you know". I might leave it maybe a little bit and call her in about an hour maybe- let her get

home and...” The Tribunal understood that this was Ms Loveland confirming she would call the Claimant to terminate the assignment, although she did not state it categorically at that point. Later in the conversation Ms Loveland confirmed this was her intention when she said, “I will speak with- I’ll speak with Magdalena today and see what she says, but obviously I will gently say that I have had a chat with you, we just think with- that the environment isn’t quite right for her and then I’ll find something more easy and straightforward when she is ready.”

117. What was surprising to the Tribunal was that Ms Loveland did not in any way seek to discuss the ending of the assignment with Ms Nichols. She did not seek to persuade Ms Nichols to let Ms Loveland speak to the Claimant before a decision was made, nor did she suggest they wait to see how the Claimant was after she had seen her GP or wait to see if the Claimant was fit to return to work the next day and see how she was when at work. Part of the reason why the Tribunal found this surprising was because of what Ms Loveland had written in her witness statement at paragraph 17, “If the assignment is in process and we feel that there is a consideration for the client or worker to continue before termination has been decided upon by either party and through open discussion with both parties regarding where improvement, training, or support can be implemented, we will aim to work with both parties to find a solution to suit them. This however is based upon both parties being in agreement and given the instruction received from Banbury, this would not have been possible.” Although Ms Loveland explained that they would normally look to see if a solution could be found before termination, there was no discussion of that nature in this case.
118. The Tribunal recognised that the less favourable treatment complained about in this case was the termination of the Claimant’s assignment, and therefore the Tribunal needed to focus on whether that was a joint decision.
119. The Tribunal concluded that both parties, Principal Medical Limited and the Respondent, were party to the decision to terminate the Claimant’s assignment. We accepted that the discussion about terminating the assignment was started by Principal Medical Limited, in the sense that Ms Nichols was clearly hinting at this. The Tribunal concluded however that Ms Loveland became a joint participant in the decision to terminate the assignment when having asked for Ms Nichols’ confirmation that she wanted the assignment terminated, Ms Loveland then immediately accepted her response that “it would be for the best” and said she would call the Claimant. Despite Ms Loveland’s evidence in her witness statement that if there was an issue between the temporary worker and the client, they would look to explore alternative solutions before termination, she did not suggest any alternative courses of action in this case, but instead she agreed with Ms Nichols straight away (“... I will gently say that I have had a chat with you, we just think with- that the environment isn’t quite right for her” (emphasis added)) and Ms Loveland then agreed to execute the decision by calling the Claimant straight away.
120. The Respondent made the argument that the Claimant’s claim against the Respondent was not for a failure to challenge Principal Medical Limited when Ms Nichols made the decision to terminate the assignment. Therefore, the Tribunal carefully considered if the Respondent’s role could be properly

categorised as being a failure to challenge Ms Nichols' decision or whether Ms Loveland became a participant in the decision to end the assignment. The Tribunal found that the Respondent became a participant in the decision to terminate the assignment by 1) seeking clarification that Ms Nichols wanted the assignment terminated, then accepting that decision without any discussion or exploration of other options, including not even speaking with the Claimant first, 2) conveying her agreement with the decision, and then 3) confirming to Ms Nichols that she would call the Claimant and terminate the assignment straight away.

121. As a result, the Tribunal concluded that the Respondent and Principle Medical Limited made a joint decision to terminate the Claimant's assignment.
122. The Tribunal then considered why Ms Loveland acted as she did. We looked at the "reason why". The Tribunal accepted that Ms Loveland would have been partly influenced by the desire to maintain a good working relationship with Ms Nichols. However, that would be true in all cases and yet Ms Loveland said in her witness statement they would usually look to see if there were other options which could be explored before termination.
123. The Tribunal concluded that the fact that Ms Nichols said that the Claimant had disclosed the "problems clinically with her mental health" had a significant influence on Ms Loveland's decision to agree with Ms Nichols straight away without further discussion and without putting forward alternative options.
124. The Tribunal did not find Ms Loveland's answer as to why in this case she did not explore if there were other possible solutions to be credible. She said, in effect, she thought that Ms Nichols had already made up her mind. The Tribunal did not find this credible because at the start of the phone call the language used by Ms Nichols was tentative, and she did not express that a clear decision had already been made. The Tribunal also took into account that it was very soon after Ms Nichols referred to the Claimant having gone into "lots and lots of detail about the problems clinically with her mental health", that Ms Loveland then sought confirmation that Ms Nichols wanted the assignment terminated, and then agreed with her straight away to terminate the assignment.
125. The Tribunal considered whether the Claimant was treated less favourably than a hypothetical non-disabled comparator. The Tribunal concluded that if Ms Nichols had called Ms Loveland and relayed that the Claimant had become very upset and distressed that morning, and it had been agreed she would leave and see her GP, but if there had been no reference to the Claimant having mental health difficulties and being on medication for her mental health, then Ms Loveland would have sought to discuss other options with Ms Nichols rather than proceeding directly to agreeing with the termination of the assignment immediately. The Tribunal concluded that given the tentative nature of Ms Nichols' initial comments, that if Ms Loveland had suggested alternatives, such as allowing her to speak to the Claimant first, seeing how the Claimant was after her GP appointment, or seeing how she was at work the next day, that Ms Nichols may well have been persuaded to follow one of those alternative courses of action.

126. In other words, the Tribunal found that both Ms Nichols and Ms Loveland decided very quickly that the Claimant's assignment should terminate immediately after she had become upset at work. The Tribunal concluded the less favourable treatment was 'because of' the Claimant's mental health disability. The Tribunal concluded that both Ms Nichols and Ms Loveland would have taken a different approach if faced with a very upset worker but who had not disclosed a disability. The Tribunal found it was unlikely that a non-disabled temporary worker would have been immediately dismissed on the basis that they had become very upset and distressed at work one morning.
127. In terms of the burden of proof, the Tribunal found that the Claimant had established facts from which the Tribunal could conclude in the absence of an adequate explanation that the Respondent had unlawfully discriminated against the Claimant. These facts were that she had disclosed her mental health to her manager during a conversation and within a few hours her assignment was terminated. The transcript of the phone call between Ms Nichols and Ms Loveland showed Ms Nichols referred to the Claimant having gone into lots and lots of detail about the problems clinically with her mental health, and then described her as being not well enough to be at work. Ms Loveland did not seek to investigate the matter at all or explore any alternative solutions before she immediately agreed with Ms Nichols, and said she would terminate the assignment, even though Ms Loveland's evidence was that her normal practice would be to look for a solution before termination if both parties were open to that. The Tribunal considered these facts gave rise to a prima facie case of discrimination, and so the burden moved to the Respondent. As set out above, the Tribunal were not persuaded by Ms Loveland's explanation for her part in the less favourable treatment, and why she did not even raise other options with Ms Nichols but instead agreed to immediately terminate the assignment.
128. The Respondent sought to emphasise a number of times that Ms Nichols had been acting out of concern for the Claimant, and that Ms Loveland also believed she was acting in the Claimant's best interests. The Tribunal was sceptical about this suggestion, but in any event, considered this to be irrelevant. It is not a defence to a claim of direct discrimination to have acted with a benign motive.
129. For these reasons, the Tribunal concluded the Claimant had been directly discriminated against by the Respondent.

Sole decision maker

130. If the Tribunal is wrong in its conclusion that the transcript and other available evidence demonstrated a joint decision was made by Ms Loveland and Ms Nichols, the Tribunal then considered the position as if Principal Medical was the sole decision maker, and the Respondent just acted on that decision. It certainly was the Respondent who took the action of terminating the Claimant's assignment. This was done in the phone call between Ms Loveland to the Claimant. Therefore, the Respondent undoubtedly participated in the termination of the Claimant's assignment in that regard.

131. This is not a “tainted information” case. Ms Nichols did not want the Claimant’s assignment terminated because of her disability, but gave Ms Loveland an entirely different reason altogether, such that Ms Loveland innocently terminated the assignment without knowing the true motive. In this case, the Tribunal concluded that the Claimant’s disability had a significant influence on Ms Nichols’ decision to terminate the assignment. The Tribunal concluded that it was clear from the transcript that Ms Loveland understood that the Claimant’s mental health disability was part of Ms Nichols’ concern.
132. The Tribunal considered that the legislation is designed to find those, who know of someone else’s discriminatory motive and who goes along with that decision by participating in the execution of the less favourable treatment, to also be liable for direct discrimination. The language of section 13 of the Equality Act (‘A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others’) is wide enough (“because of a protected characteristic”) to encompass someone acting at the behest of another, knowing of their discriminatory motive. As noted in *Fairfield*, “If a person charged with taking a decision whether to dismiss (the dismissing officer) decides to dismiss at the behest of another person who wishes the employee to be dismissed for a prohibited reason, in circumstances in which the dismissing officer knows what they are doing, including that they are being asked to dismiss for the prohibited reason, there is no conceptual difficulty in finding that the prohibited reason was adopted by the dismissing officer.”
133. Consequently, the Tribunal concluded that the Respondent subjected the Claimant to less favourable treatment when it terminated her assignment, and even if it did this at the request of Principal Medical Limited, the Respondent carried this out knowing Ms Nichols’ decision was significantly influenced by the Claimant’s disability, and so the Respondent adopted that prohibited reason itself.
134. For these reasons, the Claimant’s claim that she was subjected to direct disability discrimination by the Respondent when her assignment was terminated on 15 June 2022 succeeds. A remedy hearing will be listed for one day in person at Reading Employment Tribunal on 15 December 2023.

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Employment Judge Annand

Date: 16 October 2023

JUDGMENT SENT TO THE PARTIES ON

.....19 October 2023.....

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FOR THE TRIBUNAL OFFICE

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