Case no: 3304947/2022

EMPLOYMENT TRIBUNALS

Claimant		**First Respondent**
Miss M King	**v**	Alistair Brebner
		Second Respondent
		The Hobby Company Ltd

Heard at: Cambridge

On: 4-6 December 2023 (by video)
7 December 2023 and 5 February 2024 (in chambers by video)

Before: Employment Judge L Brown

Members: Mrs J Buck and Mr B Lynch

Appearances
For the Claimant: In person.
For the Respondent: Mr J. Feeny, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The Claimant's claim for Harassment contrary to s.26 of the Equality Act 2010 ('EqA') partially succeeds.

2. The Claimant's claim for Direct Discrimination contrary to s.13 of the EqA fails.

2. The Claimant's claim for Discrimination Because of Something Arising in consequence of her disabilities, Anxiety and Super Ventricular Tachycardia, s.15 EqA fails.

3. The Claimant's claim for Failure to Make Reasonable Adjustments contrary to s.20 of the EqA fails.

REASONS

Structure of this judgment:

A) The judgment starts with a formal declaration above of the outcome without details.

B) We then include some introductory comments to set the context for the hearing and the judgment including setting out the Issues in this case.

C) The next section sets out the Tribunal's findings of fact.

D) Then, we make reference to the applicable law, and we explain how the Tribunal applied the law to the facts; that is how we reached the judgment.

Section B

Introduction:

1. The Claimant presented her claim to the Tribunal on the 16 April 2022.

2. There were two prior preliminary hearings in relation to case management. The details of those hearings are set out in their own minutes and Orders.

3. In particular on the 25 November 2022 Judge Skehan recorded that the Claimant did not wish to bring a claim for Constructive Unfair Dismissal as set out in the case management order, and that claim was then dismissed.

4. The case management order detailed the remainder of the claims as direct disability discrimination under s.13 of the EqA, discrimination arising from disability under s.15 of the EqA, and a failure to make reasonable adjustments under s.20 and s.21 of the EqA.

5. It was also set out that, to the extent an amendment was required to add the Claimant's bonus claim to this litigation, the Claimant's letter of 27 September 2022 was considered as an application to amend the ET1. The Claimant was permitted to include her claim in respect of non-payment of bonus within her disability discrimination claim as set out below.

6. At a further preliminary hearing on the 17 July 2023 the Claimant applied to amend her claim by re-introducing her claim of constructive unfair dismissal, by adding a claim for victimisation contrary to section 27 of the EqA, an allegation of dismissal as an instance of unfavourable treatment contrary to section 15 of the EqA, and a claim of harassment contrary to s.26 of the EqA.

7. The applications to add the claims of constructive unfair dismissal, victimisation, and the act of dismissal as an instance of unfavourable treatment were refused.

8. The application to add a claim of harassment was granted.

9. Insofar as an amendment application was required to clarify the complaints of direct discrimination contrary to section 13, and discrimination arising from disability contrary to section 15 of the EqA, the amendment application was granted to include the matters contained in paragraphs 35-37 of the application (but not paragraph 37 xviii).

10. For clarity paragraph 37 xviii was as follows: -

    37. C relies upon the following instances of unfavourable treatment:
    ……...

    xviii. C's dismissal.

11. The application to strike out the Claimant's claims was refused.

Evidence Used

12. The Claimant gave evidence and did not call any witnesses in support of her claim.

13. The Respondent called the following witnesses who gave evidence in the following order: -

    (i) Mr Pete Binger
    (ii) Mr Alistair Brebner
    (iii) Ms Carolyn Biddleston

Issues in this case

14. The issues the Tribunal had to decide were set out in the Case Management Summary of Judge Skehan of the 25 November, and the later Case Management Summary of Judge Russell of the 17 July 2023. A List of Issues was also prepared by the Respondent which incorporated those issues.

15. The issues were clarified with the parties at the outset of the hearing, and we set out below the Issues this Tribunal had to decide.

16. Sometime on the first day after the issues were clarified it was noted that after the claim of harassment was added that the Respondents had failed to file an amended Response to that additional claim. This was raised with Counsel for the Respondent. An application was then made to defend the claim of harassment and an amended Response was emailed to the Tribunal.

17. The Claimant did not object to the application by the Respondents to amend their Response and accordingly this Tribunal granted the application made by the Respondent to amend their Response in the manner set out, which set out their Response to the additional claim of harassment.

18. The Claimant and the Respondents made submissions at the hearing. Counsel for the Respondents made oral submissions. The Claimant submitted her submissions in writing. Both were taken into consideration but are not recited in this Judgment.

Issues

19. **Time limits**

19.1 ACAS commenced against the First Respondent on the 29 March 2002 and ended on the 7 April 2022. Given the date the claim form was presented and the dates of early conciliation, any complaint against the First Respondent about something that happened before 30 December 2021 may not have been brought in time.

19.2 ACAS commenced against the Second Respondent on the 21 March 2002 and ended on the 7 April 2022. Given the date the claim form was presented and the dates of early conciliation, any complaint against the First Respondent about something that happened before 22 December 2021 may not have been brought in time.

19.3 Were the discrimination complaints made within the time limit in section 123 of the EqA 2010? The Tribunal will decide:

19.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

19.3.2 If not, was there conduct extending over a period?

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

19.3.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

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

Disability

20. The Respondents accepted that the combined effect of the Claimant's anxiety and heart condition (SVT) constituted a disability as defined in section 6 of the EqA 2010. The Respondents deny knowledge of this disability during the material time, this being the Claimant's employment.

1. Direct Disability Discrimination (Section 13 EqA 2010)

List of Issues

1.1 Did the Respondent do the following things:

1.1.1 Did the First Respondent single out the Claimant out to impose an absence plan requiring the Claimant to have no days off for an eight-week period from 4 January 2022 onwards;

1.1.2 Did the First Respondent in January, February and March 2022 send the Claimant emails / text messages with threats that the Claimant would lose her employment;

1.1.3 Fail to pay the Claimant's bonus for the tax year to March 2022. The bonus was due to be paid in July 2022.

1.2 If so, was that less favourable treatment?

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

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

The Claimant says s/he was treated worse than Carolyn Biddleston.

1.3 If so, was it because of disability?

1.4 Did the Respondent's treatment amount to a detriment?

2. Discrimination Arising From Disability (Section 15 EqA 2010)

2.1 Did the Respondent treat the Claimant unfavourably by:

2.1.1 The First Respondent imposing an absence plan requiring the Claimant to have no days off for an eight-week period;

2.1.2 The First Respondent in January, February and March 2022 sending the Claimant emails / text messages with threats that the Claimant would lose her employment;

2.1.3 On 21 December 2021 the First Respondent saying to the Claimant she needed not to be absent for 8 weeks from 4 January 2022;

2.1.4 On 21 December 2021 the First Respondent saying to the Claimant that the company needs to take control of its overall absences". If Claimant's absences don't improve, she will be given a warning and then dismissal;

2.1.5 On 21 December 2021 the First Respondent saying to the Claimant, 'some people may use things as an excuse just to stay at home';

2.1.6 On 21 December 2021 the First Respondent telling the Claimant she can no longer make up time for sick days;

2.1.7 On 12 January 2022 the First Respondent sending a letter confirming points discussed in meeting on 21 December 2021, and the First Respondent stating to the Claimant "... if you are genuinely unwell and can't come in, then you should take a sick day.'

2.1.8 Text messages and emails between January, February and March 2022 regarding the Claimant returning to work and threatening the Claimant with losing her employment;

2.1.9 On 17 January 2022, Andy Farmer responding to an email regarding the Claimant's absence (relating to the Claimant's disabilities anxiety and SVT) saying "How typical once again";

2.1.10 On 17 January 2022, Pete Binger sending an email at 13:43 regarding a discussion with a customer regarding the Claimant being ill 'again' and 'she [C] seems to be ill a lot';

2.1.11 On 17 January 2022, an email chain between Andy Farmer and Carolyn at 09:27, "Michelle not in again" and a reply of "how typical once again";

2.1.12 On 19 January 2022, an email chain between Sandra and Carolyn saying, 'is Michelle off sick', 'yes AGAIN!!' 'OMG what is the matter with her now' 'believe its mental health now';

2.1.13 On 21 January 2022 an email between Carolyn and Andy Farmer saying, "M has been off all week" and a reply of "FFS";

2.1.14 On 25 January 2022, an email from Sandra Walker to Pete Binger regarding the Claimant's absence saying "it's a shame she is so unreliable";

2.1.15 On 26 January 2022 an email from the First Respondent to the Claimant: -

"... we do however have a business to run and as we have previously discussed with you, your reliable attendance is important..."

"...we do have to balance the impact of your unplanned absences on business operations and the pressure it places on the rest of the team against our duty of care towards you..."

"... so far setting targets for your attendance has not worked because your health has deteriorated further since our last meeting..."

"... it is important that we understand how likely it is that you will be able to attend work reliably in the future ...";

2.1.16 On 11 February 2022 Carolyn sending Pete a WhatsApp with a screenshot of the Claimant's Facebook profile with laughing emojis;

2.1.17 On 08 February 2022 an email from the First Respondent saying, we are "recording today as an unauthorised absence" "... this lack of communication makes operational planning all but impossible for the business and places an unfair burden on your colleagues as well as a knock-on effect on our customer service ...";

2.1.18 On 10 February 2022, an email from Pete Binger to Sandra at 10:12 to say "no Michelle now until early March ..." with a reply of "OMG! I doubt she'll come back then, seems to be playing the mental health card";

2.1.19 Email from the First Respondent sent to the Claimant on 14 February 2022 which said comments such as: -

"we are sorry to learn that your condition is serious enough to warrant a further 4 weeks off..." and "...If you're unwilling or

unable to participate in an occupational health call, despite being well enough to attend meetings with your own GP, then we will have to make decisions based on the information we have available, which may be disadvantageous to yourself..." ;

2.1.20 Non-payment of the Claimant's bonus for year ending 31/3/22;

2.2 Did the following things arise in consequence of the Claimant's disability:

2.2.1 The Claimant's sickness absence;

2.3 Was the unfavourable treatment because of any of those things?

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

2.4.1 To manage staff absence and by extension, resourcing / operational planning, within the business.

2.4.2 To allow managers to express an opinion and have private discussions with one another about work related matters.

2.4.3 To reward past effort whilst retaining and motivating staff towards the end of the calendar year (the second Respondent's busiest period).

2.5 The Tribunal will decide in particular:

2.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.5.2 Could something less discriminatory have been done instead;

2.5.3 How should the needs of the Claimant and the Respondent be balanced?

3. Reasonable Adjustments (Sections 20 & 21 EqA 2010)

3.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: The practise of applying an attendance plan.

3.2 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability in that the Claimant had absence from work due to her disability?

3.3 Did the Respondent know that the Claimant was disabled?

3.4 Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

3.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

3.5.1 Steps the Respondents could have taken to avoid the disadvantage are: -

3.5.1.2 Allowing the Claimant to make the time up, cooperating with C to accommodate her disabilities.

3.5.1.3 Allowing the Claimant time away from her desk during the working day to alleviate symptoms.

3.5.1.4 Accommodating the Claimant's disability by accepting that the Claimant's SVT may on occasion result in dizziness or light headedness preventing C from driving safely;

15.1.6 Allowing remote working.

3.6 Was it reasonable for the Respondent to have to take those steps and when?

3.7 Did the Respondent fail to take those steps?

4. Harassment Related To Disability (Section 26 EqA 2010)

4.1 Did the Respondent do the following things:

4.1.1 The First Respondent in January, February and March 2022 sent the Claimant emails/text messages with threats that the Claimant would lose her employment;

4.1.2 On 21 December 2021 the First Respondent saying to the Claimant she needed not to be absent for 8 weeks from 4 January 2022;

4.1.3 On 21 December 2021 the First Respondent saying to the Claimant that "the company needs to take control of its overall absences". If C's absences don't improve, she will be given a warning and then dismissal;

4.1.4 On 21 December 2021 the First Respondent saying to the Claimant, some people may use things as an excuse just to stay at home;

4.1.5 On 21 December 2021 telling the Claimant she can no longer make up time for sick days;

4.1.6 On 12 January 2022 sending a letter confirming points discussed in meeting on the 21 December 2021, and the First Respondent stating to the Claimant, "... if you are genuinely unwell and can't come in, then you should take a sick day";

4.1.7 Text messages and emails between January, February and March 2022 regarding the Claimant returning to work and threatening the Claimant with losing her employment;

4.1.8 On 17 January 2022, Andy Farmer responding to an email regarding the Claimant's absence (relating to Claimant's disabilities of anxiety and SVT) saying "How typical once again";

4.1.9 On 17 January 2022, Pete Binger sending an email at 13:43 regarding a discussion with a customer regarding the Claimant being ill 'again' and 'she [C] seems to be ill a lot';

4.1.10 On 17 January 2022 an email chain between Andy Farmer and Carolyn at 09:27, "Michelle not in again" and a reply of "how typical once again";

4.1.11 On 19 January 2022, an email chain between Sandra and Carolyn saying, 'is Michelle off sick', 'yes AGAIN!!' 'OMG what is the matter with her now' 'believe its mental health now';

4.1.12 On 21 January 2022 an email between Carolyn and Andy Farmer saying, "M has been off all week" and a reply of "FFS";

4.1.13 On 25 January 2022, an email from Sandra Walker to Pete Binger regarding the Claimant's absence saying "it's a shame she is so unreliable";

4.1.14 On 26 January 2022 an email from the First Respondent to the Claimant "... we do however have a business to run and as we have previously discussed with you, your reliable attendance is important..."

4.1.15 "...we do have to balance the impact of your unplanned absences on business operations and the pressure it places on the rest of the team against our duty of care towards you..."

4.1.16 "... so far setting targets for your attendance has not worked because your health has deteriorated further since our last meeting..."

4.1.17 "... it is important that we understand how likely it is that you will be able to attend work reliably in the future ...";

4.1.18 On 11 February 2022 Carolyn sending Pete a WhatsApp with a screenshot of the Claimant's Facebook profile with laughing emojis;

4.1.19 On 08 February 2022 an email from the First Respondent saying, we are "recording today as an unauthorised absence" "... this lack of communication makes operational planning all but impossible for the business and places an unfair burden on your colleagues as well as a knock-on effect on our customer service ...";

4.1.20 On 10 February 2022, an email from Pete Binger to Sandra at 10:12 to say "no Michelle now until early March ..." with a reply of "OMG! I doubt she'll come back then, seems to be playing the mental health card";

4.1.21 Email from the First Respondent sent to the Claimant on 14 February 2022 which said comments such as: -

"we are sorry to learn that your condition is serious enough to warrant a further 4 weeks off..." and "...If you're unwilling or unable to participate in an occupational health call, despite being well enough to attend meetings with your own GP, then we will have to make decisions based on the information we have available, which may be disadvantageous to yourself..." ;

4.2 If so, was that unwanted conduct?

4.3 Did it relate to disability?

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

4.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Section C

Findings of Fact

21. The Claimant commenced working for the Second Respondent on the 11 of February 2020 as a sales office administrator until the date of her resignation on the 26 April 2022 when she resigned with immediate effect complaining that she had been constructively and unfairly dismissed.

22. The Second Respondent was a small medium enterprise that employed around 22 people at the time of the Claimants dismissal. It was owned by Mr Pete Binger the Managing Director. His sister, Ms Carolyn Biddleston, was also employed there and was the Claimant's line manager. The First Respondent, Alistair Brebner, was the Commercial Director of the Second Respondent, and Pete Binger was his uncle. Mr Brebner's mother, Sandra Walker, also worked in the sales office alongside the Claimant. They operated in the toy model wholesale distribution sector. It had one warehouse in Milton Keynes and dated back to 1966, and many of their employees had been with them for decades.

23. The Claimant worked on a full-time basis for the Respondent with working hours of 9:00 am until 5:00 pm Monday to Friday. Her duties included taking

orders, payments and raising invoices for customers, over the phone and by e-mail. It was not disputed that the Claimant had conversations with her manager Carolyn Biddleston from time to time about her heart condition throughout her employment.

24. Throughout her employment of just over two years the Claimant had a high degree of sickness absence. The reasons for her absence were in part related to her disability, which was not disputed by the Respondent, this disability being super ventricular tachycardia ('SVT') and associated anxiety. It was not in dispute however that a sizeable portion of these absences were non- disability related. In 2021 the Claimant took 33.5 days sickness absence. 15 days of this absence was due to COVID and due to needing to self-isolate. and we found a further 11 days were related to her heart condition.

25. In the summer of 2020, the Claimant complained of heart palpitations whilst at work and had to lie on the floor. This prompted a colleague to call an ambulance for her. An ambulance crew attended but they could not detect any reason for the palpitations, and they did not take the Claimant to the hospital. This incident was witnessed by Mr Pete Binger the Second Respondents managing director. When the incident occurred the Claimant's mother attended at the workplace to be with her daughter until the ambulance arrived, and until they left, having concluded there was no medical cause for the palpitations.

26. It was not in dispute, and we found, that on occasion when the Claimant did not come in due to being unwell, the Respondent would allow her to make up the time off so that she did not lose any pay.

Date of Knowledge of Disability

27. On 14, and the 17 September 2020 the Claimant suffered a heart related allergic reaction to the contrast dye (CAT SCAN) [P.369].

28. On the 5 November 2020 she advised the Second Respondent as follows [P.184]: -

'Going to be slightly late 20/30 minutes, got to pop into the GP surgery, they called me yesterday on withheld number and left a voicemail, didn't bother answering it as I thought it was PPI crap. I need to have a mental health review before picking up my next lot of anxiety tablets'.

29. On the 09 February 2021, she also advised the Second Respondent as follows [p.184]:

'The heart was still playing up after 11 last night. I'm now very sore & still got high blood pressure so I'm going to ask H to take me to the GP at lunch.'

30. Carolyn Biddlestone then replied,

    [09/02/2021, 09:22:03] Carolyn: Good idea re doctors, I really do think you need to get someone on this Michelle it's gone on a long time, you need some answers as to what is going on x'.

    and later that day she also asked,

    'How did the doctors go?'

    The Claimant replied,

    '*The GP told me the same old shit, rest etc. But my referral has been submitted to Harefield which is heart and lung specialist hospital.' Still currently in pain but it's manageable so will be able to come into work.'*

31. We therefore found her manager, Carolyn Biddlestone, knew of her disability on the 5 November 2020 in relation to her anxiety, and in relation to her heart condition in particular by the 9 February 2021, and that such knowledge of the Claimant's heart related disability of anxiety was therefore imputed to the First and Second Respondent from the 5 November 2020 onwards, and in relation to her SVT from the 9 February 2021 onwards.

32. We did not however find that the First and Second Respondents had actual knowledge of the Claimant's disabilities. At no point did she formally advise them of the fact she was disabled, nor provide a medical report setting out her condition and its effect on her day-to-day activities.

33. In relation to the incident at work we found that on or around the end of July 2020 the Claimant slumped over her desk at work and paramedics were called by Carolyn Biddlestone on the instruction of Pete Binger of the Second Respondent [Para. 15 of WS]. He gave evidence, and we found, that the Claimant stated she did not wish an ambulance to be called, but he called them in any event. The paramedics upon attending then stated that they could find nothing medically wrong with her and left. We did not therefore find that this incident should have alerted the Second Respondent to the fact that the Claimant was disabled by reason of her SVT heart condition.

34. Pete Binger also gave evidence that they called the Claimant's mother who arrived and was smiley and friendly and did not appear concerned [para 17 WS]. He said her manner was 'jokey' with him, and that her mother then drove the Claimant home. We accepted this evidence and found that the demeanour of the mother of the Claimant meant that the Second Respondent was not unduly concerned after being reassured by the paramedics and due to her mother's demeanour [Para.18]. He said whilst he was told by the Claimant, she suffered from palpitations he did not know that this amounted to an actual heart complaint, and that he had been reassured by the paramedics.

35. Prior to the sickness absence review meeting on the 21 December 2021 with the First Respondent we found that she did refer to renewing her application for a blue disabled badge, as her current one had expired, but we did not find that this in itself would have put the First Respondent on notice that she was disabled. We did not therefor find prior to the meeting on the 21 December 2021, that the First or Second Respondent had actual knowledge she was disabled. In the period thereafter we found they were taking active steps to ascertain if she met the definition of a disability under the EqA but did not find they had actual knowledge of her disability.

Sickness absence compared to comparator.

36. The way the Respondents managed the Claimants absence was the central issue in this claim and the Claimant compared herself to a named comparator this being her team leader Carolyn Biddleston. In essence she asserted that there was very little difference in their absence records and, amongst other things, that she had been treated less favourably by the Respondents because of her disability.

37. We found that the Respondents reacted to, and decided to take action to manage, the Claimants further sickness absence, and found that this reaction occurred following her absence on the Friday 3 December, Monday the 6 December and Tuesday the 7 December 2021. At this point Carolyn Biddleston said to the Claimant, on the 7 December 2021 as follows [p 194]: -

'I really need you in – going to start drowning soon,'

38. On the 8 December 2021 she also said [P.194],

'Hi Michelle, I do appreciate it's very difficult, I think Pete and Alasdair need to understand more of what is happening regarding your ongoing health situation.'

39. We found that on this date of the 8 December 2021 the concerns of the Second Respondent had mounted due to it being a busy time of year for them around the Christmas period.

40. We found that in total up to the date of dismissal the Claimant had 96.75 days of absence in just over two years (less than 30 of which concerned heart related issues).

41. We found that the date at which we should judge the amount of absence taken by the Claimant compared to that of Carolyn Biddleston in 2021 specifically was when the Respondent commenced its absence review procedures, and decided to call the Claimant to a meeting which then later took place on the 21 December 2022.

42. We find that at this point in time, and as of the 13 December 2020, the day after she had been invited to the absence review meeting on the 21 December 2020 that there was still either a ten and a half day difference,

or, if you stripped out the Claimants self-isolation Covid leave, there was a four and half day difference between her sickness absence and that of Carolyn Biddestone's.

43. As at the 13 December 2021 Carolyn Biddleston's absence days were 23 days [P.431]. At this point in time the Claimant's absence days for 2021 were 33.5 days [P.94]. The difference at this point in time was therefore 10.5 days.

44. However, some of the Claimant's absence was due to Covid and self-isolation of 15 days due to her disability. We found that these comparative figures if you stripped out the covid absence for the Claimant from the total of 33.5 days due to being clinically vulnerable there were still 18.5 days for the Claimant and 23 days for Carolyn Biddleston, this being a difference of four and a half days when the sickness absence procedure commenced. We found whichever figure you used the Claimants sickness absence was more than that of her chosen comparator, and that the material circumstances of her chosen comparator were not the same as the Claimants.

45. We found that the Respondents had understandable concerns about the Claimants sickness absence as in any event a proportion of her absence was not related to her disability. In particular in 2021 she had time off for a painful toe for 2 days, a sickness bug for 1 day, 1 day for the effects of a covid jab, 1.5 days due to not sleeping well, and 1 day for a migraine [P.94].

46. At the meeting on the 21 December 2020 the First Respondent proposed an eight-week plan during which he encouraged her to get her absences down. The Claimants account of this meeting was as follows [Para. 7 & 8 WS]: -

7. 'The 8-week attendance plan that Alistair Brebner forced me to agree with, this is the opening statement "We value your contribution when in the office working with the wider team." Then he goes to set out an 8-week non-attendance plan but mentions "if you genuinely unwell and can't come in, then you should take a sick day" – then continue to write in the second paragraph "If your frequent short term absences continue, we may give you a written warning that you are at risk of dismissal." There was no reasonable adjustment plan put in place, I was instantly less favourably than my colleagues who either were related to Mr Brebner or worked for the company 20 + years. (see 240, 243 in bundle).

8. The absence review meeting was held on 21 December 2021. Alistair and I were the only attendees. Alistair wanted me to agree that I would have no time off sick in the 8 weeks from 2 January 2022. I refused to agree as I had no control over my heart palpitations could occur. He put in the HR file that he agreed that if the absence was heart related, I should feel comfortable taking time off (see 243, 249 in bundle). However, he did not say this to me during the meeting.'

47. The Claimant alleged that she was told she needed not to be absent for 8 weeks from the 4 January 2022, and that the Respondent singled her out for this treatment whereas the same was not done to her chosen comparator Carolyn Biddlestone. It was not denied this was said to the Claimant. However, the First Respondent asserted that he told her during the meeting that if she needed time off for reasons related to her disability that was different. The Claimant denied this was said to her and that it was added to her file in notes of the meeting after the event. We preferred the First Respondents evidence on this matter and found that the discussion about the eight week 100% attendance target in the meeting was subjected to a reasonable caveat that if she needed time off for her disability that was different, and we found that the First Respondent did say this to the Claimant during the meeting, as referred to in the letter where the discussions of the meeting were confirmed, and where the First Respondent stated that if she was genuinely unwell and could not come in that she should take a sick day [page249].

48. We also found in this meeting that the Claimant was told that that 'the company needs to take control of its overall absences", and that if her absences did not improve, she may be given a warning and could be dismissed. However, we did not find that she was told that she needed to prove she was *'worthy of the role'.* This was never put to the First Respondent during cross-examination, despite Counsel for the Respondent saying she could put that to him in cross-examination, and so we find it was not said.

49. It was also asserted by the Claimant that the First Respondent had said to her that *'some people may use things as an excuse to stay at home.'* We found that this comment was made by the First Respondent to the Claimant and preferred the Claimants evidence on this.

50. It was not in dispute that in the past the Claimant had made up for time off sick by working extra hours to make up for this time off. We found that the First Respondent did tell the Claimant in this meeting that she could no longer do this going forward.

51. On the 17 January 2022 the Claimant was signed off sick for one week, and then for a further two weeks [P. 380, 244 and 245].

52. The Claimant asserted that after telling the First Respondent on the 24 January 2002 she had been signed off sick again, that during this sickness absence she was contacted daily by email, text and phone [265, 263, 264, 265, 266, 269, 270, 271, 378, 379, 197, 198, 199, 200, 201]. She said that during January, February and March 2021 the First Respondent sent emails and text messages with threats she would lose her employment. She said the email of the 14 February 2022 then *'tipped her over the edge.'* [P.270 & 100]. This email said as follows:

'hi Michelle, we're sorry to learn that your condition is serious enough to warrant a further four weeks off work. Unfortunately, the company is not in

a position to wait until 5/3 or potentially longer, before it can begin investigations into possible adjustments/prognosis.

If you're unwilling or unable to participate in an occupational health call, despite being well enough to attend meetings with your own GP, then we will have to make decisions based on the information we have available, which may be disadvantageous to yourself. We clearly want to avoid this and ensure we have full visibility of your position.

We would therefore like to give you a further opportunity to consider your position and confirm whether you could manage to speak by phone to an occupational health expert, or otherwise write to us with any further information that you would like the company to take into account. The hobby company now believes that it may be necessary to assess your employment situation, in order for the company to reorganise internal staffing or recruit someone else into the role to avoid any further impact on your colleagues and customer service levels. Kind regards Alistair.'

53. We found that the Claimant was resistant to attending the occupational Health advisors of the Second Respondent. We found the Second Respondent quite reasonably wished to obtain medical advice on her condition so that they could ensure they made reasonable adjustments for her disability. However, during the hearing, the Claimant gave clear evidence that she was resistant to attending until she felt well enough to attend. She in essence relied upon ill health as justification for not being well enough to have her health assessed. We found this was a perplexing position for the Claimant to adopt as the very purpose of being assessed by an occupational health advisor is for them to assess what the extent of your illness is and how it impacts on your ability to do your job.

54. We found that a standoff between the Claimant and the Second Respondent developed over this issue, but we found it was clearly reasonable of the Second Respondent to try and encourage the Claimant to be assessed by their occupational health advisors and we found that it was also reasonable of them to make clear to her that if she would not participate in such assessments that they would have to make decisions based on the information they had available, which could result in her dismissal.

55. In a small company such as this we found any business would need to plan how to meet customer demand and in order to do so needed to know what the prognosis was and when the Claimant was likely to return to work. We did not therefore find that the level of communication by the First and Second Respondent with the Claimant throughout her sick leave was inappropriate in any way, and we did not find that any of the communications amounted to threats she would lose her employment. We found it was the reasonable application by the First and Second Respondent of the Second Respondent's sickness absence policy, but note in any event they were at the very beginning of this process by seeking advice from occupational health and never even commenced sickness absence procedures in terms of asking her to attend meetings with them to discuss her absence.

56. Following the Christmas break, the First Respondent wrote to the Claimant confirming the meeting on 21 December 2021 [P.249] which said as follows:

'Firstly, it was good to hear you enjoy working at The Hobby Company. We value your contribution when in the office working with the wider team. However, the priority for us is to now ensure we improve your overall attendance levels, which over the last 12 months were 18.5 absence days excluding covid and 33.5 accounting for covid.

We have set out an 8-week attendance plan which started on Tuesday 4th January 2022. The objective is we achieve full attendance across the period but of course if you are genuinely unwell and can't come in, then you should take a sick day. What we are looking to achieve is reduce the amount of days off to level that is manageable and does not have an unduly negative impact on our business operations and / or other team members. Any absence will be documented and for absences related to your heart condition we need to be kept up to date with the relevant medical evidence to support it.

If your frequent short-term absences continue, we may give you a written warning that you are at risk of dismissal, but of course our hope is that we will be able to work together to improve your attendance so that will not be necessary.

We discussed working overtime to make up for missed days. This isn't something we will allow as we want to avoid you getting exhausted and taking additional time off as a result; we also don't feel comfortable with this idea from a welfare perspective. Therefore, taking your scheduled breaks through the day is important. Of course, you can claim over time where you've come in early or worked late due to a busy period or supporting someone else's role while they are off. Ultimately, we want you to continue to enjoy your role and to attend work consistently, whilst being both healthy and productive.'

57. On the 25 January 2021 the Claimant emailed the Second Respondent to say that she was struggling with her mental health [P.266]. The First Respondent wrote to the Claimant by email on 26 January asking her to attend an occupational health appointment [P.265] and confirmed that due to the deterioration in her health, and the setting of targets being ineffective they now needed her to be assessed by an occupational health specialist.

58. The Claimant responded via WhatsApp the following day to say she felt ready to return to work but did not thereafter in fact ever return up until the date of her resignation and throughout that period she submitted certificates stating that she was unfit for work due to *'anxiety and SVT'*.

59. Throughout the period the First Respondent wrote to the Claimant on various occasions, including by email on 8 February 2021 inviting her to a meeting to discuss her absence (her most recent sickness certificate had

expired and the Claimant had not been in touch to say she would not be coming in that day) [P.271], and they made clear the purpose of the meeting was to '..discuss your current situation as a matter of urgency and look to secure your agreement to commission an Occupational Health Report, so we can properly assess your situation and understand if there are ways we can try to assist you.'

60. The Claimant declined a meeting with the Second Respondents occupational health advisors on the 9 February [P.270], saying: -

'Please see attached doctors note. I would like to delayed any meetings as I am not in the right frame of mind.'

61. On the 14 February 2022 [P.270] the Second Respondents wrote to the Claimant and said the following: -

"We are sorry to learn that your condition is serious enough to warrant a further 4 weeks off work. Unfortunately, the company is not in a position to wait until 5/3, or potentially longer, before it can begin investigations into possible adjustments/prognosis. If you're unwilling or unable to participate in an occupational health call, despite being well enough to attend meetings with your own GP, then we will have to make decisions based on the information we have available, which may be disadvantageous to yourself. We clearly want to avoid this and ensure we have full visibility of your position."

We did not find that this was an improper email to send to the Claimant which was discriminatory in any way. The Second Respondent was simply warning the Claimant of the potential consequences for her of failing to engage with their occupational health advisors.

62. On 22 February 2022 the Second Respondent received a letter from a solicitor instructed by the Claimant alleging disability discrimination, and that the First and Second Respondents had made her health deteriorate [P.275]. The letter nevertheless emphasised that the Claimant loved her job and wished to return, but that all future correspondence should be directed via her legal representative. The letter stated that the Claimant would be willing to participate in an Occupational Health assessment. The letter also made a data subject access request on behalf of the Claimant.

63. On the 1 March 2022 [P.296] the solicitors for the Respondents replied to the Claimants solicitors refuting the allegations made and set out as follows in relation to her absence record: -

'Further, it is notable that the 31 days of absence taken by your client over the last year relate to a broad range of ailments including a sore toe, an allergic reaction, a sore throat and several migraines. Just 8 of her 31 days of absence were reported as being 'heart related'. Further, of her 94 days

absence over 2 years only 21.75 were reported as being 'heart related', so fewer than 25% in total. It is therefore unclear what adjustments may have been put in place to usefully address the significant array of ailments that have caused your client's high level of absence.'

64. The letter also requested that an Occupational Health assessment takes place, a meeting is then held to discuss this, and a way forward found. An occupational health assessment was arranged for the Claimant on 11th March 2022, but she failed to attend.

65. On 16 March 2022, the Claimant received her HR file following her data subject access request which contained a number of comments about the Claimant, and we deal with our findings on these comments below. However, the Claimant contended that they were harassing and derogatory emails regarding her disability, and that there were discussions about her health which she alleged were done in a derogatory manner, by other staff members and also on one occasion with a customer.

66. The Second Respondent then arranged a second occupational health assessment for the Claimant on 17 March 2022. The Claimant again failed to attend this occupational health assessment [P.311].

67. On 17 March 2022, the Second Respondent wrote to the Claimant through their representative again, stating that she had failed to attend two pre-arranged occupational health assessments [P.311]. They asked them to confirm why their client has failed to attend the appointment that morning and whether she had any intention of attending if their client rescheduled.

68. On 25 March 2022 [P.312], the Second Respondent wrote to the Claimant through their representative and stated that if there were not any measures that they could reasonably take to assist the Claimant to return to work, and to return reliably, then she may be dismissed on ill health capability grounds. They went on to say: -

"Our client hopes this will not be necessary, but your client's engagement with Occupational Health is critical if this outcome is to be avoided."

69. We did not find any of the communications that took place in January, February and March 2022 in relation to the Claimants return to work amounted to threatening the Claimant she would lose her employment, but instead they were reasonable warnings of what may happen if she would not agree to be assessed by occupational health. We found that all that had taken place was the initial meeting on the 21 December 2021 where her absence was discussed, and that thereafter in January 2022 she was then asked to engage with the Second Respondent by attending an occupational health meeting. No formal sickness review meetings with the Second Respondent ever took place nor was she subjected to any formal warnings. While the Claimant agreed in principle to attend with occupational health she never then attended any of the arranged meetings.

70. The Claimant then resigned from her role with immediate effect on 26 April 2022 [P.315].

Working from Home, and making up for time off sick by working through breaks

71. The Claimant accepted and we found that she had never made a flexible working time request. The evidence showed, and we found, that she had only discussed it informally with Carolyn Biddlestone. When the Claimant was cross-examined on this and why she didn't put in a flexible working time request she said she didn't know. When she was asked whether she knew that Sandra Walker working from home was due to a flexible working request and whether she knew that she said no. In any event while the Claimant asserted 70% of her role could be done from home with the remainder being required to be done in the office, we did not find it was commercially viable for the Second Respondent to arrange her workload in that way. We found part of her job involved taking orders from her desk to other parts of the premises and we did not find operationally that on the days she worked at home that the Second Respondent would be able to work around her absence.

72. Counsel submitted that the Claimant never made a formal flexible working request and without a request from the Claimant the Second Respondent could not then get occupational health advice on any such request to work from home.

73. It was also not established in evidence that the Claimant was missing work because she couldn't commute into work, due to being too dizzy to drive, but was otherwise well enough to work. We found that the text messages talked about migraines and personal issues and stressful issues at home, but we did not find that at any point she told the Second Respondent that she could work from home but was not well enough to drive to work, and requested permission to work from home on days she felt too dizzy to drive.

74. We found that working from home was not a reasonable adjustment ever requested formally by the Claimant, but in any event we found that it was not a reasonable adjustment the Second Respondent should have made.

75. In relation to the reasonable steps the Claimant says should have been taken to allow her to make up her sickness absence by working earlier and later and also missing breaks we did not find that this was a reasonable step that the Second Respondents should have had to take, and in any event we found that there was no evidence this was ever requested by the Claimant. We did not find that, while it had been allowed in the past, that the Second Respondent should have had to formalise this practice and allow the Claimant to do it going forward.

Communications between the management team

76. On the 16 March 2002 Claimant received the result of her data subject access request from the Respondent. In that documentation were various communications about the Claimant which she contended amount to harassment or were discriminatory and amounted to less favourable treatment arising from disability.

77. On the 17 January 2022 it was not in dispute that Andy Farmer, responded to an email regarding the Claimant's absence and said *'How typical once again.'*[P.250] We found this was an inappropriate remark by Andy Farmer to make about the Claimant's absence as it tended to suggest she was using her disability as an excuse to stay at home.

78. On the 17 January 2022 it was not in dispute that Pete Binger sent an email at 13:43 regarding a discussion with a customer who said that regarding the Claimant *'he guessed Michelle off ill 'again"* and that he stated *'she [C] seems to be ill a lot'*, and that he didn't want his order delayed [P.255]. We did not find any evidence that the customer was induced by the First or Second Respondent to make these comments about the Claimant.

79. On the 19 January 2022 it was not in dispute that there was an email chain between Sandra Walker and Carolyn Biddlestone saying, *'is Michelle off sick', 'yes AGAIN!!' 'OMG what is the matter with her now' 'believe its mental health now';* [P.257 & 258]. We found these were inappropriate remarks by those employees to make about the Claimant's absence as it tended to suggest she was using her disability as an excuse to stay at home. We deal with this in more detail below.

80. On the 21 January 2022 it was not in dispute that there was an email chain between Carolyn Biddlestone and Andy Farmer saying, "M has been off all week" and a reply of *"FFS" [P.260].* We found this was an inappropriate response by Carolyn Biddlstone about the Claimant's absence as it tended to suggest exasperation towards the Claimant and that she was using her disability as an excuse to stay at home. We deal with this in more detail below.

81. On the 25 January 2022 it was not in dispute that there was an email chain between Sandra Walker and Pete Binger regarding the Claimant's absence where it was said that *"it's a shame she is so unreliable"* [P.263]. We found this was an inappropriate remark by Sandra Walker to make about the Claimant's absence as it tended to suggest she was using her disability as an excuse to stay at home and was an unreliable employee. We deal with this in more detail below.

82. On the 26 January 2022 in an email from the First Respondent to the Claimant the following was said [P.265]: -

"… we do however have a business to run and as we have previously discussed with you, your reliable attendance is important…"

"…we do have to balance the impact of your unplanned absences on business operations and the pressure it places on the rest of the team against our duty of care towards you…"

"… so far setting targets for your attendance has not worked because your health has deteriorated further since our last meeting…"

"… it is important that we understand how likely it is that you will be able to attend work reliably in the future …"

We did not find that there was anything discriminatory or harassing about this email and we found that it was simply the First Respondent explaining to the Claimant the impact of her absences on the Second Respondent.

83. It was not in dispute that on the 8 February 2022 an email from was sent by the First Respondent stating that, [P.272],

'we are recording today as an unauthorised absence" and "… this lack of communication makes operational planning all but impossible for the business and places an unfair burden on your colleagues as well as a knock-on effect on our customer service."

84. We did not find that this was an inappropriate or discriminatory email as it was simply the First Respondent communicating on behalf of the Second Respondent with the Claimant about her sickness absence and the impact on its business and their employees. We deal with this in more detail below.

85. We had regard to the messages then exchanged between Carolyn Biddlestone and the Claimant. We noted that the original message by the Claimant was sent on the 9th of February 2022 [P.98] saying that she had had a panic attack and then forget to message her so wouldn't be coming into work the next day.

86. We noted that Carolyn Biddlestone responded with a comment *'I'm going back to bed'* followed by a bed icon [P.99], and a laughing emoji, to which the Claimant then responded with a laughing emoji and we found that the nature of this interaction was that it was a joke made by Carolyn Biddlestone to which the Claimant responded in a humorous way. We did not find that these messages and the response from Carolyn Biddlestone amounted to harassment and in any event the laughing emoji sent by the Claimant back to her did not indicate that she was offended by it. We deal with this in more detail below.

87. It was not in dispute that the next day on the 10 February 2022 in an email from Pete Binger to Sandra Walker at 10:12 it was said "no Michelle now until early March *…" and that Sandra replied of "OMG! I doubt she'll come back then, seems to be playing the mental health card."* [P.267] We found

this was an inappropriate remark by Sandra Walker to make to Pete Binger about the Claimant's absence as it tended to suggest she was using her disability as an excuse to stay at home. We deal with this in more detail below.

88. On the 11 February 2022 it was not in dispute that Carolyn Biddlestone forwarded to Pete Binger a WhatsApp with a screenshot of the Claimant's Facebook profile with a laughing emoji [P.99]. This was a reference to a post made by the Claimant on her Facebook page where she posted a photograph of herself where she had face paint on with her nephew, Mason, who was preparing to celebrate his sixth birthday that weekend.

89. We went on to look at the forwarding of the Claimant's Facebook profile to Pete Binger by Carolyn Biddlestone and noted that this took place two days later on the 11 February 2022 [P.99]. The Claimant had taken offence at the screenshotting of her social media pages, but she was clearly friends with Carolyn Biddleston on Facebook or at least did not have privacy settings restricting the viewing of her page by others. We asked ourselves whether that was conduct that could amount to harassment. We had regard to the fact that the Second Respondent did have concerns about her attendance record and some of the absence was non-disability related and we found they had the right to be concerned about her absence from work and there was nothing wrong with her manager Carolyn Biddleston forwarding this to Pete Binger and that this was not conduct that amounted to harassment. We did not find screenshotting her Facebook page and forwarding it to Pete Binger in the context of management discussing her absence from the workplace was harassment of her for reasons we deal with in detail below.

Non-Payment of Bonus

90. The Second Respondent operated an annual bonus scheme based on the company performance for each financial year. In previous years the Claimant received the following amounts: -

    90.1 28/05/2020 - £156.13 which was in relation to working through Covid.

    90.2 28/08/2020 - £270.00 as part of the annual bonus scheme based on company performance. At this time the Claimant had only been employed for around 1 month.

    90.3 28/07/2021 - £5000 annual bonus based on company performance.

91. The Claimant remained employed throughout the financial year 01.4.21 to 31.03.22 and so contended that she should have been paid her annual bonus but never was.

92. The Respondent gave evidence that the reason for the timing of the bonus payment in July 2021, was due to the fact that there had been a cyber-attack that year, and the Claimant accepted this in cross examination.

93. The Claimant left her employment in late April 2022 before a bonus was calculated or paid to serving employees, and it was later paid in August 2022. It was said that in its twenty two years of trading there was no precedent for the Second Respondent to make a payment of a discretionary bonus to any employee who had left the business at the payment date. They stated that the bonus was calculated in the month it is paid and they had never taken account of any member of staff who was no longer on the payroll. They pointed to the fact that another member of staff, Zac Hill, resigned from his position with the company on 28 February 2022 and he was not paid a bonus either. We accepted the Second Respondents evidence on this issue and found that there was no set date for payment of the bonus and that at no time in the past had they paid an employee who had left, at the time of payment, the discretionary bonus.

94. The Claimant's case was that she was previously paid a bonus on 28 May 2020 [P.95] and 28 July 2021 [P.96] which she asserted evidenced that she was not paid in August each year as was suggested by the Second Respondent. She pointed to the evidence that in the previous year she had been paid in May 2020 and July 2021 as opposed to the bonus payment being delayed, she said until August 2022, after she left in April 2022. However we did not find this evidence instructive in particular because whether it was usually paid in May or July, as in previous years, or in August in 2022 in her case all of these months were after she left on the 26 April 2022 so we found the bonus would not normally have been declared for the financial year ending 5 April 2022 by the time she left on the 26 April 2022, only three weeks later.

95. There were no scheme rules put forward by the Claimant as none existed it being an entirely discretionary bonus [P.89]. Her contract stated that: -

'A personal performance bonus may be paid to you from time to time at the company's absolute discretion.'

96. We also had regard to the payments made to other employees who also left in 2022 [P.74-75]. We found the failure to failure to pay any bonus to the Claimant was simply because it was declared and paid after she had left, and this was consistent with non-payment of the bonus to the other two other employees who had also left. In the absence of scheme rules setting out conditions for entitlement there was no evidence the non-payment of the bonus was linked to the Claimant's disability.

97. In any event during evidence the Claimant asserted that she believed she was not paid the bonus due to raising a grievance. This particular assertion could only amount to a claim of victimisation in any event and her application to add a claim of victimisation was refused as set out above in the introduction to this Judgment.

98. We found that this was a discretionary bonus, and the Claimant was not paid it due to no longer being an employee by the time the bonus was paid.

Section D

The Law and Conclusions

Jurisdiction and Time Points

Disciplinary Processes and Dismissal

99. ACAS commenced against the First Respondent on the 29 March 2002 and ended on the 7 April 2022. Given the date the claim form was presented and the dates of early conciliation, any complaint against the First Respondent about something that happened before 28 December 2021 may not have been brought in time.

100. ACAS commenced against the Second Respondent on the 21 March 2002 and ended on the 7 April 2022. Given the date the claim form was presented and the dates of early conciliation, any complaint against the Second Respondent about something that happened before 22 December 2021 may not have been brought in time.

101. We had to consider whether the Claimant could prove that there was conduct extending over a period which was to be treated as done at the end of the period ending on both the 22 December for claims against the Second Respondent and the 28 December 2021 for the First Respondent, and whether such conduct was accordingly in time pursuant to s123(3)(a) of the EqA 2010? ('EqA')

102. If the test at above was not made out, we then had to consider whether any complaint was presented within such other period as the Tribunal consider just and equitable pursuant to s123(3)(b) EqA?

103. Pursuant to s.123 of the EqA 2010 it is provided that: -

(1) … proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period.

Detriment and Harassment

104. S.212(1) EqA provides that the concept of 'detriment' does not include conduct that amounts to harassment. This means that as in this case where both harassment and direct discrimination claims have been brought for the same incidents and claims they are generally speaking mutually exclusive.

105. Under S.39(2) of the EqA, discrimination claims may be brought in the workplace in relation to various situations such as the terms of employment, opportunities for promotion, dismissal and 'any other detriment'. Claims brought under the last limb are therefore based on detriment and therefore cannot also form a harassment claim. In short, a direct discrimination claim, and a harassment claim could not both be upheld in respect of the same issue.

106. In relation to the Claimants claims for Unfavourable treatment arising from disability under s.15 of the EqA we noted that the concept of unfavourable treatment does not have a formal definition in the EqA. However, the EHRC Employment Code indicates that unfavourable treatment should be construed synonymously with 'disadvantage', and any issue arising where the individual reasonably feels that he or she has suffered a detriment should be covered — **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003** ICR 337, HL.

107. In relation therefore to the Claimants claims being brought under both s.13 and s.26 thereby being mutually exclusive, we also concluded that the same applied to claims brought both under s.15, and s.26 and we concluded that parliament cannot have intended that a Claimant should be able to seek double recovery by succeeding under both heads of claim. We therefore concluded that where the Claimant did succeed on some s.26 harassment claims, as set out below, she could not also succeed on those claims under s.15 also as to do so would give her double recovery in terms of injury to feelings.

Knowledge of Claimant's Disability of Anxiety and SVT – Did the Respondent have knowledge of the Claimant's disability at the relevant time?

108. The EHRC Employment Code states when such knowledge is imputed to the employer (see para 6.21) and as established in **Hammersmith and Fulham London Borough Council v Farnsworth** [2000] IRLR691 EAT. In this case the employer instructed an occupational health physician, to advise whether the employee was medically fit. The tribunal found that the local authority was fixed with the occupational health advisers' actual knowledge of the employees' disability in her capacity as its agent. The local authority could not, therefore, rely on a lack of knowledge to escape liability for breach of the duty to make reasonable adjustments. This conclusion was upheld on appeal by the Employment Appeal Tribunal.

109. The Respondent conceded that the Claimant was a disabled person for the purposes of s.6 EqA 2010, by virtue of her Anxiety and SVT in their closing submissions from the date that the Claimant discussed with Carolyn Biddleston going to the hospital, as set out at paragraph 30 above, and in relation to her tests on her heart as of the 9 February 2021.

110. The Respondents denied actual knowledge of her disability during the material time, this being during the Claimant's employment. However, the Respondent conceded imputed knowledge of the Claimants employment from the date she told Carolyn Biddleston that she was attending hospital for tests on her heart as at the 9 February 2021 [P.184] and as set out at paragraph 30 above for her claims under s.15 and s.20/s.21.

111. In any event we found, despite the admission that the Respondents had imputed knowledge of her disability relating to her heart on the 9 February 2021, we also found that they had imputed knowledge of the Claimants disability of anxiety which was part of her disability on the earlier date of the 5 November 2020. On this date, as set out at paragraph 27 above, the Claimant told Carolyn Biddlestone that [P.184]: -

'Going to be slightly late 20/30 minutes, got to pop into the GP surgery, they called me yesterday on withheld number and left a voicemail, didn't bother answering it as I thought it was PPI crap. I need to have a mental health review before picking up my next lot of anxiety tablets'.

112. We found she was disabled throughout the period of her employment with the Second Respondent, and that such knowledge was imputed to the First and Second Respondent from the 5 November 2020 in relation to her anxiety and the medication she was taking for that, and from the 9 February 2021 for her heart condition of SVT.

113. Counsel for the Respondent said that as to the First and Second Respondents denial of actual knowledge of her disability this mattered as in a claim for direct disability discrimination under s.13 in order for the Claimant to prove she was treated less favourably because of her protected characteristic she must prove actual knowledge in the mind of the decision makers of the Second Respondent this being Pete Binger, and also in the mind of the First Respondent. Having found that the paramedics attended and could find no physical cause for the Claimants collapse at work we did not find that this incident of itself amounted to proof of actual knowledge by the First Respondent, or by Pete Binger of the Second Respondent, that she had a disability of SVT and anxiety as no medical cause could be found that day. In addition, the intermittent absences of the Claimant did not lead to any formal occupational health assessment of her prior to her resignation, albeit the First and Second Respondent did try to instigate this in early 2022 but the Claimant resisted their attempts.

114. As the Claimant had never attended any occupational health appointments whereby the Second Respondent was advised of her

disability we asked ourselves if the circumstances surrounding the Claimants disability and the event in question when an ambulance had to be called at work amounted to direct knowledge of the Claimants disability in the mind of the First and Second Respondent. Whilst it was not in dispute that the Claimant did have conversations from time to time about investigations into her heart with Pete Binger of the Second Respondent there was no definitive evidence that he knew these investigations established the Claimant had a disability. We therefore found the First and Second Respondent did not have actual knowledge of the Claimants disabilities.

Direct Discrimination Claims

115. Section 13 of the EqA 2010 provides: -

> 13. Direct Discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

116. In cases of alleged direct discrimination, the Tribunal is focused upon the 'reasons why' the Respondent acted (or failed to act) as it did. That is because, other than in cases of obvious discrimination (this is not such a case), the Tribunals will want to consider the mental processes of the alleged discriminator(s): **Nagarajan v London Regional Transport** [1999] ICR877.

117. In order to succeed in his claims under the EqA the Claimant must do more than simply establish that she has a protected characteristic and was treated unfavourably: **Madarassy v Nomura International Plc** [2007] IRLR246. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the EqA 2010, but also long-established legal guidance, including by the Court of Appeal in **Igen v Wong** [2005] ICR931. It has been said that a Claimant must establish something "more", even if that something more need not be a great deal more: Sedley LJ in **Deman v Commission for Equality and Human Rights** [2010] EWCA Civ.1279**.** A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a prima facie case.

118. It is for the Tribunal to objectively determine, having considered the evidence, whether treatment is "less favourable". Whilst the Claimant's perception is, strictly speaking, irrelevant, her subjective perception of her treatment can inform our conclusion as to whether, objectively, the treatment in question was less favourable.

119. The grounds of any treatment often must be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact identifying 'something more' from which the inference could properly be drawn. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not had the relevant protected characteristic: **Shamoon v RUC** [2003] ICR337.

120. 'Comparators', provide evidential material. But ultimately, they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case disability. The usefulness of any comparator will, in any case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

121. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, as in this case, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise, some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of practice or adverse and discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, suffice.

122. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

123. It is only once a prima facie case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: **Madarassy v Nomura** [2007] EWCA Civ.33.

Conclusions and applying the law to the s.13 Claim

124. In our discussions regarding the Claimant's direct discrimination complaints, we have held in mind that we are ultimately concerned with the following alleged less favourable treatment: -

124.1 Did the First Respondent single the Claimant out to impose an absence plan requiring the Claimant to have no days off for an eight-week period from 4 January 2022 onwards;

124.2 Did the First Respondent in January, February and March 2022 send the Claimant emails / text messages with threats that the Claimant would lose her employment;

124.3 Did the first Respondent fail to pay the Claimant's bonus for the tax year to March 2022.

125. As we found that the First and Second Respondents did not have actual knowledge of the Claimants disability these claims must fail. If the First and Second Respondent did not actually know of the Claimant's disability then the 'reason why' she was treated the way she was in relation to the imposition of the eight week absence plan, the communications she received prior to her dismissal, and the failure to pay her a discretionary bonus cannot therefore have been because of her disability if they did not know of it.

126. We found that the burden of proof did not even pass to the First and Second Respondent in accordance with **Madarassy v Nomura** [2007] EWCA Civ.33 as no prima-facie case was established on this claim by the Claimant and which meant that the First and Second Respondent did not have to prove a non-discriminatory reason for the treatment.

127. In any event, and regardless of our conclusions that the First and Second Respondent did not have actual knowledge of the Claimant's disabilities, and that the burden of proof did not therefore pass to the Respondents, the Claimants case was that Carolyn Biddleston was in the same circumstances as her, but she was treated less favourably than Carolyn Biddlestone. In essence she said that Carolyn Biddleston had nearly the same amount of sick leave as she did. However, we found that at the very least Carolyn Biddleston had either 4.5 days less sick leave than her or 10 days less sick leave than her depending on how you analysed this as set above.

128. We had regard to the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL11, [2003] ICR337 where it was stated that:

> "110. ... 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."

129. We also had regard to the case of **MacDonald v MoD** [2003] ICR937, HL**,** where it was stated that:

> "All the characteristics of the complainant which are relevant to the way his case was dealt with must also be found in the comparator."

130. Counsel submitted that the Claimant's chosen comparator's circumstances were materially different as her sick leave was less than the Claimants at the time the absence review meeting took place, and the absence management plan formed by this time arose when the difference between the Claimant and Carolyn Biddleston was either one week or 10 days.

131. We found the circumstances between the Claimant and Carolyn Biddleston were materially different due to the fact the Claimant had taken more sick leave by at least more than four and a half days of her chosen comparator and we did not therefore find she was treated in a materially different way to her chosen comparator and so we found the Claimant was not treated in a less favourable way to her comparator.

132. In any event in the alternative even if she was treated in a less favourable way to Carolyn Biddlestone, we did not find it was because of her disability. We found that the reason for the matters complained of in relation to the eight-week absence plan, and the communications she received at the material time were because she had taken a high number of days off, many of which were not for reasons caused by her disability.

133. We found that only 11 days of her sickness absence out of 33.5 days absence was due to her disability, together with 15 days for self-isolating due to Covid and her being clinically vulnerable, but this still left 7.5 days of sporadic absence that were not disability related, and this led to necessary discussions about an eight week absence plan and communications thereafter, and also the failure to pay her a bonus were not because of her disability.

134. We also found that the reason for the communications by the Respondents was because she had refused to engage in agreeing to see the occupational health advisers of the Respondent. The reason she refused to engage was in our view that she Claimant had become locked into a battle with the Respondents over this issue. She formed the view that she should only be required to attend once she was better. This demonstrated to this Tribunal a fundamental misunderstanding of the purpose of the occupational health meeting which was to assess what was causing her current illness and to identify adjustments that could be made to accommodate her. This refusal to engage with occupational health led to entirely understandable and reasonable communications with her by the First and Second Respondent, and so we did not find the reason for this treatment of her in relation to the eight-week plan, and subsequent communications were because of disability, but instead it arose from the Claimants refusal to engage with the occupational health advisors of the Second Respondent.

135. In relation to the issue of the bonus and not being paid the Claimant did not identify a comparator. However, two other employees were shown not to have been paid a bonus after they left as they too left before the due date of the bonus being paid to other employees. This was a discretionary bonus, and the Claimant did not establish that the reason for failing to pay it to her was because of her disability. We found that the reason she was not paid it was because she resigned on the 26 April 2022, only some three weeks after the end of the financial year and before the bonus was declared in August 2022 that year. We did not find that the Second Respondent deliberately pushed the date of payment back to avoid paying the Claimant.

136. We also considered for each allegation of direct disability discrimination whether a hypothetical comparator with absence like the Claimants would have been treated any differently, and more favourably and we found that they would not have been treated more favourably.

137. Accordingly, the claim for direct discrimination under s.13 is not well-founded and fails.

Harassment

138. S.26 of the EqA 2010 provides as follows: -

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

……

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

139. In considering this claim of harassment we must have regard to the three essential elements of a harassment claim under S.26(1) EqA which are as follows:

139.1 unwanted conduct

139.2 that has the proscribed purpose or effect, and

139.3 which relates to a relevant protected characteristic.

140. We reminded ourselves that, as per the case of **Driscoll (née Cobbing) v V&P Global Ltd and anor** 2021 IRLR 891, EAT that the

harassment provisions in the Equality Act 2010 (EqA) must be construed purposively, so as to conform with all relevant EU directives (a position unaffected by Brexit owing to S.5(2) of the European Union (Withdrawal) Act 2018.

Unwanted Conduct

141. In relation to what could amount to unwanted conduct we had regard to the case of **Nixon v Ross Coates Solicitors and anor** EAT 0108/10 which related to office gossip. In that case whilst it related to constructive dismissal, which in this case such a claim had been withdrawn by the Claimant, it was similar in that there the Claimant had to contemplate returning to an office in an atmosphere she found unfavourable due to rumours being spread about her pregnancy. In this case there was, as revealed by the results of the data subject access request, conversations going on about the reasons for the Claimant's absence and some of those comments we find above, and below, were inappropriate and amounted to unwanted conduct and the creation of the proscribed environment. We deal with each of those comments in this section of the Judgment, but we found the comments amounted to unwanted conduct from the Claimant's point of view. We reminded ourselves that this is a subjective test as per the case of **Thomas Sanderson Blinds Ltd v English** EAT 0316/10, but that there is also an objective element to the test.

142. We also had regard to the case of **Gardner v Tenon Engineering Ltd ET** Case No.2374878/11: In that case the Claimant was absent from work after an anxiety attack. Her line manager, S, sent her a text message asking her to contact him, but as she was still feeling unwell, she asked her mother to phone instead. During the conversation, S told her mother that the Claimant was having a relationship with a married man. A few days later he mentioned to the Claimant's mother that he suspected the Claimant had had an abortion. The tribunal upheld the harassment claim, even though the Claimant only found out about these remarks later. We found that this had similarities with this case where the Claimant only found out about the unwanted comments about her sickness absence, on the 16 March 2022 around two to three months after they were made in early 2022, and when she read her HR file for the first time following the data subject access request.

That has the proscribed purpose or effect

143. The two limbs of the definition are disjunctive, i.e. a Claimant only has to show that the conduct had the purpose **or** effect either of violating dignity or of creating the proscribed environment — the Claimant does not have to show both.

144. We found in this case that where we find the comments did amount to harassment this was not because the conduct of the Respondent had the *purpose* of violating the dignity of the Claimant or of creating an intimidating,

hostile, degrading, humiliating or offensive environment for the Claimant. They could not have been said with the purpose of violating her dignity or creating the proscribed environment as they were said in private on the assumption the Claimant would never read the comments and discussions about her. However, we did find in some instances that the conduct of the Respondent had the *effect* of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We detail these instances below.

145. In reaching the conclusion that some in some instances comments made about the Claimant had the effect of, but not the purpose of, creating the proscribed environment we had regard to the fact that conduct that does in fact have that effect of creating the proscribed environment will be unlawful even if that was not the intention. In particular we noted that an employment tribunal that only considers whether the alleged harasser intended the conduct to have the relevant effect will have erred in law as established in the case of **Conry v Worcestershire Hospital Acute NHS Trust** EAT 0093/17.

146. In relation to the creation of the proscribed environment in some instances we had regard to the case of **Weeks v Newham College of Further Education** EAT 0630/11.where Langstaff P also pointed out that the relevant word here is 'environment', which means a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration to come within what is now S.26(1)(b)(ii) EqA.

147. In deciding whether the individual instances had the effect of violating the Claimant's dignity we also had regard to the cases of **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT where Mr Justice Underhill said, in relation to harassment on the grounds of race in that case as follows:

'Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'.

148. We also had regard to the case of **Greasley-Adams v Royal Mail Group Limited** [2023] EAT 86, where the Claimant was employed by Royal Mail as a driver. He had Asperger's Syndrome, a neurodevelopmental condition, which both parties agreed throughout proceedings amounted to a disability. Throughout an investigation, it actually became apparent that Mr Greasley-Adams' colleagues had disclosed confidential information about him to other colleagues and had made derogatory and negative comments about his disability.

149. Having become aware of his colleagues' behaviour following the internal investigation, Mr Greasley-Adams submitted a grievance to Royal Mail alleging that he had been harassed by them. The grievance was rejected. Mr Greasley-Adams then brought a number of claims against Royal Mail in the Employment Tribunal, including harassment. He argued that he had suffered harassment in relation to his disability by reason of

conduct, which he was not aware of at the time it occurred. The claims were all dismissed. Whilst the Employment Tribunal recognised that the comments made about Mr Greasley-Adams by his colleagues could be capable of creating an intimidating and hostile environment for him at work, it was not reasonable that this could have been the effect that the conduct had on him, since he was not aware of it at the time the comments were made.

150. The Claimant appealed to the Employment Appeal Tribunal (EAT) and claimed that a person's dignity could be violated even if they were not aware of the unwanted conduct at the time that it occurred. The EAT decided that these incidents could not have had the 'effect' of violating the Claimant's dignity before he actually became aware of them. It held that the perception of the person claiming harassment was a key factor in the 'test' for proving harassment, and that if there was no awareness, there could be no perception.

151. In particular however, the EAT agreed with the Employment Tribunal that when the Claimant did become aware of the acts of harassment, it was not reasonable, given the context in which he had become aware of them and the timing, to be considered as having violated his dignity at this point.

152. We noted that in the **Greasley** case the context was that the disclosure of the material arose out of an investigation and grievance. In this case the disclosure of the material arose out of a data subject access request. We considered this to be quite different to the facts in the **Greasley** case for reasons set out below.

Which relates to a relevant protected characteristic.

153. We reminded ourselves that the context in which the alleged harassment takes places is highly relevant. In **Warby v Wunda Group plc** EAT 0434/11 the context in which unwanted conduct takes place was an important factor in determining whether it is related to a relevant protected characteristic — particularly in cases where the conduct cannot be described as 'inherently' racist, homophobic, etc.

Third Party Harassment

154. One of the comments made about the Claimant was in relation to a customer commenting that the Claimant 'seemed to be off ill a lot' and in particular we refer to paragraph 79 above. The customer was a third party of the Second Respondent.

155. We had regard to the case of **Conteh v Parking Partners Ltd** 2011 ICR 341, EAT, where the EAT held that an employer could only be liable under S.3A for harassment carried out by a third party if the employer's failure to take action to safeguard the employee *itself* was related to the relevant protected characteristic and had the purpose or effect of violating

the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

156. We reminded ourselves of the case of **Bessong v Pennine Care NHS Foundation Trust** 2020 ICR 849, EAT, where the EAT noted that it was bound by the case of **Unite the Union v Nailard** 2019 ICR 28, CA, to conclude that there is no explicit liability under the EqA on an employer for failing to prevent third-party harassment.

Subjective and Objective Test

157. We reminded ourselves that the test therefore has both subjective and objective elements to it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser (A) has on the complainant (B). The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

158. The first part of the statutory test set out in S.26(4) involves examining the act from the complainant's perspective — that is, whether the complainant regarded it as violating his or her dignity or creating the proscribed environment. This is in essence a factual enquiry for this Tribunal.

159. In relation to the second part of the statutory test we reminded ourselves that the objective aspect of the test is primarily intended to exclude liability where a Claimant is hypersensitive and unreasonably takes offence. As noted by the EAT in **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT: -

'while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the… legislation…) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

It continued as follows: -

'if, for example, the tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.'

160. The Claimant relies on the following acts of unwanted conduct, and we found as follows: -

4.1.2 On 21 December 2021 the First Respondent saying to the Claimant she needed not to be absent for 8 weeks from 4 January 2022.

161. We did not find that this amounted to harassment for the following reasons: -

161.1.1 It was not conduct by the First Respondent that had the *purpose* of violating the dignity of, or of creating the proscribed environment of the Claimant. This was simply the First Respondent applying the sickness absence procedures of the Second Respondent.

161.1.2 It was not conduct that the *effect* of violating the dignity of or of creating the proscribed environment of the Claimant. In making this finding we reminded ourselves that this part of the claim must be subjected to both a subjective and objective test as follows: -

161.1.2.1 We did not find subjectively, having regard to the perception of the Claimant, for the conduct to have had the stated effect of harassing her. We find she would have known that this was simply the First Respondent applying the Second Respondents sickness absence procedures.

161.1.2.2 We did not find objectively, having regard to the circumstances of this case, for the conduct to have reasonably had the effect of harassing her in relation to the setting of a target of not being absent for 8 weeks as harassment. We find she would have known that this simply the First Respondent applying the Second Respondents sickness absence procedures. An employer must be able to encourage an employee to keep up a good work attendance, and we found the imposition of keeping good attendance at work was not in all the circumstances of this case something that could reasonably be regarded as harassment of the Claimant.

4.1.3 On the 21 December 2021 the First Respondent saying to the Claimant that the company 'needs to take control of its overall absences', that if her absences didn't improve, she would be given a warning and then dismissal.

162. We did not find that this amounted to harassment for the following reasons: -

162.1 It was not conduct by the First Respondent that had the purpose of violating the dignity of, or of creating the proscribed environment of the Claimant. We found the First Respondents purpose was to manage her sickness absence on behalf of the Second Respondent, and to warn her of the consequences of her continued absence,

which may result in her dismissal, and his purpose was not to violate her dignity or to create the proscribed environment.

162.2 It was not conduct that had the effect of violating the dignity of or of creating the proscribed environment of the Claimant. In making this finding we reminded ourselves that this part of the claim must be subjected to both a subjective and objective test as follows: -

162.2.1 We did not find subjectively, having regard to the perception of the Claimant, for the conduct to have had the effect of harassing her. We found the First Respondent was simply managing her sickness absence on behalf of the Second Respondent and was warning her of the consequences of her continued absence, and we find subjectively the Claimant would have known this.

162.2.2 We did not find objectively, having regard to the circumstances of this case, that this was conduct that reasonably had the effect of creating the proscribed environment in relation to these comments made. This was simply the First Respondent applying the Second Respondents sickness absence procedures and that he was warning her of the potential effect on her of her continued absence.

162.2.3 We found in the circumstances of this case that an employer must be able to apply its absence management procedures, and to be able to warn of the consequences of the any failure to improve their attendance at work as this is simply following best practise in the workplace according to ACAS procedures and was the application of their absence management policy.

4.1.4 On the 21 December 2021 the First Respondent saying to the Claimant that, 'some people may use things as an excuse just to stay at home.'

163. When the Claimant was cross examined about this, she repeated that this was said to her and that it was rude of the Respondent to imply that she would use her heart condition and anxiety as an excuse to stay at home. We find this comment was made to the Claimant by the First Respondent. We found that it was conduct that was related to her protected characteristic of her disability and so could amount to creating the proscribed environment. In relation to the comment, we found as follows: -

163.1 It was not conduct by the First Respondent that had the purpose of violating the dignity of, or of creating the proscribed environment of the Claimant. We found the First Respondents purpose was to manage her sickness absence on behalf of the Second Respondent, and to discuss that continued absence, and his purpose was not to violate her dignity or to create the proscribed environment.

163.2 We found however that it was conduct that had the effect of creating the proscribed environment. In making this finding we reminded ourselves that this part of the claim must be subjected to both a subjective and objective test as follows: -

163.2.1 We found that subjectively, having regard to the perception of the Claimant, that the conduct had the effect of harassing her. We found that she would have felt that the comment was directed at her and that it was implied she was using her disabilities as an excuse to stay at home.

163.2.2 We found that objectively, having regard to the circumstances of this case, that this was conduct that reasonably had the effect of harassing her in relation to this comment made. We found that the Claimant, who had a disability, who this comment was made to in a sickness absence meeting, would reasonably feel harassed. We found that she would have felt that the comment was directed at her and that it was implied she was using her disabilities as an excuse to stay at home.

163.2.3 We found in the circumstances of this case that the First Respondent did harass the Claimant by creating the proscribed environment when making a comment like this in the context of a sickness absence procedure, and which reasonably in all the circumstances of this case had the effect of creating the proscribed environment.

4.1.5 On the 21 December 2021 telling the Claimant she can no longer make up time for sick days.

164. We found that this was not conduct by the First Respondent that had the purpose of violating the dignity of, or of creating the proscribed environment of the Claimant. We found the First Respondents purpose was to manage her sickness absence on behalf of the Second Respondent, and to make clear how it would be managed going forward which included stopping the Claimant 'making up' days off sick by working longer hours when she attended at work.

165. We found that it was not conduct that the effect of violating the dignity of or of creating the proscribed environment of the Claimant. In making this finding we reminded ourselves that this part of the claim must be subjected to both a subjective and objective test as follows: -

148.1.1 We did not find subjectively, having regard to the perception of the Claimant, for the conduct to have had the effect of harassing her. We found the First Respondent was simply managing her sickness absence on behalf of the Second Respondent and this included stopping the Claimant 'making up' days off sick by working longer hours when she attended at work, and that she would have understood that the Second Respondent was now

stopping this informal practice that had developed. We also found that the Second Respondent was taking steps to ensure employees took their breaks, did not work excessively long days and were trying to protect the health and safety of the Claimant and others.

148.1.2 We did not find objectively, having regard to the circumstances of this case, that this was conduct that reasonably had the effect of creating the proscribed environment. This was simply the First Respondent applying the Second Respondents sickness absence procedures and that and this included stopping the Claimant 'making up' days off sick by working longer hours when she attended at work.

148.1.3 When we found that this was not conduct that amounts to harassment we found that there was no formal policy that set out that people could be off sick and come in early and stay late, and we found that this did not amount to harassment.

4.1.6 On 12 January 2022 the Respondent sending letter confirming points discussed in a meeting on the 21 December 2021 where the First Respondent stated to the Claimant that "… if you are genuinely unwell and can't come in, then you should take a sick day" thereby implying the Claimant's absences / illness was not 'genuine' [P.249].

166. We found that this was not conduct by the First Respondent that had the purpose of violating the dignity of, or of creating the proscribed environment of the Claimant. We found the First Respondents purpose was to manage her sickness absence on behalf of the Second Respondent, and to make clear how it would be managed going forward. We found the purpose of this remark was to remind the Claimant that if she was genuinely unwell, she should take a sick day, and was not said with any purpose to violate her dignity or to create the proscribed environment.

167. We found that it was not conduct that the effect of violating the dignity of or of creating the proscribed environment. In making this finding we reminded ourselves that this part of the claim must be subjected to both a subjective and objective test as follows: -

150.1.1 We did not find subjectively, having regard to the perception of the Claimant, for the conduct to have had the effect of harassing her. We found the First Respondent was simply managing her sickness absence on behalf of the Second Respondent and this included saying that if she was genuinely unwell she should take a sick day [P.249], and we found she would have known that the word 'genuinely' was not directed at her so as to have the effect of offending her.

150.1.2 We did not find objectively, having regard to the circumstances of this case, that this was conduct that reasonably had the effect of harassing her. Whilst we found that the word 'genuinely' may have been unwelcome to the Claimant we also had

regard to the circumstances in which this comment was made and we did not find it reasonable for the Claimant objectively to have been offended by the word as this comment was made to her in the context of an absence record where some of the absences were non-disability related and in the Second Respondents view were not justifiable for taking time off. This was simply the First Respondent applying the Second Respondents sickness absence procedures.

4.1.1 & 4.1.7 - Text messages and emails between January, February and March 2022 regarding the Claimant returning to work and the allegation by the Claimant that this amounted to threatening the Claimant with losing her employment.

168. We found that this was not conduct by the First Respondent that had the purpose of violating the dignity of, or of creating the proscribed environment of the Claimant. We found the First Respondents purpose was to manage her sickness absence on behalf of the Second Respondent, and we found that there was reasonable communication with her about her sickness absence by the First Respondent on behalf of the Second Respondent. We found that the First Respondent on behalf of the Second Respondent was trying to manage her absence in a small family business and was trying to arrange an occupational health assessment of her to see if any adjustments were required to accommodate her disability.

169. We found that it was not conduct that the effect of violating the dignity of or of creating the proscribed environment of the Claimant as follows: -

169.1.1 We did not find subjectively, having regard to the perception of the Claimant, that the conduct had the effect of creating the proscribed environment. We found the First Respondent was simply managing her sickness absence on behalf of the Second Respondent and this included corresponding with her about her absence and attendance with occupational health and that none of the correspondence amounted to *'threatening her with losing her employment'.* The First Respondent on behalf of the Second Respondent was simply warning of what may happen if she did not engage with their occupational health advisors and that ultimately, they may have to dismiss her on the grounds of ill health.

169.1.2 We did not find objectively, having regard to the circumstances of this case, that this was conduct that reasonably had the effect of harassing her. This was simply the First Respondent applying the Second Respondents sickness absence procedures and this included corresponding with her about her absence and attendance with occupational health. We found that the First Respondent on behalf of the Second Respondent was simply warning of what may happen if she did not engage with their occupational health advisors and that

ultimately, they may have to dismiss her on the grounds of ill health.

4.1.9 On the 17 January 2022, Pete Binger sending an email at 13:43 regarding a discussion with a customer regarding C being ill 'again' and 'she [C] seems to be ill a lot' [P.255].

170. This comment was made by a third party this being a comment by an unnamed customer. Whilst there was some evidence that the customer had been told that the Claimant was off ill, and we make a finding that he must have been told in the past that she was off ill, as he used the word 'again', we did not find that this amounted to harassment to advise a customer in the past, and on this occasion, that the Claimant was off ill when he phoned in to enquire about his order.

171. We found that this was not conduct by the Second Respondent that had the purpose of violating the dignity of, or of creating the proscribed environment of the Claimant. We found the Second Respondents purpose was to simply explain to the customer why she was not there to speak to the customer about his order.

172. We had regard to the case of **Conteh** above, where the EAT held that an employer could only be liable under S.3A of the EqA for harassment carried out by a third party if the employer's failure to take action to safeguard the employee *itself* was related to the relevant protected characteristic and had the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. We did not find that the Second Respondent advising a third party she was off sick when they phoned in to enquire about their order was itself related to her disability. We found it was related to the Second Respondents desire to explain to the customer why the person they spoke to before about their order, and who usually dealt with their order, was not there and was said by way of explanation to the customer so as to advise the customer about the progress of the order and was not related to the Claimant's disability in the strict legal meaning of the word.

173. We asked ourselves if the Second Respondent had failed to take action in some way that was *itself* related to her disabilities. We did not find that there was any failure to take action in any way in relation to the customer's comment that he was '*guessing she was off ill again'* and '*she seems to be ill a lot.'* We found the Second Respondent could not have anticipated the customer would make those comments and so they could not have failed to take action, and therefore we found that no liability attached to them in this regard.

174. We also reminded ourselves of the case of **Bessong** above, where the EAT noted that it was bound by the case of **Unite the Union v Nailard** 2019 ICR 28, CA, to conclude that there is no explicit liability under the EqA on an employer for failing to prevent third-party harassment.

175. *4.1.8 On the 17 January 2022, Andy Farmer responding to an email regarding the Claimant's absence (relating to the Claimant's disabilities anxiety and SVT) saying "How typical once again" [P.250].*

4.1.10 On 17 January 2022, an email chain between Andy Farmer and Carolyn Biddleston at 09:27, "Michelle not in again" and a reply of "how typical once again";

4.1.11 On the 19 January 2022, an email chain between Sandra Walker and Carolyn Biddlestone saying, 'is Michelle off sick', 'yes AGAIN!!' 'OMG what is the matter with her now' 'believe its mental health now'; [p.257 and P.258].

4.1.12 On the 21 January 2022 an email between Carolyn Biddlestone and Andy Farmer saying, "M has been off all week" and a reply of "FFS"; [P.260].

4.1.13 On the 25 January 2022, an email from Sandra Walker to Pete Binger regarding C's absence saying "it's a shame she is so unreliable"; [P.263].

4.1.20 On 10/02/22, an email from Pete Binger to Sandra at 10:12 to say "no Michelle now until early March …" with a reply of "OMG! I doubt she'll come back then, seems to be playing the mental health card" [P.267];

176. In relation to the comments made about the Claimant by employees of the Second Respondent as set out above in paragraph 175 we found that all these emails were the email version of a 'roll of the eyes' by these employees about the Claimant and had the effect of creating the proscribed environment and of harassing her for the reasons we set out below.

177. It was not however conduct by the First Respondent that had the purpose of violating the dignity of, or of creating the proscribed environment of the Claimant. They could not have been made for the purpose of violating her dignity as they made them in private and never intended that she should know about them.

178. However, we found that those comments were conduct that had the effect of creating the proscribed environment of, the Claimant. In making this finding we reminded ourselves that this part of the claim must be subjected to both a subjective and objective test as follows: -

178.1 We found that subjectively, having regard to the perception of the Claimant, that the conduct had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We found that she would have felt that all the comments were implying she was using her disabilities as an excuse to stay at

home, and we found subjectively these comments had the effect of creating a humiliating environment for the Claimant at work.

178.2 We found that objectively, having regard to the circumstances of this case, that this was conduct that reasonably had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We found that she would have felt that all the comments were implying she was using her disabilities as an excuse to stay at home and on one occasion it was said that she was 'unreliable.' We found that these comments would have been humiliating for the Claimant especially as she had been absent on sick leave and was contemplating a return to work, and indeed the Respondents were trying to encourage her to engage with occupational health and return to work. In all the circumstances of this case we found these comments created the proscribed environment in that the effect on the Claimant both subjectively and objectively had the effect on her of creating the proscribed environment.

179. We had regard to the first instance case of **James v Gloucestershire County Council (Gloucestershire Fire and Rescue Service)** ET Case No. 1401690/2013. This case concerned a conversation that had taken place in secret which was recorded by the Claimant on his mobile device as he suspected derogatory conversations about him were taking place. There it was found the comments were made because of his race. They found that where the comments were made in private, they could not have had the purpose of violating his dignity or of creating the proscribed environment. However, they did find that it had the effect of creating the proscribed environment even though the conversations took place in private.

180. In that case it was found that when the remark was made to the Crew Manager, they did not remonstrate with the employee making the remark which suggested that the team leader found the remark acceptable. This had striking similarities with this case. The owner of the Second Respondent, Pete Binger, received some of the comments from his sister, Sandra Walker, He said in evidence that he would have preferred his staff not to discuss the Claimant in these terms but he provided no evidence that he took positive steps to prevent the creation of this proscribed environment.

181. Whilst being mindful of the **Greasley** there the disclosure of the material was flushed out by the grievance and the investigation and discussions taking place about the Claimant in that context. However here no grievance had been raised. The Claimant was off sick and in all the circumstances of this case, and whilst she only discovered the comments after they were made after making a data subject access request, this did amount in our judgement to the creation of the proscribed environment as the Claimant knew she was being discussed in a manner we found would have humiliated her for reasons related to her disability and suggestions were made she was not genuinely ill. This was in the context of the

Claimant being encouraged to return to work. She knew she would have to return to an environment where comments had been made about her by her colleagues in a small team which were humiliating to the Claimant and were related to her disability. We found, that objectively judged, in all the circumstances of the case, that those comments did reasonably amount to the creation of the proscribed environment and that it was reasonable judged objectively for the Claimant to feel harassed by these comments.

182. Counsel suggested that in all the circumstances of this case where management needed to discuss her absence then it was not subjectively or objectively reasonable to have the effect of harassing her and creating the proscribed environment, and that when she made the data subject access request she would have known she may read unfavourable things said about her in effect. However, we could not accept this submission. The Claimant could not be expected to know she was being discussed in these unfavourable terms prior to seeing the result of the data subject access request, and it was the manner in which she was discussed that humiliated the Claimant and created the proscribed environment and so those parts of her claim relating to those comments made about her in paragraph 175 above succeed.

4.1.14 On 26/01/2022 an email from R1 to C "… we do however have a business to run and as we have previously discussed with you, your reliable attendance is important."

4.1.15 "…we do have to balance the impact of your unplanned absences on business operations and the pressure it places on the rest of the team against our duty of care towards you…"

4.1.16 "… so far setting targets for your attendance has not worked because your health has deteriorated further since our last meeting…"

4.1.17 "… it is important that we understand how likely it is that you will be able to attend work reliably in the future …"

4.1.19.1 On 08 February 2022 an email from the Frist Respondent saying [P.271], we are "recording today as an unauthorised absence" … "… this lack of communication makes operational planning all but impossible for the business and places an unfair burden on your colleagues as well as a knock-on effect on our customer service …"

4.1.21 Email from the First Respondent sent to the Claimant on the 14 February 2022 which said comments such as: - "we are sorry to learn that your condition is serious enough to warrant a further 4 weeks off…" "…If you're unwilling or unable to participate in an occupational health call, despite being well enough to attend meetings with your own GP, then we will have to make decisions based on the information we have available, which may be disadvantageous to yourself…".

183. In all of the above comments from 4.1.14 to 4.1.21 [P.265 & P.271] we found that due to the fact that there had been some non-disability related absences, and in one case an unauthorised absence, and due to the fact that the Claimant was now signed off sick with no known prognosis about her ill health and any likely date of return then in all the circumstances of the case this was simply the First Respondent stating on behalf of the Second Respondent that it needed reliable attendance from the Claimant and we found that these comments did not amount to harassment.

184. We found that this was not conduct by the First Respondent that had the purpose of violating the dignity of, or of creating the proscribed environment of the Claimant. We found that this was simply the First Respondent managing the Claimants sickness absence on behalf of the Second Respondent.

185. We found that it was not conduct that had the effect of violating the dignity of or of creating the proscribed environment of the Claimant. In making this finding we reminded ourselves that this part of the claim must be subjected to both a subjective and objective test as follows: -

185.1 We did not find subjectively, having regard to the perception of the Claimant, that the conduct had the effect of harassing her. We found the First Respondent was simply managing her sickness absence on behalf of the Second Respondent and this included corresponding with her about her absence and its impact on her colleagues, and this was important to set out in the context of requesting her attendance with occupational health so that they could manage her sickness absence, and also they were pointing out the effect of her unauthorised absence and the Claimant would have understood that.

185.2 We did not find objectively, having regard to the circumstances of this case, that this was conduct that reasonably had the effect of harassing her. This was simply the First Respondent applying the Second Respondents sickness absence procedures and this included corresponding with her about her absence, and its impact on her colleague in the context of requesting her attendance with occupational health, and also they were pointing out the effect of her unauthorised absence and the Claimant would have understood that.

4.1.18 On 11 February 2022 Carolyn sending Pete a WhatsApp with a screenshot of C's Facebook profile with laughing emojis.

186. We had regard to the messages exchanged between Carolyn Biddlestone and the Claimant. We noted that the original message by the Claimant was sent on the 9 February 2022 saying that she had had a panic attack. We noted that Carolyn Biddlestone responded with a comment *'I'm going back to bed'* followed by a bed icon and a laughing emoji to which the Claimant then responded with a laughing emoji and we found that the nature of this interaction was that it was a joke made by Carolyn Biddlestone to

which the Claimant responded in a humorous way. We did not find that these messages and the response from Carolyn Biddlestone amounted to harassment and in any event the laughing emoji sent by the Claimant back to her did not indicate that she was offended by it.

187. We went on to look at the forwarding of the Claimant's Facebook profile to Pete Binger by Carolyn Biddlestone and noted that this took place two days later on the 11 February 2022 [P.99]. We asked ourselves whether simply forwarding a message was conduct that could amount to harassment. We had regard to the fact that the Respondent did have concerns about her attendance record and some of the absence was non-disability related and we found they had the right to be concerned about her absence record and there was nothing wrong with Carolyn Biddlestone forwarding this to another member of management Pete Binger and that this was not conduct that amounted to harassment. We found that this was not conduct by the First Respondent that had the purpose of violating the dignity of, or of creating the proscribed environment of the Claimant. They could not have been made for the purpose of violating her dignity as they made them in private and never intended that she should know about them. We found the purpose was to manage her sickness absence, and we found that this was reasonable communication about her sickness absence.

188. We found that it was not conduct that the effect of violating the dignity of or of creating the proscribed environment of the Claimant. We found that it was not conduct that had the effect of violating the dignity of or of creating the proscribed environment of the Claimant. In making this finding we reminded ourselves that this part of the claim must be subjected to both a subjective and objective test as follows: -

188.1 We did not find subjectively, having regard to the perception of the Claimant, that the conduct had the effect of harassing her. We found that Carolyn Biddleston was simply managing her sickness absence on behalf of the Second Respondent and this included corresponding with Pete Binger about her absence which included a screenshot of her Facebook page.

188.2 We did not find objectively, having regard to the circumstances of this case, that this was conduct that reasonably had the effect of harassing her. This was simply Carolyn Biddlestone, a member of the management team, communicating with Pete Binger about the issue of the Claimant's absence, and its impact on her colleagues in the context of requesting her attendance with occupational health.

<u>S.15 EqA 2010</u>

189. Section 15 of EqA 2010 provides: -

> 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.

190. In **Secretary of State for Justice and Anor v Dunn** EAT0234/16 the EAT (presided over by Mrs Justice Simler, its then President) set out the elements that must be established in a S.15 claim:

(i) there must be unfavourable treatment.

(ii) there must be something that arises in consequence of the Claimant's disability.

(iii) the unfavourable treatment must be because of (i.e., caused by) the something that arises in consequence of the disability, and

(iv) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

191. Each of these elements, together with the separate requirement in S.15(2) that the alleged discriminator must (or should) have known of the Claimant's disability, must be proven. We have already found that the Respondent must (or should) have known of the Claimant's disability, in that they had imputed knowledge of her disability at the material time.

192. It has been established that what must be shown is that the disability is 'a significant influence … or a cause which is not the main or sole cause but is nonetheless an effective cause of the unfavourable treatment as established in **Hall v Chief Constable of West Yorkshire Police** [2015] IRLR893, EAT and also in **Pnaiser v NHS England** [2016] IRLR170, EAT**.** 7.

193. In **Pnaiser,** EAT**,** Simler P at [31] gives further succinct guidance on the general approach to be taken by a tribunal under s 15, in order to distinguish it from direct discrimination. The steps set out in that judgement can be divided as follows: -

(1) Was there unfavourable treatment?

(2) What caused the unfavourable treatment?

(3) Was the cause 'something' arising in consequence of the Claimant's disability?

(4) There can be more than one link in the causation chain, but the more there are the more difficult it may be to establish causation.

(5) The causation test is an objective one.

194. This term 'unfavourable treatment' is not defined in the EqA but the Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') states that it means that the disabled person 'must have been put at a disadvantage.'

Conclusions on the s.15 claim

List of Issues – Did the Respondent subject the Claimant to the unfavourable treatment because of something arising in consequence of the Claimant's disability?

The things arising in consequence of the Claimant's disability.

195. The things (the 'somethings') arising in consequence of the Claimant's disability were identified in the List of Issues as the Claimant's sickness absence.

The Unfavourable Treatment

196. The unfavourable treatment relied on by the Claimant was as set out below and in the List of Issues [P.417 onwards.]

Legitimate aim

197. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

List of Issues

2.4.1 To manage staff absence and by extension, resourcing / operational planning, within the business.

2.4.2 To allow managers to express an opinion and have private discussions with one another about work related matters.

2.4.3 To reward past effort whilst retaining and motivating staff towards the end of the calendar year (the second Respondent's busiest period).

2.5 The Tribunal will decide in particular:

2.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.5.2 Could something less discriminatory have been done instead;

2.5.3 How should the needs of the Claimant and the Respondent be balanced?

198. We make the following findings as to the matters listed below which it was asserted amounted to unfavourable treatment: -

2.1.1 imposing an absence plan requiring C to have no days off for an eight-week period;

2.1.2 The First Respondent in January, February and March 2022 sent the Claimant emails / text messages with threats that the Claimant would lose her employment;

2.1.3 On 21 December 2021 the Frist Respondent saying to the Claimant she needed not to be absent for 8 weeks from 4 January 2022;

2.1.4 On 21 December 2021 the First Respondent saying to the Claimant that the company needs to take control of its overall absences". If C's absences don't improve, she will be given a warning and then dismissal;

2.1.6 On 21 December 2021 the First Respondent telling the Claimant she can no longer make up time for sick days;

2.1.7 On 12 December 2021 the First Respondent sending a letter confirming points discussed in meeting on 21 December 2021, and the First Respondent stating to the Claimant "... if you are genuinely unwell and can't come in, then you should take a sick day";

2.1.8 Text messages and emails between January, February and March 2022 regarding the Claimant returning to work and threatening the Claimant with losing her employment;

199. The Claimants sickness absence was something arising from her disability, and therefore the imposition of the absence plan, and communicating with her about her absence then arose from her sickness absence.

200. We find that the imposition of an absence plan and communicating with her about her absence in all the instances set out above was not unfavourable treatment. Unfavourable treatment must amount to something more than ‘minor or trivial.’ We did not find that the communications above amounted to anything more than minor or trivial.

201. In any event we found the treatment was a proportionate means of achieving a legitimate aim, in that the Respondent had the aim of managing staff absence and by extension, resourcing and operational planning, within the business. The Second Respondent was a small family run business where the absence of one member of staff would impact its ability to deliver

its services to its customers and it must be able to communicate with employees about their absence and manage such sickness absence.

2.1.5 On 21 December 2021 the First Respondent saying to the Claimant, some people may use things as an excuse just to stay at home;

202. Having found this was harassment this cannot also be a detriment and amount to unfavourable treatment.

2.1.9 On 17 January 2021, Andy Farmer responding to an email regarding the Claimant's absence (relating to C's disabilities anxiety and SVT) saying "How typical once again";

203. Having found this was harassment this cannot also be a detriment and amount to unfavourable treatment.

2.1.10 On 17 January 2022, Pete Binger sending an email at 13:43 regarding a discussion with a customer regarding the Claimant being ill 'again' and 'she [C] seems to be ill a lot';

204. Having found that no liability lies with the First Respondent for this comment made by a third party as set out in paragraph 171 above then no liability can attach to the Second Respondent for this instance of unfavourable treatment.

2.1.11 On 17 January 2022, an email chain between Andy Farmer and Carolyn at 09:27, "Michelle not in again" and a reply of "how typical once again";

205. Having found this was harassment this cannot also be a detriment and amount to unfavourable treatment.

2.1.12 On 19 January 2022, an email chain between Sandra and Carolyn saying, 'is Michelle off sick', 'yes AGAIN!!' 'OMG what is the matter with her now' 'believe its mental health now';

206. Having found this was harassment this cannot also be a detriment and amount to unfavourable treatment.

2.1.13 On 21 January 2022 an email between Carolyn and Andy Farmer saying, "M has been off all week" and a reply of "FFS";

207. Having found this was harassment this cannot also be a detriment and amount to unfavourable treatment.

2.1.14 On 25 January 2022, an email from Sandra Walker to Pete Binger regarding the Claimant's absence saying "it's a shame she is so unreliable";

208. Having found this was harassment this cannot also be a detriment and amount to unfavourable treatment.

2.1.15 On 26 January 2022 an email from the First Respondent to the Claimant "... we do however have a business to run and as we have previously discussed with you, your reliable attendance is important..." "...we do have to balance the impact of your unplanned absences on business operations and the pressure it places on the rest of the team against our duty of care towards you..." "... so far setting targets for your attendance has not worked because your health has deteriorated further since our last meeting..." "... it is important that we understand how likely it is that you will be able to attend work reliably in the future ..." ;

209. The Claimants sickness absence was something arising from her disability, and therefore the imposition of the absence plan, and communicating with her about her absence then arose from her sickness absence, however we found that the imposition of an absence plan and communicating with her about her absence was not unfavourable treatment. The First Respondent had simply asked her to try and achieve full attendance in the next eight weeks but had made an exception for disability related absences, and so in that sense the email was not arising from her disability as they had made a caveat for those disability related absences. In any event we found the email was not more than minor or trivial and did not amount to putting the Claimant at a disadvantage and subjecting her to unfavourable treatment.

210. In any event we found the treatment was a proportionate means of achieving a legitimate aim, in that the First Respondent on behalf of the Second Respondent had the aim of managing staff absence and by extension, resourcing and operational planning, within the business.

2.1.16 On 11/02/2022 Carolyn sending Pete a WhatsApp with a screenshot of C's Facebook profile with laughing emojis;

211. Having found that the laughing emoji was in fact sent by Carolyn Biddlestone to the Claimant and that the Claimant then responded with a laughing emoji, we did not find that forwarding the message that included the laughing emoji's to Pete Binger by Carolyn Biddleston was unfavourable treatment. The Respondents were concerned about the Claimants absence and the simple forwarding of a message by the Claimants line manager to the owner of the First Respondent was not more than a minor matter and we did not find it amounted to putting the Claimant at a disadvantage and subjecting her to unfavourable treatment.

212. In any event we found the treatment was a proportionate means of achieving a legitimate aim, in that the Second Respondent had the aim of managing staff absence and by extension, resourcing and operational planning, within the business, and that this included communications among the management team about the Claimants absence.

2.1.17 On 08 February 2022 an email from the First Respondent saying, we are "recording today as an unauthorised absence" "... this lack of communication makes operational planning all but impossible for the

business and places an unfair burden on your colleagues as well as a knock-on effect on our customer service ...";

213. The Claimants sickness absence was something arising from her disability, and therefore communicating with her about her absence then arose from her sickness absence. We found that communicating with her about her absence was not more than minor and trivial and did not amount to putting the Claimant at a disadvantage and subjecting her to unfavourable treatment.

214. In any event we found the treatment was a proportionate means of achieving a legitimate aim, in that the Respondent had the aim of managing staff absence and by extension, resourcing and operational planning, within the business, and was simply pointing out the effect on the business of her unplanned absence.

2.1.18 On 10 February 2022, an email from Pete Binger to Sandra at 10:12 to say "no Michelle now until early March ..." with a reply of "OMG! I doubt she'll come back then, seems to be playing the mental health card";

215. Having found this was harassment this cannot also amount to putting the Claimant at a disadvantage and subjecting her to unfavourable treatment.

2.1.19 Email from the First Respondent sent to the Claimant on 14 February 2022 which said comments such as: -

> *"we are sorry to learn that your condition is serious enough to warrant a further 4 weeks off..." and "...If you're unwilling or unable to participate in an occupational health call, despite being well enough to attend meetings with your own GP, then we will have to make decisions based on the information we have available, which may be disadvantageous to yourself..." ;*

216. The Claimants sickness absence was something arising from her disability, and communicating with her about her absence then arose from her sickness absence. We find that communicating with her about her absence and not being willing to attend with occupational health, and any consequences for the Claimant, was not more than minor or trivial and it did not amount to putting the Claimant at a disadvantage and subjecting her to unfavourable treatment.

217. In any event we found the treatment was a proportionate means of achieving a legitimate aim, in that the Respondent had the aim of managing staff absence and by extension, resourcing and operational planning, within the business and this included communicating with her about her absence, and not being willing to attend with occupational health, and any consequences for the Claimant,

2.1.20 Non-payment of the Claimant's bonus for year ending 31/3/22;

218. Having found that by the time the non-payment of the bonus occurred the Claimant was no longer employed it cannot be said that the reason for the non-payment arose from her sickness absence. We found that the reason for the non-payment of her bonus was that she had resigned. The claim of constructive dismissal was withdrawn by the Claimant and in relation to her claim for unfavourable treatment including the act of dismissal this amendment was refused. This claim relating to the non-payment of her bonus was not therefore made out.

219. Accordingly, all the Claimants claims under s.15 of the EqA 2010 fail.

§.20/21 EqA 2010 Claims

220. Section 20 of the EqA 2010 defines the duty to make adjustments as follows,

> 20 Duty to make adjustments:
>
> (1) …
> (2) …
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

221. The reasonable adjustments duty is contained in Section 20 of the EqA 2010 and is further amplified in Schedule 8. In short, the duty comprises of three requirements. If any of the three requirements applies, they impose a duty to make reasonable adjustments.

222. Section 21 provides that a failure to comply with one of the three requirements is a failure to comply with the duty to make reasonable adjustments by A (A being the employer or other responsible person) and amounts to discrimination, Section 21(1) and (2).

223. The approach that a Tribunal should take was set out in the judgment of **HHJ Serota QC in Environment Agency v Rowan** [2008] IRLR 20. We are required to identify:

(a) the relevant arrangements (PCP) made 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 (as a result of the arrangements).

After determining the above, we then must consider whether any proposed adjustment is reasonable; in particular, to determine what adjustments were reasonable to prevent the PCP placing the Claimant at a substantial disadvantage.

224. A substantial disadvantage is one that is more than minor or trivial. Whether or not such a disadvantage exists in a particular case is a question of fact. It is the PCP that must place the Claimant at the disadvantage **Nottingham City Transport Ltd v Harvey** UKEAT/0032/12, and the 2011 Code paragraph 16. Using a comparator may help with this exercise as the purpose of the comparator is to establish whether it is because of disability that a particular PCP disadvantages the disabled person in question, as set out in paragraph 6.16 of the 2011 Code of Practice on Employment.

225. The substantial disadvantage should be identified by considering what it is about the disability which gives rise to the problems and effects which put the Claimant at the substantial disadvantage identified, **Chief Constable of West Midlands Police v Gardner** UKEAT/0174/11. In **Griffiths v Secretary of State for Work and Pensions** [2014] UKEAT/0372/13, a case concerning the management of sickness absence, it was also explained that the fact that the disabled and non-disabled were treated equally and may both be subject to the same disadvantage when absent in the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled or category of them than it does on the able-bodied.

Conclusions on the s.20/s.21 claim

226. List of Issues

3. Reasonable Adjustments (Sections 20 & 21 Equality Act 2010)

3.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

The practise of applying an attendance plan.

3.2 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

3.3 Did the Respondent know that the Claimant was disabled?

3.4 Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

3.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

3.5.1 Steps the Rs could have taken to avoid the disadvantage are:

-

3.5.2 Allowing C to make the time up, cooperating with C to accommodate her disabilities

3.5.3 Allowing C time away from her desk during the working day to alleviate symptoms

3.5.4 Accommodating C's disability by accepting that C's SVT may on accession result in dizziness or light headedness preventing C from driving safely;

3.5.5 Allowing remote working.

3.6 Was it reasonable for the Respondent to have to take those steps and when?

3.7 Did the Respondent fail to take those steps?

227. What amounts to a PCP is not further defined within the EqA, though the expression is to be construed broadly, avoiding an overly technical approach. The EHCR's Employment Code extends to any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications, or provisions. The existence or otherwise of a PCP is to be assessed objectively. In **Carerras v United First Partners Research Ltd.** EAT 0266/15 the term "requirement" was said to be capable of incorporating an "expectation" or assumption", which might be sufficient to establish the existence of a practice.

228. The List of Issues did not identify the particular disadvantage to which the PCP gave rise. However, the Claimants overall case was that she was at a disadvantage as she was subjected to the PCP, which was the imposition of an eight week attendance plan, and that this caused her anxiety.

229. We had regard to the Equality and Human Rights Commission's Code of Practice on Employment, which states:

'The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular [PCP] or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly — and unlike direct or indirect discrimination — under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's'.

230. In the case of **Sheikholeslami -v- University of Edinburgh** [2018] IRLR1090, EAT it was established that the purpose of the comparison exercise with non-disabled employees is to assess whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP.

231. We asked ourselves if the PCP of imposing an eight-week attendance plan on the Claimant, put the Claimant, a disabled person, at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and whether that PCP caused the disadvantage? We asked ourselves what would have happened if another employee had the same level of sporadic absence as the Claimant totalling the same number of days off over the same time period for one off days here and there for reasons such as a pet dying, or having a migraine, or having hurt their toe, and whether they would have been at the same disadvantage if the employer had proceeded with imposing an absence management plan? We concluded that it did not put the Claimant at a substantial disadvantage compared with another non-disabled employee with her attendance record and that if the Respondents had then imposed the same absence management plan on another employee the disadvantage would have been the same to that employee as it was for the Claimant.

232. We found that both the Claimant and a non-disabled person with the same level of absence and with the Claimants absence history would have been subjected to the same eight-week absence plan and both would have met the same pressure to meet that target imposed on them. We found that the Claimant was told, that the eight-week absence plan would not relate to disability related absence, and so she was at no more of a disadvantage than a person without a disability.

233. As the Claimant was not at a substantial disadvantage then the duty to make reasonable adjustments under Schedule.8 and s.20 and s.21 of the EqA 2010 was not triggered and this claim fails.

Reasonable adjustments

234. Reasonable adjustments need only be considered if we hold that the Claimant was at a substantial disadvantage, and we have found she was not.

235. In the alternative we went on to consider the issue of reasonable adjustments. We reminded ourselves that reasonable adjustments are with a view to addressing the disadvantages of imposing an absence management plan on the Claimant.

236. The burden of proof does not, of course, ultimately lie with the Claimant. She need only identify in broad terms the nature of the adjustments that would address the disadvantages for the burden to shift to the Respondent to show that the disadvantages would not be eliminated or reduced by the proposed adjustments or that they would not otherwise be reasonable adjustments to make.

237. The Claimant identified the following adjustments: -

3.5.2 Allowing the Claimant to make the time up, cooperating with the Claimant to accommodate her disabilities.

217. We did not find that this was a reasonable adjustment that the Second Respondent should have to make. We found that at no time did the Claimant in fact request permission to make time up off sick and that such a request was denied to her. In any event even had such a request been made we did not find that allowing an employee to make up time from when they were off sick was operationally feasible in terms of planning workload when the Claimant worked in a team with other people. In addition we found that from a health and safety point of view the Second Respondent, in telling the Claimant she could no longer do this was in fact the Second Respondent ensuring the health and safety of the Claimant in the workplace, In any event this part of the Claimants claim was never put to the First or Second Respondent in cross examination.

3.5.3 Allowing the Claimant time away from her desk during the working day to alleviate symptoms

238. We did not find that this was a reasonable adjustment the Second Respondent should have had to make. This was never put to the Second Respondent by the Claimant in cross-examination i.e. that she requested time away from her desk and it was refused. She was cross-examined on this, and it was put to her she didn't ask for reasonable adjustments at the meeting on the 21 December 2021, and she didn't deny this, or assert at any point that she asked for reasonable adjustments. She also accepted that she would be be allowed to leave her desk if she asked Carolyn Biddlestone but she gave evidence that she had so much work she felt she couldn't leave her desk. She accepted that she was never asked to work whilst unwell. She also confirmed when she was unwell, she wasn't at work as she wasn't fit to drive. In those circumstances we did not find this was a reasonable adjustment the Second Respondent should have had to make.

3.5.4 Accommodating Claimant's disability by accepting that Claimant's SVT may on accession result in dizziness or light headedness preventing Claimant from driving safely;

239. We did not find that this was even set out as a reasonable adjustment, i.e. that the Second Respondent should have accepted on occasion she couldn't drive safely as it was not set out what the Second Respondent should have done if it had accepted that she could not drive safely. We found that was part of the asserted need and adjustment contended for, which was for remote working as set out in paragraph 226 below, and is not of itself a reasonable adjustment request, but we find as a matter of fact that no one at the Second Respondent ever disputed that on occasion she was often dizzy and couldn't drive.

3.5.5 Allowing remote working.

240. We did not find that this was a reasonable adjustment the Second Respondent should have had to make. The Claimant accepted, and we found, that she had never made a flexible working time request. The evidence showed that she had discussed it informally with Carolyn Biddlestone. When the Claimant was cross-examined on this and why she didn't put in a flexible working time request she said she didn't know. When she was asked whether she knew that Sandra Walker working from home was due to a flexible working request and whether she knew that she said no. In any event while the Claimant asserted 70% of her role could be done from home with the remainder being required to be done in the office, we did not find it was commercially viable for the Second Respondent to arrange her workload in that way. We found part of her job involved taking orders from her desk to other parts of the premises and we did not find operationally that on the days she worked at home that the Second Respondent would be able to work around her absence. In any event she never put it to the Respondent that such arrangements could have been made for her in order for her to work at home. We found that it was not a reasonable adjustment for the Second Respondent as contended for by the Claimant.

241. We therefore conclude that this claim for a failure to make reasonable adjustments is not well founded and fails.

Jurisdiction and Time Points

Disciplinary Processes

242. ACAS commenced against the First Respondent on the 29 March 2002 and ended on the 7 April 2022. Given the date the claim form was presented and the dates of early conciliation, any complaint against the First Respondent about something that happened before 28 December 2021 may not have been brought in time.

243. ACAS commenced against the Second Respondent on the 21 March 2002 and ended on the 7 April 2022. Given the date the claim form was presented and the dates of early conciliation, any complaint against the Second Respondent about something that happened before 22 December 2021 may not have been brought in time.

244. One part of the Claimants claim that succeeded was in relation to the First Respondent's comment to her that *'some people use illness as an excuse to stay at home,'* and this comment was made to her by the First Respondent in a meeting on the 21 December 2021. Anything that happened prior to the 28 December 2021 was out of time and therefore this comment which we upheld as harassment was presented seven days out of time. However, we had to consider whether this was part of conduct extending over a period of time which was to be treated as done at the end of the period ending on other claims in which also, she succeeded.

245. Having found that some of the comments made from the 17 January 2022 through to the 10 February 2022 by employees of the Second Respondent did amount to harassment we found that the comment made by the First Respondent on the 21 December 2022 to the Claimant was part of a continuing course of conduct that started on the 21 December 2022 and ended on the date of the last comment made by employees of the Second Respondent on the 10 February 2022. We therefore found that there was a continuing course of conduct that started on the 21 December 2022 and ended on the 10 February 2022. The claim having been presented on the 16 April 2022 then we found for the successful claims of harassment against the First and Second Respondent that ACAS was contacted within the primary limitation period for these claims which ended three months after the 10 February 2022 on the 9 May 2022, and as such the Claimants claims were presented in time pursuant to s123(3)(a) of the EqA 2010.

246. If the parties are unable to reach agreement upon appropriate compensation to be paid to the Claimant, then this claim will be listed for a one-day remedy hearing and the parties are ordered to provide their availability within the next 28 days for a one-day remedy hearing.

Employment Judge L Brown

29 February 2024
Date: ……

Sent to the parties on:
29 February 2024.....

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For the Tribunal Office