EMPLOYMENT TRIBUNALS

Claimant: Mrs A Parsons

Respondent: Form Health (UK) Ltd

Heard at: **Cardiff (via CVP)** **On:** **3, 4 and 5 June 2024**

Before: **Employment Judge Leith**
Mrs J Neves
Mrs P Palmer

Representation
Claimant: In person
Respondent: Mr Pickett (Counsel)

JUDGMENT

1. The complaint of direct disability discrimination fails and is dismissed.
2. The complaint of discrimination arising from disability fails and is dismissed.
3. The complaint of failure to make reasonable adjustments fails and is dismissed.
4. The complaint of harassment related to disability fails and is dismissed.

REASONS

Claims and issues

1. The claimant claims direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, and harassment related to disability.

2. The issues had been discussed at a Preliminary Hearing before Employment Judge Jenkins on 7 November 2023, and a list of issues was appended to his Case Management Order. Subsequently, the Claimant had withdrawn two of the allegations relied upon, and had been permitted to amend her claim to add a complaint of harassment related to disability

(based on the same factual allegations relied upon as for the complaint of direct disability discrimination).

3. There was in the bundle before us a draft amended list of issues which incorporated those changes. We discussed it with the parties at the start of the hearing. Both parties agreed that it was accurate. It did not set out the legitimate aim relied upon by the Respondent in respect of the complaint of discrimination arising from disability. That was set out in paragraph 52 of the Respondent's amended Ground of Resistance. We adopted the amended list of issues subject to that. The agreed list of issues is appended to this Judgment.

Procedure, documents and evidence heard

4. An issue had previously arisen regarding exchange of witness statements. At a Preliminary Hearing on 30 May 2024, Employment Judge Povey had directed the Respondent to send its witness statements to the Claimant by 13:00 that day. It appeared that the Respondent's statements may have been sent very shortly after that deadline (around a minute). The Respondent applied to be permitted to rely on the statements. The Claimant did not object to the application. In light of that, and given the very short delay on the part of the Respondent, we allowed the Respondent to rely on the witness statements.

5. We heard evidence from the Claimant. On behalf of the Respondent we heard evidence from David Newman (Director and Chief Executive) and Robin Pickard (who at the relevant times was the Managing Director).

6. Each of the witnesses gave their evidence by way of a pre-prepared statement, on which they were cross-examined.

7. We had before us a bundle of 715 pages. We informed the parties at the start of the hearing that we would only read documents we were specifically taken to within the bundle.

8. At the conclusion of the evidence, we heard submission from Mr Pickett on behalf of the Respondent, and from the Claimant. In Mr Pickett's case, the oral submissions were supported by a short note on the relevant legal principles.

9. The Claimant represented herself throughout the hearing before us (although she had been legally represented earlier in the proceedings). She indicated that she had not done so before. At points during the hearing, she asked for guidance regarding what was expected of her (which we provided to her in neutral terms). We should record that the Claimant had clearly prepared meticulously for the hearing, and that she represented herself with considerable care and skill throughout.

Fact findings

10. We make the following findings on balance of probabilities. We have not dealt with every area canvassed before us; rather, we have focused on those necessary to reach a conclusion on the issues in the claim.

11. The Respondent is a business providing functional assessments within the workplace to clients across the United Kingdom. At the relevant time it employed around seven staff. It also used a network of self-employed Associates to deliver services. The Respondent paid associates a flat fee plus mileage. They would not be paid for expenses such as accommodation (as associates would generally be assigned assessments in their local area).

12. The Claimant was employed by the Respondent from 1 December 2021 as a Functional Capacity Assessor. At that time, the only other employee carrying out Functional Capacity Assessments was Mr Newman. Mr Newman was employed by the Respondent as Chief Executive, as well as being a shareholder and Director. He was also the Respondent's Clinical Lead. The Claimant's was the Respondent's first directly employed Functional Capacity Assessor.

13. The Claimant's role involved carrying out two types of assessments. Those were:

    13.1. an FCE, which takes up to one day to complete.
    13.2. A CPAD, which is a two-day assessment (usually with a rest day between the two days).

14. The Claimant has diverticulosis, and anxiety and depression. It is common ground that at all relevant times she had a disability for the purpose of the Equality Act 2010 by reason of both conditions.

15. The Claimant lives in South Wales.

16. The Claimant was interviewed by Mr Newman. She was informed at interview that she would be required to travel and to stay away from home. She confirmed that she would be willing to do so – her evidence was that she said she would be willing to stay away from home on an "occasional" basis. She did not quantity what she meant by "occasional".

17. Having been successful at interview, the Claimant was sent a contract of employment. Her evidence was that there was some negotiation over the terms of the contract before she eventually signed it. Regarding job location, the contract said this:

> "4.1 Subject to clause 4.2 below, your usual place of work is:
>
> Split between your home office and assessment locations as directed by the Company. You will undertake any ergonomic questionnaires reasonably requested by the Company in relation to your home office set-up and, if requested to do so, will give

representatives of the Company access to your home office on reasonable prior notice, in order to carry out inspections of your work environment.

4.2 Notwithstanding clause 4.1, the Employer reserves the right to change your usual place of work on a temporary or permanent basis and for all or part of your time, to any office of the Employer located within 60 miles of Central London. Further, if your role requires you to carry out assessments, you may be required to undertake those assessments at any location within the UK or Europe ("the Territory") and to travel on the business of the Employer, or to attend training, business development events, or meetings anywhere in the Territory."

18. The Claimant's induction consisted of three days shadowing Mr Newman (she described it in her witness statement as "minimal"). She also watched some online training videos.

19. Robin Pickard commenced employment with the Respondent in January 2022, as Managing Director. He became the Claimant's line manager.

20. During the early part of the Claimant's employment, she was required to stay away from home for work on one or two occasions per month. She would stay away from home if the journey time to the assessment location was more than 2.5 hours.

21. The Claimant's travel and accommodation expenses would either by billed to the client or absorbed by the Respondent. It would depend on the terms of the contract between the Respondent and the client.

22. The Claimant's employment was subject to a probationary period, which was due to be completed in March 2022. The Respondent had some concerns about the Claimant's performance. A review meeting took place on 8 March 2022. The Claimant's probationary period was extended for a further two months. The targets she was set were as follows:

"• Monthly Assessment revenue: £10,800 (equivalent of 12 FCE Assessments)
• Draft Reports submitted to Clinical Supervisor (David Newman) within 3 working days
of Assessment (90%)
• Final Reports dispatched within 12 working days of Assessment (100%)"

23. A further review of the Claimant's probationary took place on 29 April 2022. The Claimant's probationary period was extended for a further two months, with the same targets.

24. A further probationary review took place on 1 June 2022. The Clamant was informed that she had passed her probationary period. The outcome letter said this:

> "During your probation period you have demonstrated your skills as a clinician, adapted as well as learnt a new comprehensive assessment process, shown flexibility and fit with organisational culture as a team member. Whilst progress has been clear and month on month improvements have been made, performance against the full role expectation still requires attainment. These have been outlined in your Performance Action Plan dated 1 June 22, along with the support to assist you to achieve these."

25. The supporting Action Plan set the following targets:

> "Monthly Assessment revenue: £10,800 (equivalent of 12 FCE Assessments)
>
> Draft Reports submitted to Clinical Supervisor (David Newman) within 3 working days of Assessment (100%)
>
> Final Reports dispatched within 8 working days of Assessment (100%)
>
> Pre-Assessment Plan submitted to Clinical Supervisor (David Newman) within 3 working days before date of Assessment (100%)
>
> Pro active Diary Management esp for Assessments & travel time"

26. The Claimant's evidence was that in around March or April 2022 she told Mr Pickard that she suffered from diverticulitis and anxiety and depression. Hr evidence is that she told him orally. Her evidence was that that was in the context of there being an upcoming influx of assessments to be carried out in and around London in May and June, which would require her to work away from home a lot during those two months, and that she informed Mr Pickard that she would have to be careful as a result. That was not set out within the Particulars of Claim. The Claimant's evidence on the point was not contained within her witness statement. It was given for the first time in the course of cross-examination. Her oral evidence, at its highest, was that she did not tell Mr Pickard how long she had suffered from either condition, or when she had been diagnosed.

27. Mr Pickard's evidence was that he did not become aware of the Claimant's diverticulitis until September 2022, and that he was not aware that she had been diagnosed with depression until these proceedings. The Claimant did not suggest to Mr Pickard in cross-examination that the conversation in March or April 2022 had taken place. This was despite the fact that Mr Pickett had (very properly) explained to her that she would need to do so if she was pursuing the point.

28. We deal with this in our conclusions.

29. In May and June 2021, the Respondent had a backlog of assessments, particularly in London and the South East. The Claimant was required to undertake back-to-back assessments. She would travel on a Sunday and stay away from home overnight for four nights per week. The Respondent agreed to pay her for the travelling time undertaken on Sundays.

30. After June 2021, the Claimant reverted to staying away from home one or two times per month. The remainder of the assessments she carried out were at locations to which she could travel from home (within a 2.5 hour travelling radius).

31. In response to the level of work in London and the South East, the Respondent sought to hire a directly employed Functional Capacity Assessor based in that area. They successfully appointed an individual, Mark Guthrie, who was to start work in October 2022.

32. In July 2022, the Claimant undertook a two-day training course on using the Metriks platform, which was the platform she used to carry out the assessments. Her evidence was that she knew how to use the platform so didn't need the training, although she attended it anyway.

33. The Respondent organised internal training for the Claimant on conducting a Telephone Functional Abilities Assessment ("TFAA"). This was an assessment carried out on the telephone. The Respondent did not carry out many assessments of that type. Mr Newman was going to provide the training to the Claimant on 7 September 2022. He was unable to provide it on that day, as he had to undertake an urgent assessment. He therefore cancelled it. It was not rescheduled. The Claimant subsequently carried out two TFAAs in September and October 2022, without any apparent difficulty.

34. The Claimant was absent from work from 16 September 2022 to 22 September 2022. The reason given was abdominal pain.

35. The Claimant attended a return-to-work meeting with Robin Pickard on either 28 or 29 September 2022 (there was some discrepancy regarding the date; we do not need to resolve it). The meeting took place in South London, where the Claimant was staying to carry out a CPAD assessment.

36. During the meeting, the Claimant informed Mr Pickard that she had been diagnosed with Diverticulosis in 2019. Regarding the effect of the condition, the Return to Work form recorded that the Claimant said this:

> Management is medication / diet (avoiding trigger foods) / maintain balanced stress levels
>
> 5 & 6 episodes of the symptoms per year

> Impact on work – the symptoms can come on very quickly / generally can be managed with the rescue pack, high meds. Goal is to get on top and reduce infection. Can be debilitating to the point of bed bound, however over recent couple of years has been better managed. When it is bad, it can lead to bouts of depression.
>
> From a job demand, its difficult preempt a flair up. Generalised stress of prolonged"

37. The sentence regarding the condition leading to bouts of depression was the only reference to mental health issues within the Return to Work form.

38. Alongside the question "Is there anything the Organisation can do to help?", this was recorded on the return to work form:

> "FH mitigation / support:
> • 3 Oct a new FT Assessor in London / Home counties will be available, therefore business need to travel to this area will reduce, unless there is a absence/holiday/urgent business need, the need for Andrea to travel into London/home counties overnight is mitigated. Might be 3-4 times pa max
> • We are committed to limiting the number of overnight stay to once a month, pending business needs/demands
> • Pacing of the overnight Assessment, so that recover time from the travel is less impactful when Andrea get home
> • Booking Hotels room, essential that their a functional fridge in bedroom
> • If in London/Home counties, requires an overnight prior to date of Ax [Assessment]
> • FH to explore how they could support Nutritionist consultation for Andrea"

39. The Claimant signed the Return to Work form on 3 October 2022 to confirm that it was an accurate reflection of the discussion.

40. Mr Newman's evidence was that he saw the notes of the Return to Work meeting shortly after the Claimant signed them, so on or around 3 October 2022. His evidence was that he understood at that time that the Claimant's diverticulosis was a disability, as it was a chronic condition which had lasted or would last for more than 12 months.

41. Mr Pickard's evidence was that he was not aware that the Claimant's diverticulosis was a disability.

42. The agreed adjustments were put in place for the Claimant, save for the provision of a Nutritionist consultation. The Claimant declined as she was well versed in her dietary limitations and requirements.

43. After the Return to Work meeting, the Claimant was required to stay away from home twice (not including the trip to South London during which the Return to Work meeting took place). The first time was to carry out an FCE in Scotland on 7 October 2022. The second time was to carry out a CPAD in Warwickshire on 8 and 9 November 2022. The remaining face to face assessments she carried out were in Wales (one), Bristol (two), and Coventry (one), all of which were within her daily travel radius.

44. In November 2022, the Respondent organised training on carrying out a different kind of assessment, called a Transferrable Skills Analysis ("TSA"). The Claimant did not carry out TSAs as part of her role, although a TSA would sometimes follow on from one of the types of assessment the Claimant did carry out. The Respondent received only a limited number of instructions for TSAs – 18 in 2021 and 20 in 2022. TSAs were carried out on behalf of the Respondent by Vocational Rehabilitation Associates, and the Respondent had a pool of Vocational Rehabilitation Associates who were able to undertake those assessments. The training was attended by the Vocational Rehabilitation Associates. Functional Capacity Associates (who undertook the same type of work as the Claimant) did not attend the training.

45. Mr Pickard's evidence, which we accept, was that to undertake a TSA required the completion of a two- or three-day training course, and that the training in November 2022 was a CPD session on how best to complete the report templates.

46. The Claimant was initially invited to the session in order to gain an overview of the TSA service. Mr Pickard subsequently decided that the Claimant should not attend the session. His evidence was that this was because the Claimant needed to focus on her core role. In oral evidence, Mr Pickard explained that the Claimant was completing audits which needed to be completed in order to ensure that the Respondent met its key performance indicators on a contract with a key customer. We accept his evidence in that regard.

47. During the autumn of 2022, the Respondent suffered a downturn in work. This was in part due to a Parliamentary paper regarding ME, which led one of the respondent's largest customers, Legal & General, to significantly limit the number of CPAD assessments they were commissioning.

48. Mr Newman's evidence in his witness statement was that specifically in Wales and the Southwest, the Respondent experienced a 43% downturn in work. He was unable to explain how that figure had been calculated, or what time period it related to. His evidence was that the figure was provided to him by Mr Pickard.

49. Mr Pickard's evidence in his witness statement was also that there had been a downturn in work of 43% in the region. His oral evidence was that the 43% figure was in actual fact a shortfall against her billing target on

Claimant's part in the months from August to November 2022. His evidence was that the reason for the shortfall after the Claimant had passed her probation was because the Respondent had not had sufficient instructions to give her enough work to allow her to meet her target. His evidence was that it was not due to any performance issue on the Claimant's part. He described there being a symbiotic relationship between the amount of work the Respondent was able to generate, and the Claimant's ability to meet her target.

50. In consequence, the Respondent consulted the Claimant about the possibility of making her role redundant. Mr Pickard informed the Claimant of the possibility in a meeting on 5 December 2022. He confirmed in a letter dated the same date. The reason given in that letter for considering redundancy was as follows:

> "Reduction in assessment work (-43% over last 4 months) with restricted travel."

51. A consultation meeting took place on 8 December 2022. The notes of that meeting were in evidence before us – they were signed by the Claimant as an accurate record of the meeting.

52. The notes recoded that Mr Pickard explained that the business could not find enough work for the Claimant within the travel restrictions that had been agreed. He noted that Legal & General had reduced their instructions for CPAD assessments by approximately 50% due to the ME Parliamentary Paper. He shared graphs that showed that:

    52.1. The Claimant had billed below her monthly target of £10,500 (on a pro-rata basis taking into account holiday and absence) for every month except June 2022, with the highest deficits being in October 2022 (-£3,400) and November 2022 (-£6,400).
    52.2. In the four months from August to November 2022, the Claimant had on average been 43% below her monthly billing target.
    52.3. Across 2022, 46% of the Respondent's instructions had been in London and the South East, and only 13% had been in Wales and the South West.

53. Mr Pickard explained that the Respondent had taken a number of steps to try to win more business, and also to promote remote assessment instructions.

54. Mr Pickard asked the Claimant if she could think of any alternatives to redundancy. There was some discussion about another potential stream of work which had not come to fruition. The Claimant asked if she could do report reviews (also referred to as audits) as an alternative to redundancy. She also asked if she could go back to unlimited travel. Mr Pickard indicate that he would consider both of those points.

55. Mr Pickard subsequently discussed with Mr Newman and the Respondent's HR provider. He met the Claimant again on 9 December 2022. Again, notes of the meeting were taken, and were signed by the Claimant as being an accurate record of the meeting. The notes recorded that:

    55.1. Mr Pickard had considered reverting the Claimant to unlimited travel, but that this could not be accommodated given that the Respondent valued staff wellbeing, and the adjustments had been put in place to ensure that Claimant would stay fit and healthy at work. He further noted that given the challenging conditions the industry was facing, the Respondent's customers would not tolerate the additional expenses of milage, accommodation and travel time being charged to them.

    55.2. Regarding reviews, he explained that the backlog of report reviews had been completed, and Mr Newman was in a position to carry out all report reviews, so no additional resource was required.

    55.3. Mr Pickett therefore informed the Claimant that she would be dismissed by reason of redundancy, with a payment in lieu of notice.

56. Mr Pickard wrote to the Claimant on the same day to confirm her dismissal.

57. On 16 December 2022, the Claimant wrote to Mr Newman to appeal her dismissal. The Claimant set out a number of overlapping points in her appeal letter. The thrust of her appeal was that:

    57.1. There was no review of the reasonable adjustments that were put in place in September 2022.

    57.2. The Claimant had offered to travel without restrictions in order to avoid the redundancy.

    57.3. The Claimant was the only employee considered although the Respondent employed another full time Functional Capacity Assessor based in Kent who was not considered for redundancy.

    57.4. The Respondent did not have a redundancy policy in place.

58. Mr Newman invited the Claimant to a meeting to discuss her appeal. The meeting took place on 29 December 2022. Once again, the meeting notes were signed by the Claimant. Durin the meeting, Mr Newman invited the Claimant to expand on each part of her appeal. He then indicated that he would take some time to consider her appeal and provide her with an outcome in writing.

59. Mr Newman sought input from Mr Pickard regarding the points the Claimant had raised. On 14 January 2023, Mr Newman wrote to the Claimant with the outcome of her appeal. Mr Newman did not uphold the appeal. He concluded that:

59.1. The Respondent had a duty of care to its employees, so could not simply allow the Claimant to remove the travel restrictions.

59.2. The business did not have enough work to sustain the Claimant's role as a functional capacity assessor within the travel restrictions.

59.3. The alternatives suggested by the Claimant had been considered before the decision to dismiss her was made.

60. The claimant notified ACAS under the early conciliation process of a potential claim on 18 January 2023 and the ACAS Early Conciliation Certificate was issued on 1 March 2023. The claim was presented on 30 March 2023.

Law

61. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee:

61.1. In the terms of employment;

61.2. In the provision of opportunities for promotion, training, or other benefits;

61.3. By dismissing the employee;

61.4. By subjecting the employee to any other detriment.

62. In order to be subjected to a detriment, an employee must reasonably understand that they had been disadvantaged. An unjustified sense of grievance will not constitute a detriment (*Shamoon v Royal Ulster Constabulary* [2003] UKHL 11).

Protected characteristics

63. Disability is a protected characteristic (section 6 Equality Act 2010).

Direct discrimination

64. The definition of direct discrimination is contained in section 13(1) of the Equality Act 2010:

> "(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."

65. The comparison may be to an actual or a hypothetical comparator. In either case, there must be no material difference between the circumstances relating to each case (s.23(1)). That is, the comparator must be in the same position in all material respects save only that he or she is not a member of the protected class *(Shamoon v Chief Constable of the RUC* [2003] ICR 337).

66. Where considering the treatment of a claimant compared to that of a hypothetical comparator, the Tribunal may draw inferences from the treatment of other people whose circumstances are not sufficiently similar for them to be treated as an actual comparator (*Chief Constable of West Yorkshire Police v Vento* [2001] IRLR 124).

67. In considering whether a claimant was treated less favourably because of a protected characteristic, the tribunal generally have to look at the "mental processes" of the alleged discriminator (*Nagarajan v London Regional Transport* [1999] IRLR 572). The protected characteristic need not be the only reason for the less favourable treatment. However, the decision in question must be significantly (that is, more than trivially) influence by the protected characteristic.

Discrimination arising from disability

68. The definition of discrimination arising from disability is set out in s.15 of the Equality Act 2010:

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

69. "Unfavourable" is not defined in the statute. The EHRC Statutory Code of Practice provides that it means that the disabled person "must have been put at a disadvantage".

70. Guidance for Tribunals on how to approach the test in s.15 was set out by the EAT in *Pnaiser v NHS England* [2016] IRLR 170:

> "(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason

in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as

supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

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

71. The Respondent does not need to have knowledge that the "something" leading to the unfavourable treatment was a consequence of the claimant's disability (*City of York Council v Grosset* [2018] ICR 1492).

Reasonable adjustments

72. The duty to make reasonable adjustments is set out in section 20 of the Equality Act 2010:

"Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with

persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…."

73. Paragraph 8 of Schedule 20 provides that an employer is not subject to the duty to make reasonable adjustments if he or she does not know, and could not be reasonably be expected to know that the claimant:
    73.1. Has a disability; and
    73.2. Is likely to be placed at a disadvantage by the employer's provision, criterion or practice, the physical features of the workplace or a failure to provide an auxiliary aid.

74. The Tribunal must therefore ask itself two questions:
    74.1. Did the employer both know that the employee was disabled and that the disability was liable to put the employee at a substantial disadvantage?
    74.2. If not, ought the employee to have known both of those things?

75. If the answer to both questions is "no", the duty to make reasonable adjustments is not triggered.

76. The EHRC Code provides that employers must "do all they can reasonably be expected to do" to find out whether an employee has a disability. If an employer's agent or employee knows in that capacity that an employee is disabled, the employer will have imputed knowledge of that disability.

77. In order to find that an employer has breached the duty to make reasonable adjustments, the tribunal must identify the step or steps that it would have been reasonable for the employer to take. The adjustment must be a practical step or action as opposed to a mental process (*General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169).

Harassment

78. Harassment is defined in section 26 of the Equality Act 2010 as follows:

> **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.
>
> (5) The relevant protected characteristics are—
>
> age;
>
> disability;
>
> gender reassignment;
>
> race;
>
> religion or belief;
>
> sex;
>
> sexual orientation."

79. General harassment (section 26(1)) has three elements:
    - 79.1. Unwanted conduct
    - 79.2. That has the proscribed purpose or effect
    - 79.3. Which relates to the relevant protected characteristic

80. "Unwanted" is essentially the same as "unwelcome" or "uninvited". Where conduct is offensive or obviously violates a claimant's dignity, that will automatically be regarded as unwanted (*Reed and anor v Stedman* [1999] IRLR 299). Comments and behaviour must be looked at in context in order to determine whether they were unwanted (*Evans v Xactly Corporation Ltd* (EAT 0128/18).

81. The test for whether the treatment had the proscribed effect has both a subjective and an objective element. That is, the Tribunal must consider the subject effect the conduct had on the claimant, and must also consider whether it was objectively reasonable for the conduct to have had that effect.

82. When considering whether treatment had the proscribed effect, we must look at the effect of the incidents in the round (*Reed*). Tribunals must not "cheapen the significance" of the meaning of the words used in the statute (*Grant v Land Registry* [2011] ICR 1390).

83. In considering whether conduct is "related to" the relevant protected characteristic, a finding about the motivation of the putative harasser is not the necessary or only possible route to the conclusion that the conduct related to the characteristic in question. However, there must be some feature or features of the factual matrix which leads the Tribunal to the conclusion that the conduct in question is related to the particular characteristic in question (*Tees Esk and Wear Valleys NHS Foundation Trust v Aslam & Heads* (UKEAT/0039/19).

Burden of proof

84. Section 136 of the Equality Act deals with the burden of proof:

> "(2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene that provision"

85. The section prescribes a two-stage process. At the first stage, there must be primary facts from which the tribunal could decide, in the absence of any other explanation, the discrimination took place. All that is required to shift the burden of proof is at primary facts from which "a reasonable tribunal could properly conclude" on balance of probabilities that there was discrimination. It must, however, be something more than merely a difference in protected characteristic and the difference in treatment (*Madarassy v Nomura International PLC* [2007] EWCA Civ 33).

86. The burden of proof at that stage is on the Claimant (*Royal Mail Group v Efobi* [2021] UKSC 22). The employer's explanation is disregarded.

87. If the claimant satisfies that initial burden, the burden shifts to the employer at stage 2 to prove one balance of probabilities that the treatment was not for the prescribed reason.

88. The Court of Appeal gave guidance to tribunals the application of the burden of proof provisions in the case of *Igen v Wong* [2005] EWCA Civ 142 (the guidance was given in the context of the Sex Discrimination Act, but subsequent authorities have confirmed that it remains good law).

> "(1) Pursuant to section 63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".
> (2) If the claimant does not prove such facts he or she will fail.
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what

inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Conclusions

Knowledge of disability

89. It is common ground that the Claimant was disabled at all relevant times by virtue of her conditions of diverticulosis, and anxiety and depression.

90. The Respondent denies that it had knowledge that the Claimant was a disabled person.

91. We start with the Claimant's allegation that she disclosed both conditions to Mr Pickard in March or April 2022. In that regard, we prefer Mr Pickard's (unchallenged) evidence to that of the Claimant. Mr Pickard's evidence regarding when he became aware of the conditions was clear and consistent, whereas the Claimant's evidence regarding the conversation in March or April 2022 came out for the first time in the course of cross-examination. We bear in mind also that the minutes of the return to work meeting in September 2022 did suggest that the Claimant had previously disclosed either diverticulosis or depression to Mr Pickard previously.

92. We therefore find that the conversation did not happen.

93. We find that the Respondent was first made aware of the Claimant's diverticulosis on either 28 or 29 September 2022, at the return to work meeting. Mr Newman then became aware of the Claimant's diverticulosis on 3 October 2022. On his own evidence, Mr Newman was aware that the Claimant had a disability within the meaning of the Equality 2010 as soon as he was aware of the diagnosis. It follows then that the Respondent had knowledge from that date.

94. Nothing of significance to the allegations in the claim occurred between 28 September and 3 October 2022, so we do not strictly speaking need to consider knowledge of diverticulosis any further. But we would in any event have found that Respondent had knowledge from either 28 or 29 September 2022, because the minutes of the return to work meeting show that:

    94.1.1. The Respondent was aware of the effect the diverticulosis had on the Claimant, as described in the return to work meeting. Those effects were significant enough to have led to her having time off work. The Respondent was also aware that the Claimant had to manage the condition with medication and lifestyle changes.

    94.1.2. The Respondent was aware from what the Claimant told her that the condition fluctuated.

    94.1.3. The Respondent was made aware that the Claimant had been diagnosed in 2019, so the impairment satisfied the long-term condition.

    94.1.4. Taken as a round, we find that Mr Pickard ought to have known from what was disclosed in the meeting that the Claimant's diverticulitis had a disability within the meaning of the Equality Act 2010.

95. In respect of depression, the sentence within the return to work meeting note was the only disclosure the Claimant made of her depression during her employment by the Respondent. In context, we find that the Claimant presented depression as a symptom her diverticulitis rather than a

condition in its own right. She did not suggest within the meeting that it was a stand-alone condition. Nor did she say anything to suggest that it had any adverse effect in and of its own right (as distinct from the diverticulosis).

96. We therefore conclude that the Respondent did not at any point during the Claimant's employment have knowledge that her depression was a disability within the meaning of the Equality Act 2010.

97. For completeness, while the impairment is pleaded as depression and anxiety, the Claimant accepted that she did not ever disclose anxiety to the Respondent. It follows that the Respondent could not have had knowledge of the Claimant's anxiety.

98. So in summary we conclude that:

98.1. The Respondent had knowledge that the Claimant had a disability by virtue of diverticulosis from 28 or 29 September 2022 onwards.

98.2. The Respondent did not at any time during the Claimant's employment have knowledge that she had a disability by virtue of her depression and anxiety.

Reasonable adjustments

99. The list of issues divided the question of reasonable adjustments into two periods – before and after 5 September 2022. This appeared to be due to an error in the Respondent's Grounds of Resistance. It was not suggested to us by either party that 5 September 2022 had any relevance in light of the evidence we hard.

100. As we have concluded that the Respondent did not have knowledge of the Claimant's disability until 28 or 29 September 2022, no reasonable adjustments claim can succeed prior to that date.

Provision, criterion or practice

101. The PCP relied upon by the Claimant is that she was required to:

101.1. Regularly travel long distances to carry out assessments (LOI 23.1); and

101.2. Regularly required the Claimant to stay away from home on business (LOI 23.2).

102. We deal with the two limbs in reverse order. We find that the PCP was applied to the Claimant after 29 September 2022, because:

102.1. The PCP refers to staying away from home on a "regular" basis. It does not specify a particular frequency. The Claimant was required to stay away from home on business no more than once per month. That was borne out in practice, in that in the two months

after 29 September 2022 she was required to stay away from home twice, once in each month. The travel away from home was not at entirely predictably intervals, given the unpredictability of instructions. That is, could not be said that it would always be on, for example, the first Tuesday of each month. But as a matter of natural language, we consider a requirement to do something once per month is a requirement to do it regularly. We therefore find that the Claimant was required to stay away from home regularly.

102.2. In the context of the claim, while "long distances" was not defined within the PCP, we consider that it must have meant the requirement to travel more than 2.5 hours. The Claimant only had to travel more than 2.5 hours per assessment only on the occasions when she would stay away from home. Because that occurred once per month, we again find for the same reasons that it was a regular requirement.

Substantial disadvantage

103. In terms of the substantial disadvantage, the list of issues cross-referenced the "somethings" relied upon for the complaint of discrimination arising from disability. We find that the requirement to travel long distances and stay away from home did put the Claimant at a substantial disadvantage, in that:

103.1. She was self-evidently unable to prepare and eat meals that would minimise the effects of her diverticulosis, because she would not have access to kitchen facilities (LOI 17.2); and

103.2. The effect of travel and staying away from home was necessarily tiring (which in turn increased the risk that she would develop diverticulitis) (LOI 17.3 and 17.4).

104. There was no evidence before us that the Claimant needed to use the bathroom at extremely short notice, and that this impacted on her ability to travel (LOI 17.1).

105. Perhaps because of the way that the list of issues was constructed, we could not see how the Claimant was said to be put at a substantial disadvantage by the PCP because of low moods said to arise from her diverticulitis (LOI 17.5). Nor could we see how the Claimant's sickness absence was said to be a substantial disadvantage she was put at by the PCP (LOI 17.6).

106. The Claimant also suggested in the list of issues that the substantial disadvantage was that she was dismissed. We consider that that that is an entirely circular argument. That is not a disadvantage that the Claimant was put to by the requirement to travel and to stay away from home.

107. We find that the Respondent was aware of the substantial disadvantage the Claimant was put to by virtue of what she explained in

the return to work meeting. That was inherent in the adjustments that were agreed at that meeting.

Adjustments

108. We turn then to the steps that could have been taken to overcome the disadvantage. We take the steps suggested by the Claimant in turn.

Amending the Claimant's geographical scope of work to increase workflow (LOI 30.1)

109. The Claimant's geographical scope of work was set by travelling time. There was no evidence before us of how adjusting that would have overcome the disadvantage. The Claimant undertook day trips by virtue of travelling time within other regions (e.g. to Coventry). So the limitation on her geographical scope of work was set purely by her travelling radius rather than by the region in which she lived. That is, she was not confined to taking cases in Wales and the South West, although most of the places falling within 2.5 hours travelling time would be in South Wales and the South West. We therefore conclude that amending the Claimant's geographical scope of wok would not have overcome the disadvantage. It would therefore not have been a reasonable adjustment.

Consulting with the Claimant regarding her travel restrictions and what would be feasible for her in the circumstances (LOI 30.2)

110. Consulting regarding a potential adjustment is not, in and of itself, a reasonable adjustment. It may inform whether an adjustment ought to have been made, but it is not an adjustment in its own right. Importantly, it was not suggested that the restrictions that were put in place regarding the Claimant's travel, did not go far enough – that is, the Claimant did not suggest it would have been a reasonable adjustment to have done away with the requirement to travel entirely.

111. In any event, the Respondent did consult with the Claimant in the return to work meeting. The adjustments put in place at that meeting were agreed. The Claimant did not at any point suggest that she wanted them to be revisited save in the redundancy process, when she suggested that she was willing to forgo the restriction on travel entirely. That would not have overcome the disadvantages we have identified. If anything, it would have had the opposite effect.

112. For those reasons, this would not have been a reasonable adjustment.

Adjusting the Claimant's duties to incorporate auditing reports for newer assessors and supporting them in their roles (LOI 30.3)

113. The Claimant did conduct some audits as required. But on the evidence before us, there was not sufficient work for the Claimant to

spend a significant amount of working time on audits/reviews. And we consider that it would not have been reasonable to expect the Respondent to allow the Claimant to take over Mr Newman's auditing role entirely given that he was the Chief Executive and Clinical Lead. In that role, he would necessarily need to have been involved in the auditing function. In any event, this would not have overcome the disadvantages we have identified. So it would not have been a reasonable adjustments.

Consulting with the Claimant as to training opportunities and alternative roles (LOI 30.4)

114. Once again, consulting regarding a potential adjustment is not, in and of itself, a reasonable adjustment. In any event, on the evidence before us there were not alternative roles for the Claimant. At the time of the Claimant's dismissal, the Respondent only employed eight full time staff (including the Claimant). Of those, only one was an assessor (Mr Guthrie). He worked in London and the South East. It was not suggested to us that the Claimant could have done an administrative role. While the Claimant could, with training, potentially have undertaken vocational assessments, the Respondent only received a limited number of instructions for such assessments. It was not suggested to us that those instructions were skewed towards Wales and the South West, so the same issues would have arisen regarding travelling. It would not have overcome the disadvantages we have identified.

115. It followed that this would not have been a reasonable adjustment.

116. We therefore conclude that the Respondent did not fail to make reasonable adjustments for the Claimant. The complaint of failure to make reasonable adjustments fails.

117. The remaining parts of the claim rest on five factual allegations (which are relied upon as direct discrimination, discrimination arising from disability, and harassment). We consider them allegation-by-allegation.

<u>On or around October 2022, refusing to permit the Claimant to attend Vocational Rehabilitation Training (LOI 5.1)</u>

118. We have found as fact that the Claimant was invited to a TFAA training session on 7 September 2022, but that the session was subsequently cancelled. It was not rescheduled.

119. The cancelling of the TFAA training was before the Respondent had knowledge that the Claimant had a disability. So that cannot succeed under any of the three heads claimed.

120. There was no evidence before us that the Claimant was not permitted to attend a Vocational Rehabilitation session in October 2022. In the Claimant's witness statement she referred to TSA training in October 2022. We have found that the TSA training took place in November 2022.

That training is referred to separately on the list of issues, and we deal with it below.

121. The allegation that the Claimant was not permitted to attend Vocational Rehabilitation Training in October 2022 is therefore not made out on the facts. It follows that it fails under each of the three heads claimed.

<u>On or around November 2022, removing the Claimant from the Transferable Skills training day (LOI 5.2)</u>

122. We have found as fact that this did happen, in that the Claimant's invitation to the session was revoked. Although the allegation could be read as suggesting that she was removed from the session while it was going on, it was not suggested that that was what happened. Rather, what happened was that the Claimant was removed from the attendee list in advance of the session.

Direct discrimination

123. We consider that the correct comparator is a Functional Capacity Assessor employed directly by the Respondent with the same length of service and skillset as the Claimant, but who did not have the Claimant's disability.

124. We consider that the hypothetical comparator would not have been treated any differently because:

124.1. The session was not directly relevant to the Claimant's role. It was in essence a CPD training session for those who carried out the Vocational Rehabilitation Assessments. The Claimant did not do so. She had not undertaken the necessary training course in order to do so.

124.2. There was no evidence before us regarding whether Mr Guthrie, the Functional Capacity Assessor employed in London and the South East, attended the session. He was in a slightly different position to the Claimant in that he had only worked for the Respondent for around a month, so would still have been within his probationary period. The associate Functional Capacity Assessors were not invited to the session. We consider that that is particularly relevant, as they undertook the same work as the Claimant.

124.3. The Respondent had a backlog of audits at the time, which needed to be completed in order to ensure the Respondent complied with the contracts it had with its clients. We consider that a comparator with the same experience and length of service as the Claimant would also have been required to complete audits rather than attend the session.

125. It follows that the allegation does not succeed as an allegation of direct discrimination.

Discrimination arising from disability

126. We do not consider that removing the Claimant from the attendee list was objectively unfavourable treatment in the circumstances. The Claimant was being told she could not attend a training session that was not directly relevant to her job, at a time when the Respondent had a backlog of time-sensitive work. It is also in our judgment relevant that at the time, the Claimant was (and had been for all but one month of her employment), behind her billing target for the year. The Respondent was entitled to expect that she would pitch in to do what was required to meet client demands. In the circumstances, requiring her to do so (at the cost of missing a training session that she did not need to attend) could not be said to be objectively unfavourable.

127. In any event, we would have concluded that it was not because of any of the things said on the list of issues to have arisen in consequence of the Claimant's disability. It was entirely unrelated to anything which arose from the Claimant's disability. It was simply because of the pressure of work and the fact that the training was not directly relevant to her role.

128. It follows that the allegation does not succeed as an allegation of discrimination arising from disability.

Harassment

129. For much the same reasons as already articulated, we conclude that it did not constitute unwanted conduct. The Claimant was employed by the Respondent to do a job. Asking her to do work for clients, rather than attend a training session that was not directly relevant to her role, could not be said in all of the circumstances to be unwanted.

130. We would in any have concluded that the instruction was not objectively capable of having the proscribed effect. It was a simple and entirely unobjectionable management instruction.

131. It follows that the allegation does not succeed as an allegation of harassment.

<u>On 8 December 2022 Robin Pickard selecting the Claimant for redundancy (LOI 5.3)</u>
<u>On 9 December 2022 Robin Pickard dismissing the Claimant on notice (LOI 5.4)</u>

132. We deal with these two allegations together, as they overlap significantly. It is common ground that both of these things occurred, in that the Claimant was selected for redundancy and then dismissed on notice on 9 December 2022.

Direct discrimination

133. The list of issues indicates that the Claimant relies on a hypothetical comparator. She did suggest in evidence that she was comparing herself

to Mark Guthrie. There was no suggestion that the Claimant was seeking to amend her claim. In any event, had we been required to do so we would have concluded that Mr Guthrie was not an appropriate comparator. He worked in a region which had almost half of the Respondent's total number of referrals. The Claimant's region had a mere 13% (although she was able to undertake some assessments in the neighbouring region within a day's travel). It was also not suggested that Mr Guthrie had any limitation on his ability to travel.

134. We consider that the correct comparator is a Functional Capacity Assessor with the same length of service and skillset as the Claimant, employed in Wales and the South West (or another region with a similarly small proportion of the Respondent's total workload), and who had the same travel limitations as the Claimant but who did not have a disability within the meaning of the Equality Act 2010.

135. We find that such a comparator would also have been selected for redundancy and dismissed, for the following reasons:

135.1. The other regions with a similar proportion of workload did not have a directly employed Functional Capacity Assessor. When the Claimant was appointed, she was not replacing a previous post-holder – the Respondent had not previously employed a Functional Capacity Assessor in Wales and the South West. The Claimant's role, as an employed Functional Capacity Assessor in a region with a relatively small proportion of the Respondent's overall workload, was an outlier in terms of the Respondent's workload as a whole.

135.2. The Respondent had suffered a significant downturn in work.

135.3. The Claimant had only once met her monthly billing target. The target was set at a level which would cover her costs and allow a reasonable profit margin for the Respondent. The one month when she met the target was the month when she worked around four days per week in London and the South East, staying away from home. That suggested that there was simply not sufficient workload within the region to sustain her role, even prior to the downturn in work.

135.4. The trend over the period leading up to the Claimant's dismissal was for her performance against target to be going down not up.

135.5. Mr Pickard's clear and unambiguous evidence was that the reason the Claimant had not met her target in any month after June 2022 was nothing to do her performance. Rather, it was because the Respondent simply did not have enough instructions to provide her with a volume of work that would allow her to meet her target. The hypothetical comparator would have been in the same position.

135.6. Importantly, even if the Claimant had been able to work across the country, Mr Pickard's explanation to her at that time was that the expenses would have been a problem for customers. That is broadly consistent with his evidence to the Tribunal, which was that the position on expenses varied depending on the terms of the

contract between the Respondent and the customer. Some contracts allowed them to pass to the expenses to the client (which would have made the Respondent less attractive as a service provider), and others would not (which would have meant that Respondent would have had to absorb the expenses). Either way, that contrasted with the use of self-employed associates, to whom Respondent merely paid a flat fee plus mileage, but no payment for traveling time or hotel expenses and similar.

135.7. Finally, while this is not an unfair dismissal claim, we bear in mind that Respondent did consult appropriately with the Claimant. The Claimant was told about the reasons for the proposal. She was given the opportunity to suggest alternatives to redundancy. When she did make suggestions, they were considered, and she was given a reasoned response as to why they would not affect the redundancy situation.

136. For all of those reasons, we conclude that the hypothetical comparator we have identified would have been treated in the same way as the Claimant.

137. It follows that the allegations do not succeed as allegations of direct discrimination.

Discrimination arising from disability

138. Dismissal is inherently unfavourable.

139. We must therefore consider whether the dismissal was because of the things set out in paragraph 17 of the list of issues.

140. We find that the Claimant's selection for redundancy and dismissal were, in part, because of the restrictions on the Claimant's travel. That was not the sole cause; nor was it the main cause. The main cause, in our judgement, was the financial difficulties facing the Respondent and the downturn in work. But it was a significant (that is, more than trivial) factor in the decision. The travel restrictions were referred to in both the letter starting the consultation, and the Claimant's dismissal letter.

141. The restrictions on travel were because of the things that arose in consequence of the Claimant's disability, namely the need to limit time spent away from home (LOI 17.2), and the fact that the effect of travel and staying away from home was necessarily tiring (which in turn increased the risk that she would develop diverticulitis) (LOI 17.3).

142. We do not need to consider the things said to arise from the Claimant's anxiety and depression (LOI para 16) because we have found that Respondent did not have knowledge of the Claimant's anxiety and depression.

143. We then turn to consider objective justification.

144. The legitimate aims being relied upon by the Respondent were set out in paragraph 42 of the Amended Grounds of Resistance:

144.1. ensuring that it promoted the success of the business and remained profitable, including meeting the needs of its clients and the regional demands of its business;
144.2. ensuring that the company complied with its legal obligations to its clients; and
144.3. ensuring the safety of its staff and that reasonable adjustments were in place to prevent exacerbations of pre-existing conditions.

145. We accept that each of the aims being pursued by the Respondent were legitimate ones.

146. In respect of the question of whether dismissing the Claimant was proportionate, we bear in mind that:

146.1. The Respondent's business was suffering from a significant downturn in work;
146.2. The Claimant had only once met the monthly billing target for her role, and (through no fault of her own) her performance against target was on a downward trajectory;
146.3. As set out above, the Respondent consulted with the Claimant and considered other alternatives (including those proposed by the Claimant); and
146.4. We have concluded that the Respondent had not failed to make reasonable adjustments.

147. We therefore consider that there was no less restrictive option open to the Respondent. Dismissing the Claimant was proportionate in all of the circumstances.

148. It follows that the allegations do not succeed as allegations of discrimination arising from disability.

Harassment

149. We have no difficulty finding that the Claimant's dismissal was unwanted conduct. The Claimant did not want to be dismissed.

150. We consider that the Claimant's consultation and dismissal process was carried out carefully and appropriately. When the Claimant made suggestions, they were taken on board and considered. While the process took place relatively quickly, there was no suggestion that it was carried out in a malicious or unpleasant way.

151. The risk of being dismissed where there is a downturn in work is part and parcel of the employment relationship. The Claimant may have felt very strongly about being selected for redundancy and then dismissed. But there was nothing in either the decision itself or the way it was carried out in this case which was objectively capable of having the proscribed effect.

152. It follows that the allegations do not succeed as allegations of harassment.

<u>On 14 January 2022, David Newman dismissing the Claimant's appeal</u>

153. It is common ground that this happened.

Direct discrimination

154. We consider that the correct comparator is a Functional Capacity Assessor with the same length of service and skillset as the Claimant, employed in Wales and the South West (or another region with a similarly small proportion of the Respondent's total workload), and who had the same travel limitations as the Claimant, and who had been dismissed by reason of redundancy, but who did not have a disability within the meaning of the Equality Act 2010.

155. For substantially the same reasons as we have set out above in respect of the dismissal, we see absolutely nothing to suggest that such a comparator would have been treated any differently to the Claimant in terms of the substance of the decision. Mr Newman considered Claimant's appeal. He held an appeal meeting to discuss it with her, allowed her to expand on her appeal. He looked into the point she had raised, then provided an outcome in writing. We cannot see that a comparable employee without a disability would have been treated any differently.

156. We have carefully considered Mr Newman's apparent misunderstanding of the 43% figure. His evidence was that it was a downturn in instructions. We have seen no evidence to support that. Rather, we consider it is more likely that he simply conflated the downturn in instructions with the 43% by which the Claimant had, on average, failed to meet her monthly billing target. We do not, however, consider that the misunderstanding was a significant one in the circumstances, given that:

    156.1. There had been a downturn in work; and
    156.2. The Claimant had, on average, fallen 43% short of target across the preceding four months.

157. The Claimant sought to suggest that Mr Newman ought not to have conducted her appeal given that Mr Pickard had discussed her redundancy with him before he made the decision to dismiss. Given the small size of the Respondent, and the fact that Mr Newman was the Chief Executive, we consider that Mr Newman was self-evidently the most

appropriate person to hear her appeal, notwithstanding his previous involvement. And it is unrealistic to think that he would not have been consulted before such a significant decision was taken. In the circumstances, we could not sensibly criticise Mr Newman's involvement.

158. In any event, there is absolutely nothing to suggest that Mr Newman would not have heard the comparator's appeal.

159. It follows that the allegation does not succeed as an allegation of direct discrimination.

Discrimination arising from disability

160. We consider that the decision to dismiss the Claimant's appeal was objectively unfavourable treatment, in that it had the effect of upholding the Claimant's dismissal.

161. It was not suggested that anything specific to the appeal arose in consequence of the Claimant's disability. Rather, it was the same factors relied upon in respect of the dismissal itself.

162. For the same reasons as we have already set out, we consider that the reason for the Claimant's appeal being dismissed was (in part) the travel restrictions, which in turn were because of the things that arose in consequence of the Claimant's disability.

163. But once again, for the same reasons, we conclude that not upholding the appeal was a proportionate means of achieving a legitimate aim.

164. It follows that the allegation does not succeed as an allegation of discrimination arising from disability.

Harassment

165. Once again, we find that dismissing the Claimant's appeal was unwanted conduct. The effect was to leave her dismissal in force. The Claimant did not want to be dismissed.

166. Once again, it was not suggested that there was anything factor specific to the appeal which had the proscribed effect. So for the same reasons as we have already set out in respect of the dismissal, we conclude that dismissing the Claimant's appeal was not objectively capable of having the prescribed effect.

167. It follows that the allegation does not succeed as an allegation of harassment.

Employment Judge Leith

13 June 2024
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON 14 June 2024

FOR THE TRIBUNAL OFFICE Mr N Roche

DRAFT LIST OF ISSUES

DISABILITY DISCRIMINATION - LIABILITY

Disability Status (s.6 Equality Act 2010 ("EQA")

1. The Respondent accepts that the Claimant was disabled at the material time by virtue of:

1.1. a mental impairment in the form of anxiety and depression; and

1.2. a physical impairment in the form of diverticulitis.

Time Limits (s. 123 EQA)

2. Are any of the Claimant's complaints of discrimination prima facie out of time?

The Respondent contends that any act or omission relied on pre-dating 19 October 2022 is prima facie out of time.

3. If so, do the acts and/or omissions complained of amount to a course of conduct extending over a period ending the last act of which is within the time limit to present the claim taking into account the ACAS early conciliation period?

4. If any matter relied on is out of time, is it just and equitable to extend time?

Direct Discrimination (s. 13 EQA)

5. Did the Respondent subject the Claimant to the following treatment:

5.1. In or around October 2022, refusing to permit the Claimant to attend Vocational Rehabilitation Training?

5.2. In or around November 2022, removing the Claimant from the Transferrable Skills training day?

5.3. On 8 December 2022, Robin Pickard selecting the Claimant for redundancy?

5.4. On 9 December 2022, Robin Pickard dismissing the Claimant on notice?

5.5. On 14 January 2022, David Newman dismissing the Claimant's appeal?

6. If so, do the acts omissions amount to less favourable treatment than that shown to a hypothetical comparator whose circumstances were materially the same as those of the Claimant; namely:

6.1. a Functional Capacity Assessor with the same length of service with the Respondent and skills and competencies with a mental impairment but who was not disabled by virtue of anxiety and depression?

6.2. a Functional Capacity Assessor with the same length of service with the Respondent and skills and competencies with a physical impairment with similar symptoms but who was not disabled by virtue of diverticulitis?

7. If so, was the reason for the treatment complained of either or both of the Claimant's disabilities?

Harassment (s.26 EQA)

8. Did the Respondent subject the Claimant to the treatment in paragraph 5?

9. If so, did the acts amoL1nt to unwanted conduct?

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

11. If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, degrading, humiliating or offensive environment for the Claimant?

12. Was it reasonable for such conduct to have that effect taking the Claimant's perception into account and all of the circumstances of the case?

13. Was the conduct related to her disabilities?

Discrimination Arising From Disability (s. 15 EQA)

14. Did the Respondent subject the Claimant to the acts and/or omissions set out in paragraph 5 above?

15. If so, do those acts and/or omissions constitute unfavourable treatment?

16. Did the following arise in consequence of the Claimant's anxiety and depression:

16.1. low moods and becoming withdrawn?

16.2. increased susceptibility to feelings of rejection and requiring additional reassurance in connection with tasks and that the Claimant is performing to the required standard?

16.3. an increase in the severity of her symptoms of diverticulitis?

17. Did the following arise in consequence of the Claimant's diverticulitis:

17.1. the need to limit travelling time to enable her to use the bathroom as and when necessary at extremely short notice?

17.2. the need to limit time spent away from her home to enable her to prepare meals that minimise the effects of her diverticulitis?

17.3. feelings of nausea and increased tiredness/fatigue?

17.4. increased susceptibility to infections and fevers?

17.5. low moods?

17.6. sickness absences from work?

18. Was the Claimant subjected to the unfavourable treatment listed in paragraph 5 above because of any of the somethings set out in paragraphs 16 and 17? In particular:

18.1. Was the Claimant subjected to the unfavourable treatment in paragraph 5.1 above of not being permitted to attend the Vocational Rehabilitation Training because of the somethings identified in paragraphs 16.1, 16.3, 17.1, 17.2, 17.5 and/or 17.6?

18.2. Was the Claimant subjected to the unfavourable treatment in paragraph 5.2 above of not being permitted to attend the Transferrable Skills training because of the somethings identified in paragraphs 16.1, 16.3,
17.1, 17.2, 17.5 and/or 17.6?

18.3. Was the Claimant subjected to the unfavourable treatment in paragraph 5.3 in that she was selected for redundancy because of the somethings set out in paragraphs 16 and/or 17?

18.4. Was the Claimant subjected to the unfavourable treatment in paragraph 5.4 above in that she was dismissed because of the somethings set out in paragraphs 16 and/or 17?

18.5. Was the Claimant subjected to the unfavourable treatment in paragraph 5.5 in that her appeal was dismissed and dismissal upheld because of the somethings set out in paragraphs 16 and/or 17?

19. If so, was the dismissal in pursuit of achieving a legitimate aim? The Respondent says that its aims were:

.....

[RESPONDENT TO CONFIRM LEGITIMATE AIM].

20. If so, were the acts and/or omissions complained of a proportionate step to take in these circumstances?

21. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had a mental impairment of anxiety and depression? If so, from when?

22. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had a physical impairment of diverticulitis? If so, from when?

Failure To Make Reasonable Adjustments (ss.20 & 21 EQA 2010)

Pre-S September 2022

23. The Respondent accepts that it initially (prior to 5 September 2022) applied a provision, criterion or practice ("PCP") of requiring the Claimant to:

23.1. regularly travel long distances to carry out assessments; and

23.2. regularly required the Claimant to stay away from home on business.

24. Did the PCP put the Claimant at a "substantial disadvantage" (i.e., one that is more than minor or trivial) compared to those who do not suffer from the Claimant's disability due to the impact that the Claimant's impairments have on her (identified in the "somethings" above)?

25. Did the Respondent know or ought it reasonably to have known the PCP would have that effect on the Claimant? If so, from when?

26. It is agreed that steps which avoided the disadvantage included that the Claimant be only required to stay away from home once per month and that she would be limited to working in locations no greater than 2.5 hours away from her home to enable her to stay at home overnight to enable her to use her own bathroom as and when necessary and to prepare her own meals. By what date ought the Respondent to have reasonably put such adjustments in place? Was this prior to 5 September 2022?

Post 5 September 2022

27. Did the Respondent maintain the PCPs set out in paragraph 23 above?

28. Did the PCP put the Claimant at a "substantial disadvantage" (i.e., one that is more than minor or trivial) compared to those who do not suffer from the Claimant's disability due to the impact that the Claimant's impairments have on her (identified in the "somethings" above) and by resulting in her dismissal due to the limited amount of work?

29. Did the Respondent know or ought it reasonably to have known the PCP would have that effect on the

Claimant?

30. What steps could have been taken to avoid the disadvantage? The Claimant suggests that it would have been reasonable for the Respondent to have implemented the following adjustments:

30.1. amending the Claimant's geographical scope of work to increase workflow;

30.2. consulting with the Claimant regarding her travel restrictions and what would be feasible for her in the circumstances;

30.3. adjusting the Claimant's duties to incorporate auditing reports for newer assessors and supporting them in their roles;

30.4. consulting with the Claimant as to training opportunities and alternative roles.

31. Was it reasonable for to do so in all of the circumstances?

32. If so, did the Respondent fail to do so?

REMEDY

33. If the discrimination claims succeed, is it just and equitable to make an award?

34. If so, for how much? In particular:

34.1. what pecuniary losses has the Claimant suffered?

34.2. were those losses attributable to the act of discrimination that was upheld?

34.3. what would have happened had the discrimination not occurred?

34.4. at what point would the Claimant be likely to find an equivalently remunerated role?

34.5. has the Claimant reasonably mitigated any losses?

34.6. should the Tribunal make an award for injury to feelings in respect of any allegation of discrimination that has been upheld?

34.7. If so, what was the effect of the discrimination on the Claimant, taking into account her impairment, in particular?

34.8. How great should any such award be taking into consideration the Presidential Guidance on injury to feelings?

34.9. Should the Tribunal award interest on any sums awarded to the Claimant?

34.10. If so, how much would that interest amount to in respect of a) injury to feelings and b) pecuniary losses?