# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs. H. Nelson

**Respondents:** Ministry of Defence

**Heard at:** London South Employment Tribunal (via CVP video conference)

**On:** 7th to 10th May 2024

**Before:** Employment Judge Sudra

Sitting with Members, Miss. N. Murphy and Ms. E. Thompson.

**Appearances:**

Claimant: Mr. A. Walton (solicitor)

Respondent: Ms. J. Russell of Counsel

*(References in the form [XX] are to page numbers in the Hearing bundle. References in the form [XX,para.X] are to the paragraph of the named witness' witness statement)*

# RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's complaints of,

(i) Constructive unfair dismissal is not well founded and are dismissed.

(ii) Direct disability discriminations are not well founded and are dismissed.

(iii) Discrimination arising from disability are not well founded and are dismissed.

(iv) Indirect disability discriminations are not well founded and are dismissed.

(v) Failure to make reasonable adjustments are not well founded and are dismissed.

(vi) Harassment related to disability are not well founded and are dismissed.

(vii) Victimisations are not well founded and are dismissed.

# REASONS

1. The Claimant began Acas early conciliation on 9th September 2022 ('Day A') and was issued with an Acas early conciliation certificate on 4th October 2022 ('Day B'). On 23rd October 2022 the Claimant presented her ET1 claim form number 2303729/2023. The Respondent defended the claims by way of an ET3 and Grounds of Resistance on 15th November 2022. On 10th January 2023, the Claimant again began Acas early conciliation ('Day A') and was issued with an Acas early conciliation certificate on 3rd February 2023 ('Day B'). On 24th February 2023 the Claimant presented a second ET1 claim form number 2300899/2023. The Respondent defended these claims by way of an ET3 and Grounds of Resistance on 27th March 2023 and a consolidated Grounds of Resistance on 20th November 2023. The Claimant's two claims (2303729/2023and 2300899/2023) were consolidated by the Tribunal on, 27th September 2023.

## The Issues

2. The Claimant's claims are for:

(i) Constructive unfair dismissal.

(ii) direct disability.

(iii) discrimination arising from disability.

(iv) indirect disability discrimination.

(v) failure to make reasonable adjustments.

(vi) harassment related to disability; and

(vii) victimisation.

An agreed List of Issues was contained within the Case Management Order of Employment Judge Illing [855-861] and is appended to this judgment.

## Preliminary Matters

3. At the outset of the Hearing the Tribunal discussed the List of Issues with both the Claimant and Respondent; they agreed that the List of issues was agreed as appended.

4. The Tribunal also explored timetabling with the parties and was content that evidence and submissions would be completed within the allotted Hearing days. The Tribunal will not sit on 13th May 2024 due to other unavoidable commitments. At the conclusion of evidence and submissions, it was explained that a view will be taken on deliberations, judgment, and remedy if appropriate.

5. The Claimant, upon Tribunal enquiry, confirmed that due to her impairment, she may require regular breaks. As would be expected, these adjustments were granted and the Claimant was encouraged to speak-up should she require any further adjustments.

6. Mr. Walton mentioned that whilst he had received, from the Respondent, a skeleton argument, cast list, and chronology, it had not sought to agree them with the Claimant. The Tribunal advised Mr. Walton that it would be most unusual for a party to seek the other party to agree its skeleton argument. In respect of the Respondent's cast list and chronology, Mr Walton was invited to state what amendments/additions the Claimant may have. Mr Walton asked that: Major Rimmington; Tracy Porteous; and Stewart Horton are added to the cast list and emphasised that date of knowledge of disability was in dispute. In light of the Respondent not objecting, the aforementioned individuals were added to the cast list and the dispute regarding the date of knowledge of disability was noted.

7. Mr. Walton asked for an opportunity to submit a skeleton argument from the Claimant and to make an application to amend. This was agreed. Mr. Walton

submitted a skeleton argument which incorporated a reading list and an application to amend the Claimant's claim, in the following terms:

'*14. The Claimant seeks leave to amend its claim for Reasonable Adjustments (RA) pursuant to section 20-21 Equality Act 2024 (bundle page 17) to add the refusal by MOD to accede to a 4-week Trial period in or around July 2022, recently reported in the legal press as a valid RA Rentokil Initial UK v Miller [2024].*'

8. The Tribunal heard the Respondent's objections to allow the Claimant to amend her claim and Mr. Walton's observations on those objections. For reasons given at the Hearing the Claimant's application to amend her claim was refused.

## Procedure and Documents

9. The Tribunal had before it:
   (a) An agreed Hearing bundle consisting of 897 pages.
   (b) an agreed cast list and chronology (agreed after the amendments made as per paragraph 7 (supra.)); and
   (c) skeleton arguments from both the Claimant and Respondent.

10. The Tribunal also had written witness statements and heard live evidence from:

    <u>For the Claimant</u>

    (i) The Claimant.
    (ii) Andrew Dane.

    <u>For the Respondent</u>

    (iii) Lieutenant Colonel Charles Fields; and
    (iv) Major Tony Gauci.

11. The Claimant and Respondent produced written closing arguments and made oral closing submissions at the conclusion of the evidence.

12. The Tribunal notified the parties at the outset of the Hearing that they would only read documents that they were specifically referred to and would only read documents referred to in witness statements insofar as they were relevant.

## Findings of Fact

13. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all the evidence given by witnesses during the Hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

14. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.

15. The Respondent is a government ministerial department with the aim to '*work for a secure and prosperous United Kingdom with global reach and influence. We will protect our people, territories, values and interests at home and overseas, through strong armed forces and in partnership with allies, to ensure our security, support our national interests and safeguard our prosperity*.'

16. The Claimant was employed by the Respondent to work at the Royal Yeomanry, Croydon Civil Service Division. The Claimant began working for the Respondent, as an administrative assistant to the Quartermaster's ('QM') clerk on 6th June 2016. On 21st July 2022, the Claimant's role was changed to squadron clerk as part of a post rotation exercise by the Respondent and she was transferred to Squadron C.

17. The Claimant's transfer to Squadron C entailed a move of location in respect of her physical office but this was on the same site as her previous role. The Claimant had accepted the transfer to her new role on 26th July 2022 and did not ask for a trial period in her new role.

18. The Claimant is, and was, during all material times, a disabled person within the meaning of s.6 of the Equality Act 2010 and has the impairment of Type 2 diabetes. Emanating from her disability, were the conditions of:

    (a) Diabetic Macular Edema ('DME');
    (b) blurred vision.
    (c) dry eye condition.
    (d) a requirement to take medication, including regular injections.
    (e) pain, irritation and mild headaches or flare ups; and
    (f) the need to avoid constant PC use.

19. The Claimant resigned from her role with the Respondent, with notice, on 6th January 2023 and her employment terminated on 6th February 2023.

20. The Claimant's role required her to use a computer in a wide-ranging manner including accessing emails and using the Respondent's 'MyHR' application. In or around November 2020 the military roles within QM were to be relocated to Leicester and the civilian support QM roles were planned to be relocated to Leicester after the military roles had done so. The Claimant, by virtue of her employment contract, could not be compelled to relocate to Leicester as it was outside of the reasonable geographical location to which she could be expected to be redeployed.

21. Since around 2020, the Claimant experienced issues with her eyes and required regular eye injections. The Claimant's then line manager, Pat McCormack, afforded her paid time off work to attend hospital appointments to receive eye injections.

22. The Claimant was not computer literate and struggled with using computers as she lacked familiarity with information technology ('IT'). This was not due to her disability but due to age, as accepted by the Claimant during cross-examination, and this had an adverse effect on the Claimant's ability to perform the IT aspects of her role. The Claimant had mentioned this to Captain 'Paddy' Ireland and Corporal Carey. However, the Claimant had at no point mentioned her eye condition or Type 2 diabetes to Capt. Ireland as she thought that Corp. Carey had mentioned them to him. He had not.

23. On 8th July 2021, the Claimant and a colleague attended an on-line meeting with Major Rimmington and Lieutenant Colonel Bragg at which she was told of the QM department's move to Leicester and the possible impact of the move on civilian staff members who could not, or would not, be able to re-locate to Leicester.

24. When the Claimant's role changed to squadron clerk in Squadron C, she was provided with training to assist her to smoothly integrate into her role. From 25th to 28th July 2022, the Claimant was due to be provided with training by Cpl. Carey at the Croydon base. The Claimant had a day off work on 25th July 2022 so her first session of training was on 26th July 2022. On 27th July 2024, when Cpl. Carey arrived at the Croydon base the Claimant was upset as she had been waiting for Cpl. Carey to arrive and stated that she did not need Cpl. Carey's help and was going home. Eventually, the Claimant calmed herself and partook in training and Cpl. Carey covered JPA reports with the Claimant.

25. At the beginning of September 2022, the Claimant received further training from Jo Collison (clerk) regarding her new role. Also in September 2022, the Claimant received training from Jon Farthing (W02) including on the following topics,

- Computer basics e.g., IT equipment Care and operation (Mouse, Keyboard and monitor etc).
- How to Start Up and Close Down the PC.
- How a mouse, keyboard and monitor plug into the back of the PC.
- Actions on if the mouse, keyboard or monitor fails to work.

- Explained the basics of office security, passwords and keeping file cabinets locked.
- Explained who is and who is not allowed to look through documentation held within the office.
- Explained what one can display and not display on the Sub-Unit Clerk wall, e.g. medical details etc.
- Explained what JPA is and how we use it within RY and the Army as a whole.
- Explained publications (JSPs) focused on JSP752 and where to find them.
- Explained the power and responsibility of JPA and the access and permission of a Sub-Unit Clerk.
- Explained the importance of locking the JPA down and ensure all cabinets are locked when leaving the office for any reason.
- Explained the damage or potential fraud that could be committed if a known or unknown person has access to
- JPA being left on and able to access – Pay, expenses etc. etc. (Never to give out or write down your password)

The Claimant found the training to be very good.

26. On 20th September 2022 the Claimant lodged a grievance which she sent to Capt. Ireland [339]. The Claimant complained that she had not been given any meaningful work since 21st July 2022 and had hitherto, only received one day of training. The Claimant also stated that she had had no valid response *'regarding my redundancy.'* This was not true as on 15th July 2022, Gary Blain (Brigade Secretary) had emailed the Claimant to tell her that there was no intention to make her redundant. The Claimant's evidence during cross-examination regarding her grievance was confused. When asked if she had written her grievance the Claimant replied '*no*.' However, when it was pointed out that her name was on the bottom of the grievance letter she then stated that Andrew Dane (her husband) had '*helped'* her with it.

27. We find that, as with many other documents (including her ET1 claim forms) Mr. Dane had drafted the grievance which explained why she did not even remember seeing it. It also explains why part of the Claimant's allegations are in respect of Capt. Ireland's role in the grievance process even though the grievance was about his actions. There is no mention of Capt. Ireland in the Claimant's grievance and in it, she asks to meet with Capt. Ireland to discuss

the grievance. This does not accord with the allegations the Claimant makes and she would only be making the claims she makes, if she was unaware of what was written on her behalf. During his evidence, Mr. Dane admitted he had written her first ET1 and written the second ET1 with assistance from Mr. Walton. It is apparent that the Claimant was not fully aware of what claims were being pleaded on her behalf. A stark example of this is that the Claimant, in cross-examination, was under the apprehension that she had also brought a claim for race discrimination, which she had not.

28. Capt. Ireland emailed Major Rimmington and Mr. Blain, on 20th September 2022, informing them that the Claimant had met with him and was very emotional and stressed. Capt. Ireland outlined an action plan to assist the Claimant to be more confident in her role and for further training to be provided to her; these things were implemented. Capt. Ireland then sent the Claimant an email, on 20th September 2022, informing him of the measures that would be taken to support her. When questioned by Ms. Russell on her grievance, the Claimant agreed that the main thrust of her grievance had been resolved and she received meaningful training in September 2022.

29. On 27th September 2022, Capt. Ireland emailed Mr. Blain to progress the Claimant's grievance and asked for HR advice in handling it. The Claimant was invited to attend a grievance hearing scheduled to take place on 5th October 2022 and it was agreed that she could be accompanied by Mr. Dane. On 30th September 2022 Mr. Dane wrote to Maj. Rimmington, Mr. Blain and Capt. Ireland confirming the Claimant's attendance and stated,

> *'Since the grievance was first raised, things have moved on since that time, and it would appear that largely main thrust* [sic] *of the grievance has been resolved with Homa, after 2-months of inactivity, now undertaking meaningful training in her new position.'* [385] (Our underlining).

30. The grievance hearing proceeded as planned, chaired by Capt. Ireland, and the Claimant attended with her companion, Mr. Dane. The Claimant's grievance was discussed, and she was given an opportunity to put forward any representations she wished to make. Capt. Ireland upheld the Claimant's grievance and sent her an outcome letter the same day outlining a training plan, actions, and expectations going forward [417-418].

31. On 6th October 2022, Mr. Dane wrote to Capt. Ireland in respect of the previous day's grievance hearing [433-434]. Mr. Dane stated,

> *'To clarify the situation, my understanding is, as we agreed, with effect from 5th October 2022 the grievance raised on 20th September 2022 has now been resolved, and that you would be forwarding the necessary documents confirming this.'*

As the Claimant had commenced Acas early conciliation (for her first ET1) Mr. Dane confirmed,

> *'I will now inform the Acas Conciliator that the grievance has been resolved.'*

32. On 10th October 2022 the Claimant was signed off work sick, until 21st October 2022 with '*work stress.*'

33. The Claimant appealed the grievance outcome on 18th October 2022 [477], notwithstanding that she had, without any ambiguity, stated that she considered the grievance to have been resolved. In her grievance appeal, the Claimant made no complaint about Capt. Ireland's involvement or handling of her grievance. What the Claimant did say in her appeal was that in light of her symptoms of, blurred vision, medication including regular injections, irritation and mild headaches or flare ups, and dry eye condition it was unrealistic for her to be expected to attend intensive IT training in Glasgow. However, whilst the Respondent *preferred* that the Claimant attended the IT training in Glasgow, there was no *compulsion* for her to do so.

34. On 6th January 2023, the Claimant wrote to Maj. Rimmington resigning from her role with notice (the Claimant had calculated that her last day of employment would be 6th February 2023. In her letter the Claimant stated that she felt that there had been a total breakdown in her relationship with the Respondent and specifically mentioned:

    (a) She had had wages unlawfully deducted from her pay.
    (b) her grievance had been '*tainted'* by the involvement of Capt. Ireland.
    (c) Capt. Ireland had neglected altogether from the process.
    (d) the disappearance of her job description with the Royal Yeomanry; and
    (e) that she was expected to continually use screen technology despite her eye condition.

35. In cross-examination, the Claimant accepted that what she had *thought* was Capt. Ireland's departure from the Respondent, was <u>not</u> a reason for her resignation.

36. Major Tony Gauci was appointed to hear the Claimant's grievance appeal. In preparation for the appeal hearing, Maj. Gauci was sent:

    (i) The Claimant's grievance.
    (ii) the grievance decision of Captain Ireland.
    (iii) the Claimant's appeal letter.
    (iv) a letter dated 19 October 2022 acknowledging receipt of the appeal and stating will the appeal process be delayed until the outcome of the Occupational Health Assessment.
    (v) Grievance and dispute resolution procedures.
    (vi) Investigation Guidance.
    (vii) Appeals guidance.
    (viii) Appeals Standards.
    (ix) an email from Corporal Rachel Carey dated 29 September 2022 setting out the training she provided.
    (x) an email from Warrant Officer Farthing dated 29 September 2022 also. setting out the training he had provided; and
    (xi) various documents provided by the Claimant including her Employment Tribunal Claims.

37. Having spoken to the Claimant about her grievance appeal and the process, between 20th and 27th January 2023, Maj. Gauci invited the Claimant to an

Appeal Hearing scheduled for 2nd March 2023 by which time he would have conducted any interviews he needed to and read the relevant documents.

38. 6th February 2023 was the Claimant's last day in employment with the Respondent.

39. The Claimant attended the appeal hearing accompanied by Mr. Dane; Mr. McCormick also attended to support he Claimant.

40. Maj. Gauci spent some time listening to the Claimant make her representations and then allowed Mr. Dane to read out a pre-written speech. Maj. Gauci then asked the Claimant questions pertinent to her appeal. During the appeal hearing, the Claimant told Maj. Gauci that she had not mentioned her eye condition to Capt. Ireland as she thought he already knew. Maj. Gauci then concluded the hearing to consider what he had heard and to make his decision.

41. On 8th March 2023 the Claimant was sent an appeal outcome letter; the Claimant's grievance appeal was not upheld.

## Relevant Law

### Constructive Unfair Dismissal

42. Under section 95(1) Employment Rights Act 1996, an employee is considered to have been dismissed in circumstances where '*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*.' This is commonly known as constructive dismissal.

43. In order for there to have been a constructive dismissal there must have been: -

    (i) a repudiatory or fundamental breach of the contract of employment by the employer.

(ii) a termination of the contract by the employee because of that breach; and

(iii) the employee must not have affirmed the contract after the breach, for example by delaying their resignation.

44. In *Western Excavating (ECC) Ltd v. Sharp* [1978] ICR 221, CA, it was said '*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed*.'

45. An employee can rely on breach of an express or implied term of the contract of employment. In cases of alleged breach of the implied term of trust and confidence the test is set out in the case of *Malik v. Bank of Credit and Commerce International Ltd* [1998] AC 20; namely, has the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test of whether there has been such a breach is an objective one (see *Leeds Dental Team Ltd v. Rose* [2014] IRLR 8).

46. It is open to an employee to rely on a series of events which individually do not amount to a repudiation of contract, but when taken cumulatively are considered repudiatory. In these sorts of cases the *'last straw'* in this sequence of events must add something, however minor, to the sequence (*London Borough of Waltham Forest v. Omilaju* [2005] ICR 481).

47. On the question of waiving the breach, the *Western Excavating* case makes clear that the employee '*must make up his mind soon after the conduct of which he complains; if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will regard as having elected to affirm the contract*.'

**Direct Disability Discrimination**

48. Section 13 of the Equality Act 2010 ('EqA 2010') provides that (so far as material),

> '*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.'*

….

49. Under section 23(1) EqA 2010, where a comparison is made, there must be no material difference between the circumstances relating to each case. It is. possible to compare with an actual or hypothetical comparator.

50. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the Claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

51. We must consider whether the fact that the Claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

52. In many direct discrimination cases, it is appropriate for a Tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of disability. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be. answered without first considering the 'reason why' the Claimant was treated.

as she was.

**Discrimination Arising from Disability**

53. Section 15 of the Equality Act 2010 ('EqA') provides that:

**15 Discrimination arising from disability.**

*(1) A person (A) discriminates against a disabled person (B) if—*

*(a) A treats B unfavorably 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.*

54. Section 136 of the EqA sets out the relevant burden of proof that. must be applied. A two-stage process is followed. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which. we could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent committed an act of unlawful. discrimination.

55. At the second stage, discrimination is presumed to have occurred, unless the Respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the Respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the Claimant's race. The Respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-. discriminatory.

56. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258 and we have

followed those as well as the direction of the court of appeal in the well-known case of *Madarassy v. Nomura International plc* [2007] IRLR 246, CA. The recent decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the EqA.

57. The Court of Appeal in *Madarassy*, stated:

> '*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.'* (56)

58. It may be appropriate on occasion, for the Tribunal to take into account the Respondents' explanation for the alleged discrimination in determining. whether the Claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy*.) It may also be appropriate for the Tribunal to go straight to the second stage, where for example the Respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A Claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).

59. We are required to adopt a flexible approach to the burden of proof. provisions. As noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, they will require careful. attention where there is room for doubt as to the facts necessary to establish. discrimination. However, they may have little to offer where we in a position. to make positive findings on the evidence one way or the other.

60. Allegations of discrimination should be looked at as a whole and not purely. on the basis of a fragmented approach (*Qureshi v London Borough of Newham* [1991] IRLR 264, EAT. This requires us to "see both the wood and

the trees" (*Fraser v University Leicester* UK EAT/1055/13 at paragraph 79).

**Indirect Disability Discrimination**

61. Turning to the applicable law, the test for indirect discrimination under s.19 EqA 2010 is as follows:

    (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

    (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

        (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

        (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

        (c) it puts, or would put, B at that disadvantage, and

        (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

62. The provision, criterion or practice in such cases can be quite general, as the Court of Appeal made clear in *Griffiths v. Secretary of State for Work and Pensions* 2017 ICR 160, CA. In that case Elias LJ held that the appropriate formulation was that the,

> *'Employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That was the provision, breach of which might end in warnings and ultimately dismissal. It was clear that a disabled employee whose disability increased the likelihood of absence from work on ill health grounds, was disadvantaged in more than a minor or trivial way.'*

## Failure to Make Reasonable Adjustments

63. The Relevant provisions are found at ss. 20 and 21 EqA 2010

## Harassment Related to Disability

64. S.26(1) EqA 2010 provides:

*'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.'*

65. A similar causation test applies to claims under section 26 as described. above to claims under section 13. The unwanted conduct must be shown. 'to be related' to the relevant protected characteristic.

66. The shifting burden of proof rules set out in section 136 of the Act can be helpful in considering this question. The burden is on the claimant to establish, on the balance of probabilities, facts that in the absence of an adequate explanation from the respondent, show she has been subjected. to unwanted conduct related to the relevant characteristic. If she succeeds, the burden transfers to the respondent to prove otherwise.

67. Harassment does not have to be deliberate to be unlawful. If A's unwanted conduct (related to the relevant protected characteristic) was deliberate and is shown to have had the purpose of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out. There is no need to consider the effect of the unwanted conduct.

68. If the conduct was not deliberate, it may still constitute unlawful harassment. In deciding whether conduct has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, we must.

consider the factors set out in section 26(4), namely:

(a) the perception of B;
(b) the other circumstances of the case.
(c) whether it is reasonable for the conduct to have that affect.

69. The shifting burden of proof rules can also be helpful in considering the question as to whether unwanted conduct was deliberate.

70. Whilst the unwanted conduct need not be done 'on the grounds of' or 'because of', in the sense of being causally linked to, a protected characteristic in order to amount to harassment, the need for that conduct be 'related to' the protected. characteristic does require a 'connection or association' with that; see *Regina. (Equal Opportunities Commission) v. Secretary of State for Trade and Industry* [2007] ICR 1234 QBD. Notwithstanding it was decided under the prior legislation including the formulation 'on the grounds of', the observations made. by the EAT in *Nazir v. Asim* [2010] ICR 1225 may still be of some relevance:

> *'69 We wish to emphasise this last question. The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace: it is concerned only with harassment which is related to a characteristic protected by equality law—such as a person's race and gender.'*

71. In relation to the proscribed effect, although the Claimant's perception must be taken into account, the test is not a subjective one satisfied merely because the Claimant thinks it is. The ET must reach a conclusion that the found conduct reasonably brought about the effect; see *Richmond Pharmacology v. Dhaliwal* [2009] IRLR 336 EAT.

72. Guidance on the threshold for conduct satisfying the statutory definition was. given by the EAT in *Betsi Cadwaladr University Health Board v. Hughes* [2014] 2 WLUK 991; per Langstaff P (as he then was):

10. Next, it was pointed out by Elias LJ in the case of Grant v HM Land **Registry [2011] EWCA Civ 769 that the words "violating dignity",** "**Intimidating, hostile, degrading, humiliating, offensive" are** signi**fi**cant words. As he said:

"Tribunals must not cheapen the signi**fi**cance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

11. Exactly the same point was made by Underhill P in Richmond Pharmacology at paragraph 22:

".not every racially slanted adverse comment or conduct may **constitute the violation of a person's dignity. Dignity is** not. necessarily violated by things said or done which are trivial or **transitory, particularly if it should have been clear that any** o**ff**ence. was unintended. While it is very important that employers, and **tribunals, are sensitive to the hurt that can be caused by racially** o**ff**ensive comments or conduct (or indeed comments or conduct on other grounds **covered by the cognate legislation to which w**e have referred), it is also **important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."**

**12. We wholeheartedly agree. The word "violating" is a strong word.** O**ff**ending ag**ainst dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might** be. **said of the words "intimidating" etc. All look for effects which are** serious. and marked, and not those which are, though real, truly of lesser. consequence.

## Victimisation

73. The test under s.27 EqA 2010 is as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act.
(b) giving evidence or information in connection with proceedings under this Act.
(c) doing any other thing for the purposes of or in connection with this Act; …

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

## Conclusions and Analysis

Credibility of Evidence

74. Whilst we find that the Claimant's evidence was honest, it was, in many aspects, contradictory and confused. Upon hearing the oral evidence and from the documentary evidence, the Claimant's stance regarding the handling of her grievance, Capt. Ireland's involvement in it, and her proficiency in using computers has been inconsistent. The Claimant was also under a misapprehension to what her claims actually were; perhaps as she had not completed her ET1 claim forms and because the majority of her correspondence with the Respondent was drafted by Mr. Dane.

75. We found the Respondent's witnesses' evidence to be measured and cogent. Where there was a dispute, we preferred the evidence of the Respondent's witnesses.

Constructive Unfair Dismissal

76. We have not heard in oral evidence nor read any document in the bundle that supports the contention that the Respondent committed a irrevocable or fundamental breach of the Claimant's contract of employment entitling her to consider herself constructively dismissed. It is patently obvious that the Claimant has misunderstood the concept of, or the constituents required for, a claim of Constructive Unfair Dismissal.

77. The Claimant alleges that the Respondent insisted that she comply with a Performance Development Plan and agreed in evidence that what she was referring to was:

'1. Continue X1 day per week with Mrs Collison until further notice.
2. CpI Carey J PA trg week 10 - 14 Oct 22
3. CM Reserve Course – 1st quarter of 2023' [417]

However, in cross-examination the Claimant stated that she had agreed to this plan and it was in any event suspended and taken no further in October 2020.

78. During cross-examination the Claimant accepted that any deductions from her wages were corrected upon her providing the Respondent with a fit for work note in December 2022.

79. The Claimant also accepted in cross-examination that the PC training in Glasgow in February 2023 did not destroy the employment relationship, so it was baffling that she had citied this as an allegation of constructive unfair dismissal. It was equally baffling that the Claimant alleged that Capt. Ireland's involvement in her grievance caused her to resign when she accepted in evidence that her grievance was not even about Capt. Ireland and that his alleged abandoned progression of her grievance did not cause her to resign.

80. Misplacing or losing the Claimant's previous job description and expecting the Claimant to use IT in her new role are not matters which can, in this context, be capable of constituting a fundamental breach of contract. For these reasons, the claim of constructive unfair dismissal has not been made out.

Direct Disability Discrimination

81. The Claimant, at various points in her evidence, accepted that she had access to, and indeed received, training in respect of her role post-redeployment. The Claimant received training from Cpl. Carey on 26th July 2022, Jo Collison in September 2022, and Jon Farthing in September and October 2022. The Claimant also accepted that her grievance did not involve a complaint about Capt. Ireland. Thus, the Claimant had received no unfavourable treatment on grounds of disability or at all and he claim for direct disability discrimination fails.

Discrimination Arising from Disability

82. The Tribunal accepted Maj. Gauci and Col. Field's evidence that the Glasgow IT course was a standard course which was not mandatory as opposed to an

intensive compulsory course the Claimant was required to attend. The Claimant did not proffer any evidence, oral nor documentary, that she was required to undertake intensive on-screen work. Therefore, her claims under this head must fail.

83. Even if the Claimant's claims had succeeded, the Tribunal accept that attendance at the Glasgow course and doing intensive on-screen work, was a proportionate means of achieving the legitimate aims of: (a) mitigating the risks of a redundancy dismissal; and (b) ensuring the Respondent's administrative positions are staffed by those with appropriate experience and the necessary skills.

Indirect Disability discrimination and Failure to Make Reasonable Adjustments

84. For the reasons stated at paragraphs 81 to 82 (supra.) these claims must also fail.

(In respect of her failure to make reasonable adjustments claim, the Tribunal were satisfied that there was not enough non-PC based work at the Respondent to enable them to re-organise administrative tasks amongst the administrative pool in order to allocate the Claimant more non-PC based work).

Harassment Related to Disability and Victimisation

85. In evidence, the Claimant accepted that she was not harassed because of disability, nor was she victimised. The Tribunal asked specific questions of the Claimant to ensure that she was aware of her evidence on this point and she confirmed that she was not making a complaint about harassment or harassment related to disability.

86. In light of the Claimant's unequivocal evidence that she had neither been harassed or victimised these claims fail. In any event, in relation to victimisation, the Tribunal found that the Claimant was not subjected to any detriments.

87. For these reasons the Tribunal finds that the Claimant's claims fail and are dismissed.

**Employment Judge Sudra**

Date: 4th July 2024

JUDGMENT SENT TO THE PARTIES ON

5th July 2024

FOR THE TRIBUNAL OFFICE

P Wing