



EMPLOYMENT TRIBUNALS

Claimant: Miss R Dovkants
Respondent: Cathedral Leasing Limited
Heard at: Birmingham
On: 15, 16, 19, 20 & 21 October 2020
Before: Employment Judge Flood
Mr White
Mr Howard

Representation

Claimant: In person
Respondent: Mr Rozycki (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant succeeds in her complaint that the respondent failed to comply with a duty to make reasonable adjustments (section 20 & 21 Equality Act 2010 (“EqA”)) when it did not allow her to have someone to accompany her during the meeting which led to dismissal on 24 July 2019.
2. The claimant’s complaints of direct disability discrimination (section 13 EqA); discrimination arising from disability (section 15 EqA) and disability related harassment (section 26 EqA) fail and are dismissed.

REASONS

The Complaints and preliminary matters

1. The claimant was employed by the respondent, from 13 May 2019 until 24 July 2019. By a claim form presented on 7 August 2019 following an unsuccessful period of early conciliation from 10 to 31 July 2019 she brought complaints of unfair dismissal, direct disability discrimination, discrimination arising from disability, a failure to make reasonable adjustments and disability related harassment.
2. The claimant's unfair dismissal claim was dismissed on 8 November 2019 on the basis that she did not have sufficient length of service to bring that claim.
3. There was an agreed list of issues which we referred to throughout the hearing, which is shown below. A bundle of documents had been produced by the respondent.
4. At the outset of the hearing, the claimant made an application to have various documents excluded from the bundle, namely the sales figures at page 52 and all of the tracker information and/including the following numbered pages: 175A, 139, 140, 141 and 142 123, 144, 147, 154, 156, 175A. With respect to the sales figures data shown at page 52, the claimant contended that the figures had been fabricated (and pointed out what she said were figures related to her colleague and comparator Shamema Khan ("SK") that could not be correct and that her own figures for total contracts were inconsistent with figures also shown at page 98 to support this contention). She claimed that she had never been notified by the respondent that she was being tracked and that this would include her movements during her personal time. She submitted that the tracking was unlawful and excessive and asked for the documents to be excluded and that the respondent would not be able to rely on such documents.
5. The respondent objected to the application, firstly denying that numbers had been falsified, and in any event, if this was what was being alleged, the respondent's witnesses can be asked about that by the claimant. Mr Rozycki submitted that the points raised by the claimant were not a good enough reason for documents to be excluded, but that the relevant documents should be looked at and witnesses asked to give evidence on those points made by the claimant.
6. After carefully considering the claimant's application whilst doing our reading our decision was that we would not exclude the documents as the test we had to apply was whether the documents and evidence were relevant and necessary to the fair determination of the claim. On the basis of what we had heard at that time, we decided that the documents were of relevance to the issues in dispute and that the claimant could ask questions of the witnesses and could dispute the veracity of the various documents when making

submissions. Accordingly we declined the application to exclude these documents.

7. On the third day of the hearing, and after the claimant and her witnesses had completed their evidence, the respondent produced a document found over the weekend which it said may have some relevance. Mr Rozycki said that following on from the evidence of Stephanie Rogers ("SR) heard on Friday that she also met with SK on 22 July 2020 (she had met with the claimant earlier that day and a note of that meeting was at page 150), the respondent had found a note prepared by SR of that meeting with SK. The respondent submitted that this may have some relevance as SR's evidence had been that the meetings she had with the claimant and SK were very similar. The claimant objected to this and explained that late disclosure of documents was extremely distressing to her. The claimant explained to the Tribunal that she had found the process of disclosure and exchange of documents and generally the preparation for the hearing extremely difficult. She did not believe the respondent had co-operated with her as well as it should have done and this was a further example. We had several discussions about documents that the claimant considered that had not been disclosed during the hearing. The Tribunal decided that the document would be admitted but we assured the parties that appropriate weight would be given to it given that the claimant challenged its veracity and it had been produced very late in the proceedings and after SR's evidence had been completed.
8. The claimant told us on the first day of the hearing that she was very anxious about the Tribunal hearing and in particular she was concerned about the presence of the respondent's witnesses in the Tribunal room whilst she was giving evidence and asking her questions. We were able to facilitate a video link to another Tribunal room and the respondent's witnesses generally observed the hearing from that room and only entered the Tribunal room the hearing was taking place in when they were required to give evidence. The claimant was content with this arrangement but then became concerned that the respondent's witnesses were discussing matters in the other room and this was leading to additional documents being disclosed and new matters being raised. I explained that the respondent's witnesses should be able to observe as it was a public hearing and the arrangements involving the second room were made to alleviate the claimant's initial concerns. I explained that all and any new documents that the respondent wished to add would need to be the subject of an application and the lateness of this would be a relevant factor for the Tribunal. The claimant was unable to complete her cross examination of Tom Gooder ("TG") as she became distressed and felt exhausted by the process. The Tribunal assisted the claimant by asking various questions to TG where it felt this had not been covered in his existing witness statement.
9. The claimant is experiencing difficulties due to her ongoing mental health condition. The claimant became distressed at various times during the

hearing and we were extremely concerned as to the effect these proceedings were having on her. We were able to take regular breaks and with the invaluable and constant support and assistance of the claimant's mother and her friend, Ms Hyde, the claimant was able to get to the end of the hearing. This Tribunal commends the claimant for her efforts in managing an undoubtedly difficult set of circumstances for her. We thank the claimant's companions for their assistance and the respondent's representative for his patience and co-operation over the five days of the hearing which were clearly very challenging for the claimant to cope with.

The Issues

1. Disability

- 1.1 It is accepted that the claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about, namely Emotional Unstable Personality Disorder.

2. Direct disability discrimination (Equality Act 2010 section 13)

- 2.1 Did the respondent do the following things:

- 2.1.1 On 25 June 2019 Stephanie Rogers of the respondent tell the claimant not to be late and to "*calm her personality down*" when attending training in Tamworth.
- 2.1.2 On 26 June 2019 Darren Peel of the respondent tell the claimant that concerns had been raised about her behaviour at a training event (specifically about wearing a yellow jacket; having a "Cars" umbrella and using hand sanitiser) and ask her whether she had a personality disorder.
- 2.1.3 On 10 July 2019 Stephanie Rogers of the respondent require the claimant to send an e mail to her setting out where the claimant had acted appropriately and inappropriately throughout the day on 10 July 2019 (the day her car broke down) and ask her whether the job was for her what the impact of her mental health had on her job and children.
- 2.1.4 Access the claimant's car tracker to monitor her movements in the two weeks prior to termination of employment.
- 2.1.5 On 22 July 2019 Stephanie Rogers of the respondent tell the claimant to ignore appointments she had already made and cold call to get contracts.

- 2.1.6 Not inform the claimant in advance of the purpose of the meeting held on 24 July 2019.
- 2.1.7 Deny the claimant the opportunity to have someone to accompany her at the meeting on 24 July 2019.
- 2.1.8 Not provide the claimant with the information from the car tracker (used as a reason for dismissal) during the meeting on 24 July 2019.
- 2.1.9 Not give the claimant an opportunity to discuss the justification for her dismissal during the meeting on 24 July 2019.
- 2.1.10 Not follow the disciplinary procedure applicable (by not issuing any warnings about performance) before dismissing the claimant.
- 2.1.11 Dismiss the claimant on 24 July 2019.
- 2.1.12 Not consider the claimant's appeal sent on 29 July 2019.

2.2 Was that less favourable treatment?

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

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

The claimant says s/he was treated worse than:

Shamema Khan and Tracey Tallboy-Cottons in respect of 2.1.1; 2.1.3; 2.1.4 and 2.1.10; and

a hypothetical comparator without the claimant's disability in respect of the other allegations.

2.3 If so, was it because of disability?

3. **Discrimination arising from disability (Equality Act 2010 section 15)**

3.1 Did the respondent treat the claimant unfavourably by:

- 3.1.1 Louise and John informing the claimant that she had to stay with her vehicle and get into a tow truck when it arrived after her car broke down.
 - 3.1.2 Louise questioning the claimant's professionalism and how she could manage to be alone with a client if unable to get into a tow truck.
 - 3.1.3 Not permitting her to have someone with her during the meeting on 24 July 2019.
 - 3.2 Did the following things arise in consequence of the claimant's disability:
 - 3.2.1 The claimant became anxious when in enclosed places with another person when she was unable to leave that space (hence was unwilling to get into the tow truck with the driver when her car broke down on 10 July 2019).
 - 3.2.2 The claimant was anxious and needed support during the meeting on 24 July 2019.
 - 3.3 Was the unfavourable treatment because of any of those things?
 - 3.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
 - 3.4.1 []
 - 3.5 The Tribunal will decide in particular:
 - 3.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
 - 3.5.2 could something less discriminatory have been done instead;
 - 3.5.3 how should the needs of the claimant and the respondent be balanced?
 - 3.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?
4. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

- 4.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?
- 4.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:
 - 4.2.1 Taking decisions about individuals without meetings with the person concerned.
 - 4.2.2 Not implementing the recommendations of occupational health reports.
 - 4.2.3 Requiring sales staff to depart from their planned working day to carry out re-signs and renewals at short notice without the relevant training.
 - 4.2.4 Not permitting employees to have someone to accompany them during meetings with management
- 4.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in relation to:
 - 4.3.1 In relation to 4.2.1 not asking the claimant what her triggers were and discussing these with her meant they did not understand her disability before dismissing her;
 - 4.3.2 In relation to 4.2.2, not implementing a wellness plan recommended in the occupational health report supplied on 12 July 2019 led to dismissal;
 - 4.3.3 In relation to 4.2.3, instructions to go to different locations and do tasks not trained for caused the claimant's working day to be stressful and chaotic;
 - 4.3.4 In relation to 4.2.4, in that as a person with the claimant's disability this caused additional anxiety and left her feeling vulnerable?
- 4.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
- 4.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:
 - 4.5.1 Hold a meeting with the claimant, line management and HR to discuss how the claimant's disability could be

accommodated as requested by the claimant on 10 July 2019.

- 4.5.2 Putting in place a wellness plan as recommended in the occupational health report supplied on 12 July 2019.
- 4.5.3 Not requiring the claimant to depart from her planned working day to carry out re-signs and renewals at short notice.
- 4.5.4 Allow the claimant to be accompanied during the meeting on 24 July 2019.
- 4.6 Was it reasonable for the respondent to have to take those steps and when?
- 4.7 Did the respondent fail to take those steps?

5. **Harassment related to disability (Equality Act 2010 section 26)**

- 5.1 Did the respondent do the following things:
 - 5.1.1 On 25 June 2019 Stephanie Rogers of the respondent telling the claimant not to be late and to “*calm her personality down*” when attending training in Tamworth.
 - 5.1.2 On 26 June 2019 Darren Peel of the respondent tell the claimant that concerns had been raised about her behaviour at a training event (specifically about wearing a yellow jacket; having a “Cars” umbrella and her use of hand sanitiser) and ask her whether she had a personality disorder.
- 5.2 If so, was that unwanted conduct?
- 5.3 Did it relate to disability?
- 5.4 Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 5.5 If not, did it have that effect? The Tribunal will take into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

6. **Remedy for discrimination**

- 6.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 6.2 What financial losses has the discrimination caused the claimant?
- 6.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 6.4 If not, for what period of loss should the claimant be compensated?
- 6.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 6.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
- 6.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- 6.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 6.9 Did the respondent or the claimant unreasonably fail to comply with it?
- 6.10 If so is it just and equitable to increase or decrease any award payable to the claimant?
- 6.11 By what proportion, up to 25%?
- 6.12 Should interest be awarded? How much?

Findings of Fact

10. The claimant attended to give evidence and Ms Dawn Hyde, a colleague of the claimant at the respondent ("DH") and Mrs Stephanie Rogers, the claimant's former line manager, ("SR") also gave evidence on behalf of the claimant. Mr Tom Gooder, Managing Director, ("TG"), Ms Louise Thomas, HR Manager ("LT"), Mr Darren Peel, National Sales Manager ("DP"), Mr John Smith, Service Manager ("JS"), Mr Marcus Amilian, Regional Sales Manager ("MA") and Ms Tracey Talboys-Cotton, Field Sales representative ("TTC") all currently employed by the respondent gave evidence on behalf of the respondent. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to

questioning from the Tribunal. We considered the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to us in the Bundle.

11. We have made findings not only on allegations made as specific discrimination complaints but on other relevant matters raised as background as there may have been relevance to drawing inferences and conclusions.
12. The Tribunal resolved conflicts of evidence as arose on the balance of probabilities and assessed the credibility of the witnesses and the consistency of their evidence with surrounding facts.
13. We made the following findings of fact:
 - 13.1. The claimant was at all relevant times a disabled person as defined by section 6 of the EqA. She was diagnosed with EUPD in 2010 and has received regular support from mental health services and her GP since then. In her witness statement she described the symptoms as "*feelings of despair, alienation, depression, isolation, low mood, high mood, confusion, fatigue, insomnia and anxiety*" which "*sometimes led to frustration and strong emotional reactions when I feel I was under attack*". She manages her condition by using various techniques learnt in talking therapies (CBT) including "*music, productive planning and structure to daily task, strict routine*". The claimant explained that if she is not able to implement these techniques it can make her behaviour "*erratic, highly angry, distraught with high emotional characters*". The claimant has a good understanding of her own mental health and how it affects her. The claimant told us clearly that her performance in the role of Field Sales representative had "*nothing to do with her mental health condition*".
 - 13.2. The respondent is a washroom service provider supplying products such as sanitary bins, air fresheners and soap dispensers to approximately 30,000 sites in the UK. It employs over 250 people. Most of its employees are based at home and use a company provided vehicle to either service the customers (service role) or to search for new customers and maintain our relationships with existing customers (sale role). The Field Sales representative is the main sales role. The respondent employs approximately 50 people in this role.
 - 13.3. The respondent has a high turnover of staff in the Field Sales representative role. It typically recruits, appoints and trains 3 or 4 employees to this role at a time and of those perhaps only 1 employee will remain employed longer term. We accepted TG's evidence that for every three employees that are recruited, it would not be unusual for only one individual to succeed and it was a frequent occurrence for sales representatives to resign or be dismissed within the first 24 months of their employment. Some sales representatives leave their employment very quickly and do not make it through the first week of training (see below). We accepted TG's evidence that it depends on the particular employee

and what any concerns with performance might relate to as to how long they would be given in the role before any action is taken to address performance. We heard evidence from LT about how the employment of another employee, employee X, had been terminated following the discovery of some performance issues by monitoring the car tracker. In this case the process was consistent with the respondent's approach to dealing with performance issues with new starters and was the same as the approach adopted with the claimant including the use of the abbreviated procedure (see below).

- 13.4. The Field Sales representatives are line managed by the Regional Sales Managers who report to the National Sales Manager DP who reports to the Managing Director, TG. The respondent also employs a number of employees in a telesales role in addition to its Field Sales representatives. The purpose of the telesales team is to contact customers and potential customers by telephone and try to arrange physical appointments for the Field Sales representatives to attend. TG was clear that he did not want the Field Sales representatives making telephone calls to clients and potential clients and their role was to visit customers and potential customers in person. The Job Description of the Field Sales representatives was shown at page 37-38.
- 13.5. The Field Sales representatives work exclusively on obtaining new business when starting out in employment. They would be required to attend the various telesales appointment that had been made for them during each working day and additionally they were expected to "prospect" in between and around those appointments in the geographical area in which they were based. As the Field Sales representatives became more experienced and had completed further training, they were then asked to carry out sales with existing clients dealing with "re-signs" or renewals of existing contracts but they are not permitted to deal with these matters until the training has been completed. It was expected that Field Sales representatives would be "on patch" and ready to start work for around 9am and would finish at 5pm. They would not be expected to go home during the working day but if the representative lived "on patch" it would not be a problem if they occasionally visited their home if they were passing to e.g use the bathroom. However the respondent regarded this as exceptional rather than usual and representatives were expected to fit in breaks around their own appointments wherever they were during the working day.
- 13.6. It is clear that a high level of trust was required between the respondent and its Field Sales representatives. They are lone workers and are required to be professional and self-motivated. The Regional Sales Managers were in regular telephone contact with the Field Sales Representatives during the day by telephone and initially would attend sales visits and spend time with new employees. Different Regional Sales

Managers had different styles of management as to how closely the activities of the Field Sales representatives would be managed. Field Sales representatives were required to submit a daily sheet which set out what their activities were each day as well as monthly reports showing pipeline sales. Field Sales representatives are provided with company cars and these cars are fitted with a tracker device which is always on allowing the respondent to monitor the movements of the car. The data obtained from these tracker devices was accessed mainly by JS as the manager responsible for the fleet of company cars. However, the trackers had the added purpose of enabling the respondent to see what its Field Sales representatives were doing throughout the day when the car was in use. This was a tool the respondent used to manage the performance of its employees. We heard much discussion during the hearing about whether the respondent was legally entitled to carry out such monitoring of its employees. For the purposes of this claim, this was not something the Tribunal had to make any consideration on so this has not been explored further.

- 13.7. The claimant started to work for the respondent on 13 May 2019. She was interviewed by LT and SR. SR had also started for the respondent relatively recently at the time the claimant was recruited. SR had been tasked with managing a new geographical area for the business of the respondent and to recruit a new team of Field Sales representatives. Two further Field Sales representatives SK and TTC were recruited at the same time as the claimant. SK and the claimant were allocated to SR's region and her team. LT confirmed that the claimant performed well at her interview. The claimant was issued with and signed a returned a contract of employment (shown at pages 39-47). The claimant acknowledged that the contract had a grievance procedure at clause 20. She also acknowledged that the contract contained a clause at 22 vi which stated:

"During the first 24 months of employment an abbreviated form of the disciplinary procedure may be used",

although the claimant was not aware that the respondent took this to mean that the employer could move straight to dismiss an employee without going through various warning stages during the first 24 months. LT gave evidence about what the respondent understood the abbreviated procedure to be which was accepted. She confirmed that the usual provisions contained in the disciplinary procedure at clause 21 of the contract of employment (pages 43-45) did not need to be applied. This included the right to be accompanied by a trade union representative or colleague. She also stated at paragraph 8 c) of her witness statement that *"Where Cathedral Hygiene has decided not to continue with an employee's employment during the probationary period or within the first 24 months an abbreviated procedure will always be used."*

Induction training programme in Llanelli w/c 20 May 2019

13.8. The respondent operates a 3 stage training programme for its Field Sales representatives, The first stage of this training was held during the week of 20 May 2019 and was conducted by DP. The course was also attended by SK and TTC. DP noticed that the claimant was loud and “boisterous” but he put this down to nerves. He also noticed that the claimant used hand sanitiser regularly but saw this as a positive given the business of the respondent. He said that the claimant was enthusiastic and contributed well to the training but said that her loudness “*did appear to affect*” SK and TTC and that he said to the claimant that “*she needed to allow them to contribute by not calling out all the time*”.

Field sales accompaniment between claimant and SR 29-30 May 2019

13.9. Following the training the claimant started to carry out her role in the area that had been assigned to her which was Northampton. She was in regular contact with SR. On the afternoon of 29 May and all day on 30 May 2019, SR spent the day with the claimant as she carried out her duties. She completed a Field Accompaniment Form which is used to record how new recruits are progressing, make a note of any discussions held and record training needs and tasks set. This form also had space for the manager and the representative to add their comments. The Field Accompaniment Form for this visit was at page 50. There were no negative comments about how the claimant was working and it was generally positive. The comments made on the form by SR are:

“Rebecca you have an infectious enthusiasm and a genuine love for the role. You are doing everything you need to be doing. The sales will come and you will be fantastic. You have a great grasp of the figures and break evens already. All is heading in the right direction, just calm down and give yourself time”

The claimant’s comments are also positive about the support she was receiving from SR.

13.10. The claimant more generally though found it difficult working under the management of SR and described her management style as being chaotic. She said that she had been asked by SR to work on re-signs and to depart from her working day to collect such contracts even though they were not part of her working day and that she had not been trained to do this work. She pointed to contract she had completed at page 51f which she had been asked to complete. SR admitted that she had asked the claimant to collect a contract that was a re-sign as it was in the claimant’s area. SR explained that this was a matter she had dealt with when out in the field with the claimant but subsequently asked the claimant to return to the client to collect an amended contract. She acknowledged that she was not always able to answer the claimant’s calls instantly as she had her own area to cover and another employee to manage, SK. SR also

believed that the change in the information that had to be provided by representatives on their daily sheets which co-incided with her going on holiday may have led to some confusion on the part of the claimant, SR enjoyed managing the claimant and had been impressed with her performance.

- 13.11. MA managed the claimant for the week of 17 June 2019 as SR was on holiday at this time. He is the Regional Sales Manager for the South of England and had been in the role since 2012. During that week MA confirmed that he planned to spend a day with the claimant and SK as they were new recruits and SR had asked him to do this. Before he met with the claimant, he had noticed from paperwork she had sent him on 17 June 2019 that there were some errors with how she had completed contracts and her daily report sheet. MA sent e mails to the claimant on 17 June which were shown at pages 56 and 57 which pointed out some errors (in the daily report - page 56 -59) and contracts (page 55). The e mails about the completion of daily sheets were copied to SR and DP.
- 13.12. MA spent the day with the claimant on 19 June 2019 and his evidence of what took place that day is at paragraphs 9-14 of his witness statement. The Field Accompaniment form completed by MA and the claimant is shown at pages 60-61. This recorded the discussions between the claimant and MS as regards to the completion of daily sheets and around how to manage a sales call. It was generally encouraging and MA stated that he was trying to be positive and encouraging in his meeting with the claimant. The claimant acknowledged that at this time there was “*room for improvement*” in terms of completion of her paperwork but she did not agree that MA was critical of her performance during this meeting. The claimant said that during her meeting with MA, she complained about SR’s “*chaotic management*” of her and MA accepts that a comment was made by the claimant about SR’s management as being chaotic but he thought this was just a passing comment.
- 13.13. At paragraph 10 of MA’s statement we noted his evidence that he said it was “*impossible to keep Rebecca’s attention on any subject*” and that she would interrupt whilst he was talking and that the claimant found it “*hard to focus*” on what MA was saying. We also noted that at paragraph 12 of his witness statement that he thought that the claimant had a “*long way to go*” and at paragraph 24 that he was glad not to have to manage the claimant for more than one week as he felt she took up too much of his time. We accepted MA’s evidence about the views had had formed about the claimant during the day he was with her and the week managing her. We find that there were no further discussions between MA and DP about the claimant or any issues with her performance at that time. MA had a conversation with SR to update her about how the week had gone but no specific concerns were raised. We were referred to various WhatsApp message between the claimant and MA and his team during the course of

this week but we did not consider these to be directly relevant to the issues we needed to determine and did not consider them further. At page 91 we were shown an e mail from MA to the claimant with some encouraging comments and the claimant e mails thanking MA. This exchange of e mails was copied to DP, LT and SR. MA acknowledged that the daily sheets and contracts completed by the claimant after their discussions had improved.

- 13.14. The claimant was due to attend Stage 2 of the respondent's training course the week after her time with MA's team. Before the course started SR spoke to the claimant by the telephone about the forthcoming course. The claimant says that SR told her that she needed to "*Calm her personality down*" during this conversation and she was upset by this comment as she took this as a reference to her EUPD, which she said did sometimes mean that she exhibited "*highs and lows*" and she could appear very happy and excited. The claimant believed that SR "*was requesting that I not be myself which made me feel uneasy and nervous about going to Tamworth*". The claimant did not complain to anyone at the respondent at the time about any such comment.
- 13.15. SR does not agree that this was said. She accepts that there was a conversation with the claimant during which she gave her advice about how to behave and conduct herself during the training. SR's evidence was that this was because the training was taking place at the respondent's Tamworth head office, where all the senior management was based. SR said that she told the claimant, to "*mind your ps and qs, dress smart, be there on time*". SR explained that she said this to both the claimant and SK and it was intended to be helpful advice given that the claimant and SK were about to meet members of senior management and wanted them to be respectful. On balance we prefer the evidence of SR regarding this conversation. We find that SR did use the word "*calm*" during this conversation but did not say the specific phrase "*calm your personality down*".

Field Sales training programme in Tamworth on 24 & 25 June 2019

- 13.16. The claimant attended training on 24 June 2019 and was on time for this training. There was some discussion about whether SK was late for this training or not. This is not directly relevant but we conclude that SK arrived after the claimant but was there in time for the training to commence. DP's recollection of the training is set out at paragraph 15 of his witness statement which we have broadly accepted. He said that the claimant was "*very vocal and loud and somewhat overwhelming*" and that she "*dominated the day*". He said he "*had to keep asking Rebecca to allow the others to participate but it proved difficult*". DP said that at this point he "*started to have doubt about Rebecca's suitability for the role*". He said that he "*was worried that Rebecca would not be well received by prospects*". The claimant said that she had been anxious about attending

the claimant and said that she was extremely bubbly and may have appeared “*over happy*”. She explained presenting as overconfident is one of the behaviours she adopts to protect herself (protective characters). DH supported this evidence when she told the Tribunal that the claimant’s bubbly personality hid her mental health problems and she had not been aware that the claimant had a personality disorder at the time she worked with the claimant at the respondent.

- 13.17. The claimant says that at some time after this training, DP had raised concerns with her about her behaviour at the training in that she had worn a bright yellow jacket and had a child’s “Cars” umbrella. She said that she was upset by this and points to an e mail exchange on page 54e where she references wearing a bright yellow blazer. It was agreed by everyone that the claimant wore a yellow blazer type jacket to the training. The claimant also had an umbrella with her at the training. This was left behind and LT emailed the claimant to ask her whether she wanted it kept to one side but the claimant informed her to dispose of it as it was broken (see e mails page 93). TTC also recalls the claimant having the umbrella and wearing the yellow jacket.
- 13.18. DP said that he made no comment about her jacket or the umbrella at any time and his view was that the claimant looked smart and business like. On balance we prefer DP’s version of events and accept did not make a comment to the claimant about her yellow jacket or umbrella at the training. We conclude this because other than the claimant alleging this, there is no evidence of DP making a comment of this nature. The e mail the claimant points to in support is an e mail sent by the claimant herself to DP where she mentions a yellow jacket but this sent on 17 June before the training in Tamworth. TTC’s recollection is also that the claimant raised the issue of the jacket discussing with colleagues where she had bought it and how much it was.
- 13.19. DP had a conversation with TG after the training day and at paragraph 9 of TG statement’s, TG gives his account of the discussion which we accepted. TG says that DP told him that the claimant was “*overbearing and kept interrupting people*”. He also said that “*The feeling at this point was that Rebecca was not suitable for the role*”. DP had already planned to spend a day with the claimant the following day, 26 June 2019, which was standard for him to do with his new sales representatives. He agreed with TG that he would raise the concerns about the claimant’s behaviour and how this related to her role during the day.

Day spent with claimant by DP and disclosure of mental health condition on 26 May 2019

- 13.20. DP’s account of the day he spent with the claimant at paragraphs 16-23 of his witness statement. We also saw a note made by DP after the meeting which was shown at page 96. We accepted that this note had not

been seen by the claimant at the time nor signed by her (which had been the case with other Field Accompaniment Forms, e.g those completed by SR and MS at pages 50 and 60-61 respectively). However we did not accept that it was a fabrication as alleged by the claimant. We accepted that the circumstances of his visit this was a different situation than the Field Accompaniment visits carried out by the Regional Sales Managers and the note he made was to record his observations and the discussions he had which he would use to discuss with the Regional Sales Manager of the particular Field Sales Representative. This was not a minute of the meeting but a note taken after the meeting recording the matters discussed but also making other observations and comments which were not discussed with the claimant but were for the use of her manager, SR.

13.21. DP said that on his day in the field with the claimant he felt that she had not planned the day properly and there was no structure of how her day would go. DP offered her some advice about her approach and communication style saying that she should relax as DP felt she was too domineering. The claimant contended that DP asked her at this stage whether she had a personality disorder. DP denies that he asked the claimant this question but says that after he gave the claimant the feedback about her style she disclosed to him that she had a mental health condition. We find that DP did not make this statement but it was the claimant who disclosed her mental health condition having been given the feedback from DP during the meeting. DP recorded in his note of that meeting that the claimant disclosed to him that she had two behavioural disorders – schizophrenia and bipolar disorder. We find that the claimant did not tell DP that she had these disorders. The claimant was very accurate and consistent when describing her own mental health conditions and find it unlikely that she would have told DP that she had these disorders when she did not. We accept that the claimant may have referred to such conditions when perhaps trying to describe the effects of her condition to DP. Both the claimant and DP accept that there was a lengthy discussion about the claimant's mental health and how she managed her conditions and this may be when DP got the impression that the claimant had these two mental health conditions. DP asked the claimant to have a discussion with SR to inform her of her conditions and the claimant subsequently did this.

13.22. DP went on to give some feedback to the claimant about areas where improvement was given, with regards to paperwork. Our conclusion is that whilst this was mentioned briefly to the claimant during this meeting, the claimant was not provided with the detailed feedback in full as set out at page 96. This was a note of matters that DP had noted that the claimant needed improvement on to be raised with her by her line manager SR. This is a note that DP would ordinarily have sent to SR after the meeting. However given that the claimant had disclosed her mental health condition to him during this meeting, DP instead sent this note to his line manager,

TG and copied in LT on the evening of 26 June 2019 (see page 95). We note that in the email that DP sent on this date he states: *"This is the information that I would normally send straight to the manager, in this case, Steph, however due to the sensitive nature could we please discuss this in the morning"*

OH referral

- 13.23. DP had a telephone conversations with TG about the claimant's disclosure of her mental health condition and TG responds by e mail (page 94) indicating that the respondent *"may need to refer Rebecca to occupational health to get a fuller understanding of her condition and capability together with any adjustments we need to make"*. DP also discussed the claimant's disclosure and the plan to obtain OH support with SR at this time. DP emailed TG and LT on 1 July 2019 (shown at page 97) where he refers to the process discussed and agreed between him, LT and TG about referring the claimant to Occupational Health (OH). It had been agreed between DP and SR that SR would not mention the OH referral to the claimant before the weekend as she did not want it to worry her and spoil her weekend. He went on to say: *"I understand the situation with Rebecca's condition but wonder, will the Occupational Health call give us answers to help this? Steph can take control and "micro-manage" her as is her wish but are we going to get the best out of both of them by working this way? I think that Rebecca is a lovely lady but am concerned"*. LT and TG explained that they regularly made OH referrals in the business. The process was started by LT in conjunction with the manager in response to a variety of reasons (e.g long term absence, poor attendance, driving at night etc. LT had the relationship with the OH provider and liaised between them to set up an appointment which the employee attended. A report was produced and sent to LH and when she got the report, she would forward to the employee and the manager, looking particularly at any recommendations for adjustments such as a phased return. She then assisted the manager to deal with the employee regarding any recommendations. She did not accept that the respondent had a policy of ignoring such reports. We broadly accepted her evidence on this matter.
- 13.24. SR spoke to the claimant about an OH referral and LT completed the form for the OH referral on 1 July 2019 (shown at page 100). This form was not shown to or discussed with the claimant. The form referred to *"elements of her behaviour that caused concern including being overbearing, talking over others when they were speaking, putting a lot of pressure on herself"*. It went on to say that the respondent was *"worried about how Rebecca may handle situations where she faces rejection or maybe criticism"*. There were some errors made in the referral in the way that the claimant's conditions were identified and about the number of times that the claimant had been sectioned. During the Tribunal hearing, we noted that TG apologised to the claimant about the errors the

respondent made when making this referral and the claimant thanked TG for this apology.

13.25. LT also asked SR to seek the consent of the claimant to request a report from her GP. The claimant was concerned about doing this initially but upon reassurance, she also provided her consent to the respondent seeking a medical report which is shown at page 103.

13.26. The claimant's appointment with OH took place on 8 July 2019. It was conducted over the phone and it is mentioned in the report prepared by the OH consultant (page 135) that the consultation was difficult as the claimant was in her car waiting for the AA as she had a problem with her car tyres.

Car Incident on 10 July 2019

13.27. We heard a significant amount of evidence from both the claimant and respondent's witnesses about the events that took place on 10 July 2019. The claimant deals with the events of that day in the second and third pages of her statement and SR deals with her involvement in the second page of her statement. LT explains her involvement at paragraphs 23 to 32 of her statement and JS statement explains what he did and said that day. The various telephone calls made between the claimant, LT and JS were also recorded and a transcript of these conversations was shown at pages 105-122. The key points we note from that day are that the claimant had a problem with her car from the beginning of the day. Having initially resolved the issue, she parked outside a client premises and her car alarm started to go off continuously and the car would not start. The claimant initially contacted SR to inform her who then told JS. There were a series of conversations between JS and the claimant about how to deal with the problem, but when it was not possible to solve, the AA were called and attended. The AA were not able to fix the problem and it transpired that they would need to send a tow truck to retrieve the car.

13.28. We accept that this was a difficult and very stressful situation for the claimant. Her car alarm was going off outside a client premises and she was concerned and embarrassed about how disruptive this was. She was trying to deal with the matter by reporting it to JS, and by carrying out to his instructions about how to potentially solve the problem, it appeared to the claimant to be making the situation worse. We accept JS evidence that he was trying to assist the claimant to solve the problem but the it is clear to us from the at times difficult exchange on the telephone between the claimant and JS that both of them were becoming frustrated. JS was told during the discussion by the claimant that she did not have her work phone with her that day (having left it at her mother's home) so was using a different phone. JS said to the claimant that he did not think this was very good for a field sales representative which we accept upset the claimant further. We accept entirely the evidence of JS that he had no

knowledge of the claimant's mental health condition at any time during their conversations that day. We also accept that he did not at any time think that the claimant was in any danger or have reason to be concerned about her safety and did not enquire with the claimant about this. The claimant was informed by JS that she would need to stay with the car until it was retrieved and then travel with the car and tow truck to the garage where she could pick up a hire car. JS went on to tell the claimant that SR would not be coming to get her as she understood. JS had spoken to SR around this time and told her not to make the visit to the claimant. JS said his view was that this was a *"routine matter where a car had broken down; Stephanie's involvement did not at the time appear to be a good spend of management time"*. We accepted JS evidence that all his instructions that day were based on the information he had and took into account *"employee safety, the need to protect company property and to ensure that operational efficiency could be maintained"*.

13.29. The claimant then became very upset and distressed. The claimant explained to us in her evidence that past childhood trauma was a trigger for her and meant that she felt unable to get into a car with a male who was driving that vehicle as she felt trapped and vulnerable. She spoke to SR and explained the difficulties she was having and that she could not get into a vehicle with a stranger. It appears that during this conversation SR queried with the claimant how she would be able to manage a meeting with a male on her own (see below). After a conversation between SR and LT, when SR told LT the reason why the claimant did not want to get into the tow truck, it was agreed that SR would go and collect the claimant.

13.30. Whilst the claimant was waiting for SR to arrive, the claimant phoned LT and the transcript of their conversation is shown at page 113-116. The claimant was distressed during this phone call. She says to LT that she wants to explain why she has difficulties getting into a vehicle with a man and LT says that SR has already explained this to her. The claimant said to LT *"Steph has just said to me well what are you going to do when you are in a meeting with a guy? How are you going to handle that? Are you able to do this Becky?"*. Later in the conversation LT said to the claimant *"You are at work. You've got to handle different types of people and to be able to handle different types of situations"*. The claimant told LT that she could handle certain situations but that *"getting into a car with somebody I don't know"* was *"just alarm bells for me"*. She went on to say that she felt she needed to explain as she did not want *"you guys to think that I'm just being difficult"*. We find that LT was supportive to the claimant during this conversation and was generally trying to reassure the claimant that SR was on her way. LT told the claimant that dealing with this situation was new to the respondent and it was not something they had dealt with before. At this point the claimant asked LT if she could come in to a meeting with her to tell her all her history and so that she could understand. LT told the claimant that they should wait to get the OH

report and “we will take it from there and we will make a decision on what we do”. The claimant responded by saying “I’m just worried that I’m going to lose my job when I’m capable because I can get contracts”. The claimant made a similar comment later in the call when she said “I’m just worried I’m going to lose my job, honestly. I’m so worried Louise, I really am”. LT responded by saying “Keep selling”. The claimant told us she was very upset by this comment and we find it was perhaps a clumsy comment to have made when the claimant had just expressed concern about her job security. We accept the explanation of LT that she was trying to lighten the tone of the conversation and it was not meant in any way to upset or offend.

13.31. There were several more conversations between the claimant and JS that day resolving the matter and the incident took up lots of time and involved various managers at the respondent getting involved. We can see that this perhaps created some concern within the respondent’s office about how the claimant was managing the role. We accepted the evidence of the respondent’s witnesses that what happened with the car did not play a part in future decisions about the claimant

13.32. When SR arrived to the claimant in the afternoon she had a discussion with the claimant about whether this incident impacted her ability to carry out her role and the claimant told her it was an isolated incident that brought back traumatic memories. SR asked the claimant that evening to set out in an e mail her account of the events of the day and how she dealt with this. During this conversation, SR mentioned to the claimant that she should think about what the impact of the issues arising might be on her role moving forward and how matters might impact her children. The claimant was upset by this instruction SR explained that she did this to “show that this was not only unprecedented but was also far from the norm and very distressing”. The claimant did this and her e mail is at pages 128-130. SR forwarded this email to DP and LT.

Occupational Health report issued on 12 July 2019

13.33. The OH report prepared following the telephone consultation with the claimant on 8 July was received by the claimant and the respondent on 12 July 2019 and is shown at page 135 – 137. There are a few parts of this report that the parties drew our attention to in particular at page 136 where the report notes that:

“Rebecca made it very clear that one of her triggers was the worry or fear or being judged by colleagues or peers”.

At the section headed OH Opinion, the reports states:

“Rebecca is fit to remain at work in her full contracted role. She does have an underlying health condition which does affect her on a day to day basis but she manages this condition well and has several coping strategies to

help her manage. She does have worries about how this will be perceived and needs reassurance at work, She reports that she had no concerns about her ability to complete her contracted role, and again, feedback on how she is doing would be good for her.

Clear, honest and open communication is needed when dealing with Rebecca. She will also benefit from clear expectations and targets. She is very articulate and has insight into her condition, and it would be beneficial to ask her how she would like to be managed/communicated with and if there is anything that will trigger her symptoms.

It is useful to have a "Wellness Action Plan" for individuals who have mental health conditions. This can identify what signs and symptoms management should be aware of which may indicated an individual is not coping at work, and what support to offer."

It contained a link to further information on wellness action plans. Further on in the document, there is a section which states:

"What triggers there may be that we should be looking out for in order to support her

Please discuss this with Rebecca, and this can form the Wellness Action Plan Rebecca has a concern about being judged, and this is a trigger for her that was discussed during the consultation. This will need to be dealt with sensitively."

- 13.34. We heard evidence from the respondent's employees about how they reacted to this report. TG described the report as being "positive". The respondent focused on that part of the report that confirmed that the claimant was fit to remain at work in her full contracted role. It took these words at face value and concluded that the claimant's condition did not affect her ability to work in any way and that it did not need to make any adjustments to her role in order for her to carry it out. It concluded that this meant that everything that did or might come up with at work she could manage. It also went on to conclude that therefore any issues that were arising at work already were unrelated to her condition.
- 13.35. LT explained that as far as she was concerned that the respondent was already following the recommendations of the OH report. She contended that discussions were already ongoing between the claimant and SR about what the claimant's triggers were and that there was a clear process in place. She acknowledged that no formal actions had been taken to implement a separate wellness action plan but this would have been done had the claimant remained employed. LT's view was that the performance issues were so important that these were addressed first and that implementing a wellness plan would not have made a difference to the decision to dismiss the claimant. The claimant's opinion was that if a wellness action plan had been put in place management would have a

better understanding of her condition and the problems reported could have been avoided. On balance we find that LT's view was the correct one. The contents of the OH report were not discussed with the claimant by any of the respondent's managers.

Decision to access the claimant's vehicle tracker data and monitor movements

13.36. Having concluded that the issues that had been noted with the claimant's performance were unrelated to her medical condition, the respondent's managers decided to continue the discussions they had had about whether the claimant was suitable for the role. TG's view at this time was that "*on the facts, however Rebecca was not performing in well in her role*" and that concerns he had about the claimant's performance related what he had been told by DP after the training in Tamworth about the claimant not listening, being overbearing and interrupting. He had also seen the feedback raised by DP about the claimant in DP's note of his meeting with the claimant of 26 June 2019 that the claimant was not strong enough on her paperwork. LT's view at this stage was also that there was a perception that the claimant was not doing her role well which had arisen because of DP's experiences with the claimant at the training and field visit in June and from reviewing the field accompaniment forms. TG did not at this stage particularly consider that the claimant's sales figures were particularly relevant. He thought that her level of sales were "OK" but that on sales alone it was too early to tell what her sales performance would be. Both TG and LT talked about having paused the actions and discussions on the claimant's performance whilst getting the OH report, they then decided to take the pause off once they had concluded that the OH report indicated that the claimant's health did not affect her performance.

13.37. At this stage, following a discussion between LT, TG decided to access the claimant's vehicle tracker. He told us that in his experience where there are problems with the performance of any employee, the respondent will firstly check that the employee is carrying out their day of work correctly. He said that the respondent will then go "*back to basics*" and check that what is happening in the sales representative's day follows the job specifications and matches the instructions that the representatives were given during training. TG explained that if the day is being carried out correctly, then this can take one consideration about what is being done wrong off the table. LT explained that in her experience with field sales representatives, if one element of the role is not being carried out, then there were often other problems as well and by looking at the tracker movements the respondent could see what the representative was doing on territory and whether they were being efficient during the day.

13.38. TG started to look at the claimant's vehicle movements on 15 July 2019. The vehicle tracker can produce a report which shows for each day where

the vehicle started the day and at what time, the time and distance it travelled between each stop, the location and duration of each stop and the last stop of the day. The report produced by the tracker system for the claimant's car for 15 July 2019 was at page 139, for 16 July 2019 at page 144, for 18 July was at page 147 and for 19 July 2019 at page 148. The claimant was on annual leave on 17 July 2019. He then looked at the claimant's weekly plan for that week (shown at page 138) which sets out the fixed appointments in the diary for the week (which are normally made by the telesales department). He also looked at the daily reports filled in by the claimant for these days (report for 15 July shown at page 143 and the respondent did not have daily reports for 16, 18 or 19 July). TG conducted an analysis of these items and this is shown at pages 140-142. TG said he reached the conclusion on this analysis that the claimant's days were not fully worked and that the claimant's report of the work she had done "*did not seem possible or truthful*". He then discussed his findings with LT and DP and asked LT to put a report together and to arrange a meeting with the claimant to discuss what he described as "*fundamental problems*". LT having looked at the data provided had also identified that there were examples of the claimant not being on territory and not attending appointments and the times spent for some journeys did not match the distances. She said that the respondent started to question its trust in the claimant. TG admitted that this meeting was to discuss and would possibly and indeed probably result in the termination of the claimant's employment. TG could not recall whether he had any specific discussions with either LG or DP about how the meeting should be carried out or whether the respondent's abbreviated disciplinary procedure should be used but admitted that this would typically be used early on in employment saying that "*a prolonged process could be worse than a short process*".

- 13.39. TG's full analysis of the days he looked at is described by him at paragraphs 34 to 49 of his witness statement. The claimant strongly disputes the conclusions reached by TG and the respondent about what she was doing and not doing on the days that she was tracked. There was much discussion about the various stops that were made and whether these were appropriate and correct for the claimant to do. However for the claims before the Tribunal it is not necessary or appropriate for us to make detailed findings about what the claimant's movements on the days in question were or whether these were authorised or appropriate. These are not findings of fact that need to be made to determine the claimant's discrimination complaints before this Tribunal so we have not considered or analysed these matters further.

Claimant and SK's sales performance

- 13.40. There was much discussion at the Tribunal hearing about the claimant's sales performance in terms of the number of contracts she had obtained

and the value of her sales. In particular there was a discussion about how her performance compared to SK who was in the same team as the claimant also reporting to SR. We were not shown any comparative raw sales data that had been extracted from any systems of the respondent (which might have assisted us to resolve any factual disputes) but we did see a document that had been prepared by LT which was at page 52. The figures on this document purported to show a comparison between the various sales figures achieved by the claimant, SK and TTC. The claimant hotly disputed the figures shown on this document. The respondent also admitted that one of the figures on here was incorrect. We did not find this document to be of assistance to the Tribunal as it was not reliable.

- 13.41. The claimant and SR contended that SK was not performing as well as her which we broadly accept. Both SR and the all the respondent's witnesses accept that SK was not a good performer. TG stated that she was likely to have been "next on the list" to be considered for dismissal after the claimant. It is clear to us that neither SK or the claimant was performing at the sales level the respondent required – see e mail below.

Meeting between claimant and SR on 22 July 2019

- 13.42. On 22 July 2019, DP sent an e mail to SR which we saw at page 156a. This e mail gave some feedback to SR about the performance of her team and appears to be in response to an e mail from SR about some plans she had to improve the team's performance. SR had approached DP with a plan as to what she would like to do to improve her team's performance suggesting that targets be halved so that the representatives had something attainable and when this was achieved she could build up the confidence moving forward. DP stated in this e mail: "*The new reps need to be signing new contracts, Becka in particular is disappointing*". He went on to say "*Let's push hard this week, as new starters they are behind where I would like them to be*". DP said the reference to the claimant in particular here related not only to sales figures but her overall performance in the role.
- 13.43. SR met with the claimant that same day. SR planned to have a team meeting with SR and SK that day but that as SK had a client appointment, the meeting was just with the claimant. SR met with SK separately later that day. The notes of the meeting she had with the claimant were shown at page 150. We accept that the claimant had not seen a copy of those notes at the time but she knew that SR was making notes on her computer at the time. During that meeting SR told the claimant that "*a turnaround needs to happen now*". They went on to discuss the various matters the claimant was working on. During this conversation SR told the claimant to concentrate on cold calling new clients rather than trying to follow up on existing leads. SR explained that the reason for this was to try and maximise sales in the run up to the month end. She did not tell the claimant to ignore appointments. SR recorded in her note that "*I have had*

a very open and frank conversation with Rebecca and informed her that she should be much further along than she is now. The whole team needs to make a turn around, the areas are slow and there is a price war happening". The note goes on to record a discussion about the problems the claimant had been having with her car. It also mentions that the claimant had been "thrown off" by the call she had with OH. SR's note records that she told the claimant *"I reminded her that both she and occy health had deemed her fit to work with no intervention or changes needed. I reinforced that this is not about her mental health this is about figures and performance"*.

- 13.44. Both the claimant and SR agree that this part of the conversation took place in response to the claimant asking SR whether these concerns were being raised with her because she had told the respondent about her mental health condition recently. SR's view was that this conversation was taking place as part of a plan to improve sales performance. SR was not aware at this point that the respondent had been monitoring the claimant's car tracker and was considering whether it would continue to employ the claimant. SR had not seen the OH report at this time.
- 13.45. SR met with SK that afternoon and also had a conversation with SK about improving her performance. We noted from the note produced late by the respondent that is said to be of this meeting that format of the meeting is similar in structure to the one held with the claimant (albeit that the tone of the meeting with SK does not appear to be as strong as the meeting held with the claimant). However given that SR was not asked about this note by the respondent nor had the claimant seen this note in advance of the hearing, we did not place any weight on the contents of this note save to confirm that a meeting did in fact take place with SK that afternoon and broadly similar topics were discussed.
- 13.46. Following the meeting she has with the claimant, SR sent the note of her meeting to DP and LT (see page 149). At this stage, it had already been agreed that DP and LT would hold a meeting with the claimant to discuss her performance at which there was a strong likelihood would result in dismissal. SR was not aware of this and had not been involved in any discussions or plans about the proposed meeting with the claimant or the likelihood that the claimant would be dismissed. We note at page 156B there was an exchange of e mails between DP and TG about this proposed meeting on 22 July 2019. DP confirms that *"Louise is putting the information together, I have forwarded her the information that you sent to me. We are aiming to meet with her on Wednesday, if you have anything that may be useful for Louise please let her know. I believe it is best for Louise to be with me, so we will carry out the meeting together. Steph had already arranged a meeting with Rebecca, about performance, this morning so we are waiting on her notes too."*
- 13.47. At some point before 24 July 2019, LT prepared the information that the

respondent wanted to present to the claimant that it had discovered because of TG's tracking of her vehicle and analysis of this. LT prepared a note of the issues that the respondent wished to discuss with the claimant and this is shown at 159-161. She also had copies of the information uncovered by TG which is shown at pages 138-144, 147-148 & 151-156 which she and DP wanted to discuss with the claimant. LT and TG decided that the respondent would follow its "*abbreviated procedure*" in conducting the meeting with the claimant. It determined that although a meeting would be held with the claimant to discuss the issues, it was likely that the claimant would be dismissed. As the abbreviated procedure was being applied, the respondent did not notify the claimant in writing of the meeting or of the nature of the complaint and it did not offer the claimant the opportunity to be accompanied by a trade union representative or work colleague. When asked in cross examination whether she thought a third party attending with the claimant would have been helpful given her mental health condition LT said that as the OH report has confirmed that the claimant was fit to carry out her contracted role (and the respondent felt this included meetings) and because she was there from HR and DP was a senior manager, this was not required. LT confirmed in her witness statement that: "*This was not going to be an easy meeting for anyone concerned and it would be stressful for Rebecca to have to discuss the fact that there were issues about her performance and conduct. The decision to bring an employee's employment to an end is never an easy one.*"

Meeting between claimant, DP and LT where claimant is dismissed
Wednesday 24 July 2019

- 13.48. The claimant said in her witness statement that DP phoned her on Tuesday 23 July 2019 to ask her to attend an informal meeting that was just a catch up. The claimant said that she asked DP whether she was being sacked and whether she needed a third person to support her and DP said "*no, just attend*". In her evidence in response to cross examination the claimant said that "*DP notified me on the Wednesday morning, please can you come in, just a catch up, nothing to worry about*". DP was clear in his evidence that he informed the claimant that she needed to attend a meeting on the morning of Wednesday 24 July. He said that this was done because the respondent felt that the claimant would find it difficult to deal with knowing such a meeting was coming up in a few days time. SR was also informed of the proposed meeting with the claimant on the morning of Wednesday 24 July. SR had suspected something was going to happen from the day before as DP had phoned her and told her he would pick her up in the morning and they would all have a meeting with the claimant. SR told us that she suspected she may be being dismissed. We prefer the evidence of DP on this that the claimant was notified of this meeting on the morning of 23 July, given the conflicting accounts given by the claimant on this matter and the evidence

provided by SR which supports this account. We find that the claimant was not told what the meeting was to be about by DP. We also find that the claimant was mistaken in her recollection that she had asked for someone to accompany her in advance of the meeting. This was raised by the claimant during the meeting itself but not before this.

13.49. SR had been informed that she would be attending the meeting with the claimant and arrived at the Holiday Inn where the meeting would take place with DP. SR was shown the information that LT had prepared for the meeting for just a few minutes. SR asked DP & LT was there anything that she could do to change the outcome for the claimant. SR did not take part in the meeting and was asked by DP to go outside and wait in his car which was parked around the corner.

13.50. The meeting was held in the lobby area of the Holiday Inn which was an area open to the public rather than a meeting room. At page 162-3 there is a document which is described as “Minutes of Meeting with Claimant”. This is a typed document prepared by LT and is her note of the meeting held on 24 July 2019. The claimant disputes the accuracy of the note prepared by LT and points out that there is no mention of the claimant becoming distressed during the meeting as is accepted by all parties. However we conclude that this is a broadly accurate account of the matters discussed at that meeting and is consistent with the evidence given by LT and DP and indeed by the claimant in many respects.

13.51. The meeting started by DP informing the claimant that “*things were not going well*”. The claimant claimed she was told that she was also informed right at the start of the meeting that she was being dismissed. DP and LT both say that this was later in the meeting. We prefer the evidence of DP and LT on this as it is consistent and is reflected in the note of the meeting and is a more logical and plausible account. The claimant was not told that she was being dismissed at the outset, albeit that we accept that the claimant may well have concluded that this was what was being communicated to her by the language used by DP.

13.52. The claimant disputed the statement that it was not going well and mentioned that she had signed a contract worth £10,000 the previous day and that this was her fourth contract this month. DP then raised matters about wider issues of performance namely “*administration, following instructions, attending appointments, the structure of her days and her productivity*”. The claimant disputed this and at this stage DP mentioned that the claimant had been doing her appointments and going home. DP and LT both say that at this stage in the meeting they tried to show the claimant the tracker information that had been prepared so that this could be discussed. LT’s recollection is that she had the documents in front of her during the meeting and tried to show them to the claimant They both say that the claimant refused to look at the documents or discuss them. The claimant says she was never shown these documents during the

meeting. She contends that she asked to see the evidence and she was told that she could not see this and that because the respondent was using the shortened version of the contract that it did not need to provide the claimant with reasons why she was being dismissed or justify its reasons. We did not accept the claimant's evidence on this as it does not reflect any other recollection of the day or the contemporaneous notes.

- 13.53. At this point the claimant stated that she knew the inevitable is going to happen and asked if everyone (SK and TTC) were getting the same. The claimant contended she had performed better than these two employees. It was at this point that the claimant was informed by DP that he did not feel that things were working out and that she was being dismissed. The claimant then complained about the support she had received from her managers. The claimant became agitated during the meeting and DP and LT found it difficult to keep control. DP described the claimant becoming louder and more aggressive and that she was visibly upset.
- 13.54. DP said he was the one that made the final decision to dismiss the claimant, although this had been a likely outcome from the time it had been discussed with TG and LT earlier. He was clear that the decision to dismiss was only made then and was still just "*a possibility*" up to that point in the meeting. He explained that he wanted to listen to what the claimant had to say about the issues and give her the right of reply but that this was not forthcoming. DP said that the reason to end her employment was not simply on sales but it was the claimant's approach to the role. He concluded that she was "*during the day was not doing what she should have been doing*". DP stated that the decision was based on performance and conduct and that she was not demonstrating the capabilities required for the role. He also concluded that he claimant "*did not want to listen or accept anything that had been raised about her conduct*" and that "*the reason I decided to dismiss Rebecca was unrelated to her mental health conditions, that never crossed my mind.*"
- 13.55. At this stage the claimant asked why she had not been offered the right to be accompanied at the meeting and said that she thought this had been recommended by the OH report. LT told her that because an abbreviated form of the disciplinary procedure was being used (as the claimant was within the first 2 years of employment), the full procedure did not apply and that she did not recall any reference to this in the OH report (and that it stated that the claimant was fit to work). The claimant gave the following evidence to the Tribunal in her witness statement which was unchallenged:

"Due to the lack of support during the meeting for my mental health and the way the meeting was conducted, I felt victimized and vulnerable which could have been avoided had I been given a 3rd party. I then ended the meeting as my strategies to manage my mental health was exasperated."

- 13.56. The meeting had become very difficult by this stage and the claimant then was asked to return her company car. She asked LT and DP how she would get home and was told that DP would give her a lift home which she refused. The claimant went to her car to retrieve her belongings but did not return to the meeting and drove the car home. The claimant's mother phoned DP shortly after this to confirm that the claimant was at home and the car could be collected and DP collected it later that day.
- 13.57. After she had been dismissed the claimant spoke to two colleagues who she was friendly with in the respondent's Telesales department. The transcript of those telephone calls was shown at pages 165-168 and the claimant was asked about the conversation in cross examination, it would appear primarily on the issue of her credibility generally. We did not feel this conversation was of any real significance or relevance to the issues we had to decide. The claimant was upset that she had been dismissed and this conversation was an informal conversation about this.
- 13.58. The claimant sent emailed DP on the evening of her dismissal informing him that she had contacted ACAS and she wished to appeal. This attached screen shots of whatsapp message between the claimant and SR. She e mailed DP again later that evening and stated: "*I would like to ask you when I asked yourself was I refused to have someone present?*". She emailed DP again late that evening with some details about ongoing work she was carrying out and asked for details to be provided to her about the appeal process.
- 13.59. The claimant's dismissal was confirmed in a letter from DP sent on 25 July 2019 (page 176). This confirmed that the decision to terminate the claimant's employment was "*relating to your productivity, the structure of your days, attendance at appointments, following of instructions, attitude and administration.*" The claimant was notified that she had the right of appeal. On 26 July 2019 the claimant spoke to DP by telephone and he informed her that her appeal should be put in writing to TG and that she should provide evidence of e mails supporting this.

Appeal

- 13.60. The claimant sent her appeal by email on 29 July 2019 (page 180-1). The claimant challenged the basis for her dismissal mentioning why she said that productivity; attendance to appointments; following instructions; and attitude and administration were not at fault as suggested by the respondent. She referred to the actions of SR stating that she was not always supported by her and claimed that she was the best performer out of those that started with her. The claimant did not refer to disability discrimination or her mental health condition having played a part in her dismissal in her appeal letter.
- 13.61. A letter arranging the claimant's appeal was prepared by LT for TG to send and this is shown at page 194. This explains that the appeal was

arranged for 9 August 2019 at the Tamworth head office. It stated that the claimant had the right to be accompanied at the meeting by a fellow worker or union representative. It also set out options for the claimant to attend by telephone or for her to provide a written statement instead of attending. We also saw a copy of an e mail sent to TG by LT on 31 July 2019 (page 193) attaching a letter and asking TG to “*have a quick read through before I print it*”.

13.62. There is a dispute about whether this letter was ever printed or sent to the claimant. The claimant suggests that it was never printed and relies on page 195 of the Bundle which is the properties information of the word document. Where dates are shown as to when the document was created, last modified or printed, whilst the date of 31 July 2019 is showing for created and modified, the date for when it was printed is blank. The claimant says this shows that the letter was never printed. The claimant told us she never received this letter. The respondent says it was printed and sent and relies on other similar properties information of word documents that were printed and again where this section is blank. We did not find the information on properties to be conclusive either way. We find that the letter was printed and sent by the respondent. However we also accept entirely the evidence of the claimant that she did not receive the appeal letter from the respondent. We are confident that had the claimant received this letter she would have responded to it in some way either by attending or contacting the respondent further. She had been in contact with the respondent several times since her dismissal and was asking them for her appeal to be considered. It is not plausible in these circumstances that having been notified of the appeal date that she would simply have ignored it.

13.63. The respondent held the appeal hearing 9 August 2019. The claimant did not attend (and we accept this was because she was not aware this was taking place). The claimant’s appeal was heard by TG and we accepted his evidence about the matters he considered when hearing the claimant’s appeal. A note of what was considered at the appeal was shown at page 199-200. The appeal was turned down and the claimant was notified of the outcome of the appeal by a letter dated 12 August 2019 (page 201).

13.64. Shortly after this time SR resigned her employment on 20 August 2019. She told us that the way that the claimant had been treated by the respondent had influenced her decision to resign and she felt that the decision to dismiss the claimant had been taken over her head. She mentioned this at her exit interview with the respondent. SK also resigned shortly after the claimant.

The Law

14. The relevant sections of the EqA applicable to this claim are as follows:

4 The protected characteristics

The following characteristics are protected characteristics: ... disability”

6 Disability

*(1) A person (P) has a disability if -
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

13 Direct discrimination

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

15 Discrimination arising from disability

“(1) a person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability”.

20 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.

21 Failure to comply with duty

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing

whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case.”

26 Harassment

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

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

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

(i) violating B's dignity, or

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

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

(a) the perception of B;

(b) the other circumstances of the case;

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

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Section 212(1) EqA defines substantial as being “*more than minor or trivial*”.

Paragraph 20 (1) (b) of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

15. In relation to the section 13 claim, the following authorities were relevant:

Anya v University of Oxford & Another [2001] IRLR 377 - it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246.

The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the

respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Nagarajan v London Regional Transport [1999] IRLR 572, HL, -The crucial question in every case was, *'why the complainant received less favourable treatment ... Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'*

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for ...'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'*

Bahl v Law Society [2003] IRLR 640 – *"where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups."*

16. In relation to harassment the following authorities were relevant:

Richmond Pharmacology V Miss A Dhaliwell [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A respondent should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the claimant felt, about the treatment in question, and the claimant must, additionally, subjectively feel that their dignity has been violated, etc.

Pemberton v Inwood [2018] EWCA Civ 564. Underhill J "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).

17. In relation to section 15 EqA, the case of *Pnaiser v NHS England and Coventry City Council EAT /0137/15* confirmed as follows:

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

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. 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

(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 ...[and] 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) 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)

(h) *Moreover, the statutory language of section 15(2) makes clear 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.*

18. City of York Council v Grosset [2018] WLR(D) 296 also confirmed that section 15 (1) (a):

"requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability". This case also established that there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test

19. The case of South Warwickshire NHS Foundation Trust v Mrs S Lee and Others: UKEAT/0287/17/DA was also referred to illustrate how the question of causation is approached in terms of the decision in Pnaiser above and the application of the burden of proof provisions in s 36 EqA.

20. In relation to a claim for failure to make reasonable adjustments under sections 20 and 21 EqA, the importance of a Tribunal going through each of the parts of that provision was emphasised by the EAT in Environment Agency –v- Rowan [2008] IRLR 20.

21. The Equality and Human Rights Commission Code of Practice on Employment ("the Code") paragraph 6.10 says the phrase "provision, criterion or practice" ("PCP") is not defined by EqA but

"should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions".

22. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is considered in the Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case.

23. The duty to make reasonable adjustments arises when a disabled person is placed at a substantial disadvantage by the application of a PCP etc. Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA, -the duty to comply with the reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.

24. Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA - The

nature of the comparison exercise under s.20 was to ask whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they were treated equally, and might both be subject to the same disadvantage when absent for the same period of time did not eliminate the disadvantage if the had a more substantial effect on disabled employees than on their non-disabled colleagues. In addition, in relation to whether an adjustment is effective the Court of Appeal said '*So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.*'

25. Tribunals must consider the essential question whether a particular adjustment would or could have removed the disadvantage experienced by the claimant *Romec Ltd v Rudham EAT 0069/07.*

Conclusion

26. It is conceded by the respondent that at all material times, the claimant was a disabled person under s6 EqA as a result of Emotional Unstable Personality Disorder (EUPD).

EqA, section 13: direct discrimination because of disability

27. The claimant strongly believes she has been discriminated against because of her disability. For us to reach the conclusion that the claimant has been subjected to direct disability discrimination, there must be evidence, although it is possible for that evidence to be by way of inferences drawn from the relevant circumstances. A belief, that there has been unlawful discrimination, however strongly held is not enough.
28. In order to decide the complaints of direct disability discrimination, we had to determine whether the respondent subjected the claimant to the treatment complained of and then go on to decide whether any of this was "less favourable treatment", (i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances). We must then go on to decide whether this was because of disability, deciding whether the respondent did or would have acted differently if the matter had concerned an employee who was not disabled in circumstances that were not materially different.
29. We applied the provisions of the two-stage burden of proof test referred to above. We first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the treatment was because of disability. This would shift the burden of proof to the respondent. The next stage was to consider whether the respondent in question had proved that the treatment was in no sense whatsoever because of disability. We set out below our conclusions on each of these questions for each allegation listed in the List of Issues above with reference to each paragraph number where the allegation is listed:

Paragraph 2.1.1 – Stephanie Rogers of the respondent telling the claimant not to be late and to “calm her personality down” when attending training in Tamworth

30. We refer to our findings of fact above that SR did tell the claimant not to be late and that although she did not specifically say “*calm your personality down*” she did tell the claimant to remain calm (see paragraph 13.15 above). However we also conclude that the claimant was not treated less favourably than her non-disabled comparator in this regard as we also accepted the evidence of SR that she gave the same advice to SK before she attended the training in Tamworth (see paragraph 13.15 above). As the claimant has not been able to show that she has been treated less favourably, this claim fails. We also note at this stage the claimant had not disclosed her mental health condition to SR or anyone at the respondent so it is hard to see how any comment could be related to disability.

Paragraph 2.1.2 – On 26 June 2019 Darren Peel of the respondent telling the claimant that concerns had been raised about her behaviour at a training event (specifically about wearing a yellow jacket; having a “Cars” umbrella and using hand sanitiser) and asking her whether she had a personality disorder.

31. This claim must fail because we did not find as a matter of fact that the conduct complained of took place (see paragraph 13.18 of our findings of fact above).

Paragraph 2.1.3 - On 10 July 2019 Stephanie Rogers of the respondent requiring the claimant to send an e mail to her setting out where the claimant had acted appropriately and inappropriately throughout the day on 10 July 2019 (the day her car broke down) and asking her whether the job was for her what the impact of her mental health had on her job and children.

32. We conclude on this question that although we found as a fact that SR did the acts as described (see paragraph 13.32), we further conclude that the claimant has not been able to show that SR treated her in any way less favourably than her non-disabled comparators. We accepted SR’s explanations as to why she asked the claimant to provide an account of what had happened on 10 July 2019 and that this was undertaken to assist the claimant. This was an attempt by SR to highlight to the management of the respondent that the events of the day were unusual and unlikely to occur again. In terms of asking the claimant about the impact of her mental health issues on her work and family, again we do not conclude that this can amount to less favourable treatment in the circumstances. SR was concerned as to the claimant’s welfare having been told earlier that day about the experiences the claimant suffered when she was a child which had triggered her reaction to the incident with the car that day. Asking about how the claimant might manage her role moving forward and what the impact on her family might be in this particular case were the actions of a concerned manager. Any employee making a similar point about being unable to get into a car because

of an incident in the past would potentially be subject to the same sort of concern from their manager. I take note of the cases of **Kelly v Covance Laboratories Limited UKEAT/0186/15/LA** and **Dziedziak V Future Electronics Limited [2012] UKEAT/0270/11/ZT** as raised by Mr Rozycki that even though the comment appeared to be related to the disability, namely enquiring about the claimant's ability to manage, there was a reasonable explanation for the comment that was not linked to disability. As the claimant has not been able to establish less favourable treatment, this claim fails.

Paragraph 2.1.4 – The respondent accessing the claimant's car tracker to monitor her movements in the two weeks prior to termination of employment.

33. It is accepted that this took place (see paragraph 13.38 above). It is also accepted that the respondent did not access the car tracker of the claimant's non-disabled named comparators during this period. We went on to consider whether this was because of disability. Firstly we conclude that the claimant has not shown a prima facie case that disability could be the reason to even shift the burden of proof to the respondent to explain that it was not. We conclude this for several reasons. Our findings of fact about this at paragraph 13.37 above provide a clear reason why the claimant's car tracker was accessed which we accepted. This was to see what was being done by the claimant during the day to try and identify where problems were arising. By the time the tracker had been accessed, the respondent's manager had been aware of the claimant's disability for some weeks and had in the meantime had the benefit of an OH opinion. This OH report made a distinction between the claimant's disability and her ability to do her role which the claimant acted upon (see paragraph 13.34). There is no evidence to suggest that any other employee with whom the respondent had concerns about performance would not have been treated similarly and had their tracker monitored. Indeed our findings of fact suggest that that this was a tool that had been used by the respondent before in order to discover what might be causing performance problems (see 13.3 and 13.6).

34. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that the treatment was because of disability, we do not find that this shifts the burden of proof to explain the reason for the treatment. It is clear from the bare facts found above what the reason was. Even if the burden had shifted it, the respondent has clearly discharged that burden. This allegation of direct disability discrimination fails.

Allegation 2.1.5 - On 22 July 2019 Stephanie Rogers of the respondent tell the claimant to ignore appointments she had already made and cold call to get contracts.

35. We refer to findings of fact above which we have concluded that SR did not tell the claimant to ignore appointments but that she did instruct the claimant to cold call to get new contracts (see 14.43 above). However we have accepted

that this was a management instruction given by SR during a meeting with both the claimant and SK (see 13.43 and 13.45). This was to maximise sales as the month was coming to an end. No evidence had been adduced to suggest that this was in any way related to disability. This allegation fails as there was no less favourable treatment by SR in this regard.

Allegation 2.1.6 - Not informing the claimant in advance of the purpose of the meeting held on 24 July 2019 and Allegation 2.1.7 - denying the claimant the opportunity to have someone to accompany her at the meeting on 24 July 2019.

36. The facts behind both allegations are made out. DP did not inform the claimant what the meeting was about (see paragraph 13.48) above and the claimant was not permitted to have someone accompany her during the meeting (see 13.47). DP, LT and LT accepted that the respondent was using its abbreviated procedure and the usual protections set out in that procedure including informing the employee in advance of the nature of the allegations he or she was facing or allowing them to be accompanied did not apply. It has not been shown that any other employee in the claimant's position (facing dismissal as a result of performance concerns in the early months of employment) would not have been treated in exactly the same way. On the contrary we have clear evidence from the respondent's witnesses that they consistently used the abbreviated procedure to exit employees who they felt were not performing during the first 24 months of employment (see 13.3. and 13.7). This was the respondent's modus operandi for dealing with representatives that it did not wish to continue employing. Therefore there was no less favourable treatment when this approach was taken with the claimant. I was reminded by Mr Rozycki at the outset that the claimant's complaint was not one of unfair dismissal and accordingly whether this was a fair and reasonable thing to do was not the question the Tribunal should be asking itself. This is indeed correct. Needless to say had the claimant had the ability to bring an unfair dismissal claim, we would not have looked kindly on the respondent's actions in not informing her what the meeting was about nor allowing her to be accompanied. This was unfair and undoubtedly put the claimant at a disadvantage during the meeting. However there is no evidence at all that this was because of disability and significant evidence that this was a policy applied to disabled and non-disabled employees across the board. Accordingly these claims must fail.

Allegation 2.1.8 - Not providing the claimant with the information from the car tracker (used as a reason for dismissal) during the meeting on 24 July 2019.

37. Our findings of fact above are that the respondent did attempt to show the claimant the information from the car tracker during the meeting on 24 July 2019 but that she refused to look at this (see 13.52). We accept that the claimant was not provided with a copy of this information during or in advance of the meeting. However the core of the allegation that the respondent failed to raise the car tracker data with the claimant is not made out so the claim fails. Moreover there is no evidence and it is not possible for us to make any

inferences that what the respondent did or did not do with the tracker information in this meeting was in any way related to disability. The claimant has not satisfied the initial burden of proof in any event.

Allegation 2.1.9 - Not giving the claimant an opportunity to discuss the justification for her dismissal during the meeting on 24 July 2019.

38. We refer to our findings of fact above. We conclude that this factual allegation has not been made out. The claimant was given the opportunity to discuss the justification for her dismissal during the meeting (see paragraphs 13.51-13.56). Some discussion took place between the claimant and DP and LT about why she had should not be dismissed (see 13.52). There was an opportunity for the claimant to make further points. However the claimant did not use this opportunity or was unable to do so as the meeting became difficult and confrontational fairly quickly (see 13.53 and 13.56). As to whether the way the respondent approached the meeting was fair and reasonable is another matter. Had we been considering this as part of an unfair dismissal claim our conclusions might well have been very critical of the respondent in the way it handled this matter. However as above, we are not considering these questions are part of the direct discrimination claim and there is no claim for unfair dismissal before us. The claim for direct discrimination before us on this must fail on the facts.

Allegation 2.1.9 - Not following the disciplinary procedure applicable (by not issuing any warnings about performance) before dismissing the claimant.

39. This factual allegation is made out and accepted by the respondent (see 13.47). However for the same reasons as set out at paragraph 36 this claim fails. The respondent adopted this same approach with all employees in the first 24 months of their employment. There was no less favourable treatment.

Dismissing the claimant on 24 July 2019.

40. This is essentially the nub of the claimant's case and that is that her disability was the reason for her dismissal. There is no dispute that the claimant was dismissed and the comparators she relies upon, SK and TTC, were not dismissed at this time. Our findings of fact refer to the fact that SK was also regarded by the respondent as not performing well (see 13.41). The respondent's concerns about the claimant may well have been of a different order as Mr Rozycki suggests but both the claimant and SK were potentially in line to have their performance addressed in some way. SK was not dismissed at this time but indeed resigned later or "jumped before she was pushed". We accepted the evidence of TG that SK was next in line, but it is clear that the claimant was the first to be so dismissed and we accept that she was less favourably treated on the face of it. We have considered the two stage burden of proof in this regard and have asked ourselves what was in the mind of the dismissing officer DP and the person who made the decision that the claimant would very likely be dismissed at that meeting, TG.

41. Looking at the first stage of the test referred to above, we find that on the balance of probabilities, the claimant has satisfied the burden of proof in suggesting that dismissal could be because of disability. We were prepared to consider this having noted the fact that the claimant had only recently disclosed to the respondent that she was a disabled person and the respondent was responding at least in part to matters relating to the claimant's behaviour which could on their face to us have some link to her mental health condition (see 13.8, 13.13 and 13.17 above). This means that the burden of proof passes to the respondent to respondent in question had proved that the treatment was in no sense whatsoever because of disability. However given our clear findings of fact above based on the evidence of TG and DP (paragraphs 13.19, 13.38 and 13.54, we conclude that the respondent has satisfied us that the decision to dismiss was not related to disability. Both DP and TG had reached the conclusion that the claimant was not suitable for the role. DP had reached this conclusion at a relatively early stage and before the claimant had disclosed her disability to him or the respondent (see 13.19). He had already discussed this with TG. I accepted the submissions of the respondent that the claimant's disclosure of disability in fact caused the respondent to pause in its consideration of this matter to investigate whether the problems it observed were related to the claimant's disability. No action was taken in pursuance of the conclusions previously reached whilst the OH report was being obtained. However once this was received and the respondent was informed that the claimant's disability did not affect her ability to do her job, the respondent restarted its consideration of whether the claimant was suitable for the role. As part of this consideration, and having ruled out in its mind the issue of the claimant's health affecting performance, it examined data about the claimant's working day including tracking data and this led TG to the firm conclusion that the respondent could not continue to employ the claimant because of a lack of trust. Both TG and DP have shown that there was a reason not related to disability why the decision to dismiss was taken. This allegation of direct disability discrimination fails.

Allegation 2.1.12 - Not consider the claimant's appeal sent on 29 July 2019.

42. This claim must fail because we did not find as a matter of fact that the conduct complained of took place (see paragraph 13.63 of our findings of fact above). There was undoubtedly a problem with the communication process which meant that the claimant did not receive notification of her appeal hearing so did not attend. However we found that an appeal did take place and her appeal was considered and an outcome provided. Therefore this allegation must fail.

Discrimination arising from disability

43. We then considered the s15 EqA claim of discrimination arising from disability. We started by identifying what was the something arising from disability that the claimant relied upon as being the reason for unfavourable treatment. The claimant contended two matters namely:

43.1. The claimant became anxious when in enclosed places with another person when she was unable to leave that space (hence was unwilling to

get into the tow truck with the driver when her car broke down on 10 July 2019).; and

- 43.2. The claimant was anxious and needed support during the meeting on 24 July 2019.
44. The respondent points out that it has not been clear whether the claimant's disability has any connection with the matter in 43.1. We conclude that the claimant had not shown sufficiently that the anxiety related to being in the car was caused by or arising from her disability. The claimant's own evidence was that anxiety was related to and was caused by previous childhood trauma which was a trigger for her disability. We have no doubt that this was the case and were very sympathetic to the claimant's obvious distress on this issue. We acknowledge that the childhood trauma may have had a contributing effect to the claimant's disability manifesting itself and how it clearly impacts the claimant in daily life. However we are unable to make the cognitive leap and make an assumption that the matter at 43.1 arose from disability in the absence of any clear evidence that this is the case. This element of the claim must therefore fail.
45. We do however conclude that the claimant's anxiety and need for support during the meeting did arise from her disability. The claimant was very clear in describing the symptoms of her disability (see paragraph 13.1 above) and gave clear evidence about how her disability was manifesting itself at the meeting on 24 July 2019 (see 3.55).
46. Having found that this one matter relied upon was a matter arising from the claimant's disability, the next stage was to consider whether the unfavourable treatment was caused by these matters. The only relevant act of unfavourable treatment relevant to this matter arising was the respondent failing to permit the claimant to have someone with her in the meeting on 24 July 2019. This is clearly unfavourable treatment so the question must arise as to the reason for it – was this because of the claimant's anxiety and requirement for support. The respondent's evidence was very clear and we have already accepted that the reason that it did not allow the claimant to be accompanied was that it was applying the abbreviated disciplinary procedure which it applied to all new starters who were having their performance addressed during the first 24 months (see 13.7). The claimant has not been able to show or adduce any evidence which suggests that it was her anxiety and need for support at that meeting of itself had a significant or indeed influence on the decision to not to allow her to be accompanied (as is required by *Pnaiser* above). We therefore conclude that the burden of proof to explain the reason for the unfavourable treatment does not pass to the respondent. This claim must fail. We do not need to go on to consider whether the claimant had knowledge or whether the respondent has shown a justification defence under section 15 (1) (b) EqA. The claimant's complaints of discrimination arising from disability are dismissed.

Reasonable Adjustments Claim

47. When looking at the claimant's complaint under sections 20 and 21 EqA, we firstly conclude that the claimant was aware that the claimant was a disabled person from 26 June 2019 when she informed the claimant that she was suffering from EUPD. From this date the respondent had either actual or was fixed with constructive knowledge of the claimant having a disability under Paragraph 20(1) (b) of Schedule 8 to the EqA.
48. We were required to look at whether any of the PCPs identified and relied on by the claimant were applied to her and, if so, when this took place. We then had to consider whether any such PCP applied put the at a substantial disadvantage compared to non-disabled people (and what that disadvantage was), considering the appropriate comparator. We then looked at the whether the respondent knew that the claimant was placed at this disadvantage at the relevant time. We finally had to consider what adjustments would have been reasonable to make to avoid any relevant disadvantage.
49. The respondent does not accept that the PCP identified at 4.2.1 that of "*Taking decisions about individuals without meetings with the person concerned*" was a PCP or that this was applied to the claimant at any time. Given our findings of fact above (see 13.48-13.56), we firstly conclude that even is such a PCP did apply more generally in the respondent, this was not applied to the claimant. The claimant was in the meeting on 24 July 2019 at which the decision to dismiss her was taken and so this is not an applicable PCP that was applied to the claimant and this claim much fail.
50. The PCP at paragraph 4.2.2 that the claimant relies upon relates to the respondent having a practice of not implementing the recommendations of occupational health reports. Leaving aside the question of whether this can be a valid PCP, we have concluded that the claimant has not satisfied the burden of proof of providing sufficient evidence to show the existence of this PCP in the respondent. LT gave evidence which we accepted about the respondent's approach to the use of OH reports and what steps it takes when it needs to make and follow an OH referral (see 13.23). It is of course the claimant's contention that the respondent failed to follow the OH report that it received on her on 12 July 2019. She says that the respondent did not put in place a Wellness Action Plan nor did it ask the claimant how she would like to be managed or what her triggers were. Although we accepted that the respondent had already started to discuss the claimant's triggers with her via conversations she was having with LT and SR, no formal Wellness Action Plan had been put into place or started to be put into place before the claimant's employment was terminated. To that extent, this recommendation had not been expressly followed as at this date. However there is no evidence that the respondent failed to follow any other OH reports either in respect of the claimant or anyone else that would be sufficient to amount to a "provision, criteria or practice". Therefore as the claimant has not established this PCP, this element of her claim fails.
51. The PCP at paragraph 4.2.3 that the claimant relies upon relates to requiring

sales staff to depart from their planned working days to carry out resigns and renewals at short notice and without the relevant training. We did find above that the claimant was asked to do this by SR her line manager (see paragraph 13.10). However we have also accepted the evidence of the respondent that Field Sales representatives were not required to undertake these tasks until they completed their Stage 3 training and we more experienced (see paragraph 13.5). Therefore we cannot conclude that this amounted in any way to a PCP of the respondent even if this was experienced by the claimant from SR on occasion. This was expressly against the policy of the respondent and although it may have happened in respect to the claimant, it is not sufficient to make it a PCP. Therefore this element of the claim fails.

52. The PCP at 4.2.4 relates to a practice of not permitting employees to have someone to accompany them during meetings with management. The respondent conceded that this could amount to a PCP and that decision was taken not to permit the claimant to have someone to accompany her on 24 July 2019. Given the evidence of the respondent's witnesses especially LT and TG about the way it operated its abbreviated disciplinary procedure and our clear findings of fact above (paragraphs 13.3, 13.7, 13.47) we conclude that it was a PCP operated by the respondent not to permit those employees with less than 24 months service to have someone to accompany them in meetings with management. It evidently applied the PCP to the claimant when it did not allow accompaniment at the meeting when the claimant was dismissed (paragraph 13.47).
53. Having found that this PCP existed and was applied to the claimant, the next issue we considered was whether this PCP put the claimant at a substantial disadvantage compared to non-disabled people. We rely on the case of Griffiths above and suggests that we need to consider whether the PCP "*bites harder*" on disabled people or a category of them than non-disabled people.
54. The substantial disadvantage pleaded by the claimant at paragraph 4.2.4 above is that as a person with the claimant's disability this caused additional anxiety and left her feeling vulnerable. We refer to our findings of fact at paragraph 13.55 above. We are satisfied that the claimant was at a substantial disadvantage in this regard. Her evidence was clear and unchallenged and we take particular note of the advice of the OH report at paragraph 13.33, our findings of fact at 13.1 and 13.24 and our own observations of the claimant's awareness of how her mental health condition impacts her in stressful situations (paragraphs 8 & 9 above). Whilst being unaccompanied in a meeting of this nature could cause anxious feelings for anyone, given the claimant's particular mental health condition we are satisfied entirely that this did bite harder on the claimant than someone without this condition. The claimant was accompanied throughout her Tribunal hearing and we have no doubt that this assisted her to manage her mental health during this stressful process (see paragraph 9). To not have this accompaniment at such a crucial meeting was bound to have caused her additional anxiety and substantially more so than a

non disabled person given her particular condition.

55. We then need to consider whether the respondent knew that the claimant was at the relevant disadvantage when it applied the PCPs. Given our findings of fact at paragraphs 13.24, 13.33 and 13.47 above, we are wholly satisfied that the respondent knew or could reasonably have been expected to know that not permitting this claimant to be accompanied at a meeting which was highly likely to result in her dismissal would cause her additional anxiety and leave her feeling vulnerable. It had noted this already from its observations, had this confirmed in the OH report of 12 July 2019 and anticipated in when planning for the meeting. It knew that one of the claimant's triggers was "*the worry or fear of being judged by colleagues or peers*" at the latest by the time it received the OH report on 12 July 2019. A meeting where the claimant would be asked about her performance and was likely to result in her dismissal was clearly a meeting which could trigger and exacerbate the claimant's condition.
56. Having concluded that the respondent was under a duty to make reasonable adjustments to avoid the disadvantages caused by the application of this PCP from 12 July 2018 onwards, the next question was whether there were steps that were not taken that could have been taken to avoid the disadvantage. The claimant identifies several steps at paragraph 4.5 but we think that the only matters relevant to this particular duty were the adjustments suggested at 4.5.1 (Hold a meeting with the claimant, line management and HR to discuss how the claimant's disability could be accommodated as requested by the claimant on 10 July 2019); 4.5.2 (Putting in place a wellness plan as recommended in the occupational health report supplied on 12 July 2019) and 4.5.4 (Allow the claimant to be accompanied during the meeting on 24 July 2019). We have looked at these and considered whether any other adjustments would have been reasonable for the respondent to make.
57. We conclude that holding a meeting with the claimant, line management and HR might have removed the disadvantage relating to the PCP of not permitting the employee to be accompanied in meetings which the respondent applied on 24 July 2019. However this is a very narrow point and application of the PCP in relation to the dismissal meeting was unlikely to have been considered in such a meeting. Therefore we do not find that holding a meeting would in this particular situation removed the particular disadvantage complained of. This same can be said by implementing the Wellness Action plan which was unlikely to have covered the arrangements for dealing with meetings likely to result in dismissal. However, the clear adjustment that the respondent could have made would have been to allow the claimant to be accompanied during the meeting on 14 July 2019. This may have impacted the outcome of that meeting and allowed the claimant to participate in it more successfully as she may have been able to keep her agitation and distress under control and make points to DP about his decision. There was already a strong likelihood that the claimant was going to be dismissed at the meeting but the final decision had not yet been taken. DP was clear in his evidence on this particular point (13.54). Had

the claimant been able to participate fully in the meeting of 24 July 2019 and perhaps discuss and challenge some of the information relied upon by the respondent as regards to the structure of her working day, there is a small chance a different outcome could have occurred. We do conclude however that the likelihood of dismissal if not at that meeting but within a relatively short period would have been quite high in any event given the various issues that had already arisen. Irrespective of whether the outcome had changed, we do conclude that being accompanied at this meeting would have removed or reduced the substantial disadvantage by reducing some of the anxiety and the claimant's feelings of vulnerability. The respondent was prepared to allow the claimant to be accompanied at her appeal hearing (although this did not in the end include her) so it was clearly something that was within the reasonable gift of the respondent to offer. Making this one adjustment to its usual abbreviated disciplinary procedure to take account of the mental health condition of this claimant appears to us entirely to be an adjustment it was reasonable to make. In not doing so, we find that the respondent was in breach of its duty to make reasonable adjustments (section 20 & 20 EqA) in this regard.

Harassment claims made against R1 and R2

58. The claimant makes two complaints of harassment on the grounds of disability contrary to section 26 EqA which are set out in the list of issues above at paragraphs 5.1.1 and 5.1.2.
59. To determine these complaints, we need to decide whether the claimant was subject to unwanted conduct of the type described; then determine whether the conduct was related to disability. We are then required to consider whether the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

Allegation that on 25 June 2019 Stephanie Rogers of the respondent telling the claimant not to be late and to "calm her personality down" when attending training in Tamworth.

60. This the same allegation to the conduct also said to be direct discrimination which we deal with at paragraph 30 above. We have found that the claimant was told not to be late but was not told to calm her personality down. Some but not all the facts behind this allegation are proved. The next question is whether the conduct is question is related to disability. On this point we make the overall conclusion that none of the conduct complained of was related to disability. It is a key component of harassment under section 26 EqA that it must relate to the protected characteristic. None of the matters alleged have a disablist element or are alleged to involve language or behaviour that is objectively offensive. Our findings of fact above and conclusions on the direct discrimination claim make it clear that none of the actions were related to or on the grounds of disability. Therefore the harassment claim of the claimant must fail on this ground alone. It is not necessary to go on to answer the remaining

questions as to whether the conduct was unwanted, what its purpose or effect is. In any event our view is that none of the conduct could be said to have the purpose that is required and we also doubt that given the findings of fact and the evidence of the claimant even at its highest, none of the allegations could even have said to have had this effect.

On 26 June 2019 Darren Peel of the respondent tell the claimant that concerns had been raised about her behaviour at a training event (specifically about wearing a yellow jacket; having a “Cars” umbrella and her use of hand sanitiser) and ask her whether she had a personality disorder.

61. This allegation relates to the same conduct alleged to be direct discrimination which we deal with at paragraph 31 above. The facts behind this element of the allegation are not made out (see findings of fact paragraph 13.18). This allegation is also dismissed.

62. The remedy for the successful claim of a failure to make reasonable adjustments as set out above will be determined at a further hearing, if necessary. The parties will apply to the Tribunal within 28 days of receiving this judgment and written reasons if they are unable to reach agreement on the appropriate remedy and require a remedy hearing to be listed.

Employment Judge Flood

Date: 13 November 2020