EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107301/2020

Hearing Held at Edinburgh on 1st, 2nd, 3rd February 2022

Employment Judge McFatridge
Tribunal Member R Henderson
Tribunal Member L Grime

Ms M	**Claimant** **In Person**
AMC Safety Management Ltd	**Respondent** **Represented by:** **Mr W McIntyre,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal was that:

(1) The claimant had not been unlawfully discriminated against by the respondent on grounds of disability.

(2) The claimant had not been unlawfully discriminated against by the respondent on grounds of sex. The claims are dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unlawfully discriminated against by the respondent on grounds of sex and disability. The respondents submitted a response in which they denied the claims. They did not accept that the claimant was disabled. Their position was that if the claimant was disabled they had neither actual nor constructive knowledge of her disability. In any event they denied discrimination. The case was subject to a degree of case management and following a Preliminary Hearing conducted by Employment Judge Macleod the claimant provided answers to various questions which clarified her claim. She claimed direct discrimination on grounds of disability, discrimination arising from disability and to harassment related to disability. She also indicated she was claiming victimisation but did not set out any protected act. She claimed that she had been indirectly discriminated on grounds of sex. She did not specifically set out the PCP upon which she was relying but indicated that in her view the respondents applied a PCP to the effect that employees were required to be available full time and that this placed her as a woman at a disadvantage. At the Hearing the claimant gave evidence on her own behalf. Evidence was then led on behalf of the respondents from Alan McClusky and Sharon Crossley, two of their Directors, together with Margaret Bell, an administrator. Each party lodged their own set of documents. I refer to the claimant's documents below with the prefix C and the page number. I have referred to the respondent's documents with the prefix R and the page number. On the basis of the evidence and the productions the Tribunal found the following essential facts relevant to the claim to be proved or agreed.

Findings in Fact

2. The respondents are a health and safety consultancy which deals with a wide variety of industries, mainly construction. The respondents provide clients

with policies and procedures, documentation and audits for quality control, environmental standards and health and safety standards. The purpose of auditing is so that a client can obtain confirmation that it meets the appropriate standards. These standards are ISO9001 for quality, ISO14001 for environmental and 450001 for health and safety. In addition to this the respondents provide training. Training courses are normally arranged at the specific request of a client. They can range from a half day course to a 4 day course. Usually the client will ask for the course to be on specific days and the respondent will try to accommodate this. Audits can also take 2 or 3 days. Often clients wish to have the audit carried out in respect of more than one standard (e.g. quality and health and safety) and this takes longer.

3. The claimant commenced employment with the respondent on or about 9th December 2019. At that time the company had around 8 or 9 full time employees and the 2 Directors Mr McClusky and Ms Crossley who are husband and wife.

4. The claimant's situation in December 2019 was that she had been unemployed for over a year. The claimant had not had any mental health or other difficulties until around 2018. In or about 2018 the claimant had encountered a stressful situation involving a dispute with her brother. Following the death of the claimant's mother the claimant had remained living in the mother's house for a period of around 3 years before it was sold. She understood she was doing so on the basis of an agreement both from her mother and her brother that she would be able to stay there rent free. At the end of this period the claimant fulfilled a longstanding ambition by moving to Canada with her daughter in order to take up a course of study. The claimant intended to fund this move out of her share of the proceeds of sale of her mother's house.

5. It would appear that a dispute arose between the claimant and her brother. The claimant's brother indicated that he would only sign the documents for sale of the house on condition that the claimant paid rent of around £38,000 for the period she had been in occupation of her mother's house after her

mother's death. The claimant considered this to be extremely unreasonable and considered that she had documentation which showed that she had been entitled to stay in the house rent free. In order to complete the sale the claimant and her brother agreed with the solicitor that following the sale the money would be placed on joint deposit pending either the parties reaching agreement on the distribution of funds or an order of the court. The claimant had anticipated that she would be able to get the funds released quickly, however in the event that did not happen. The claimant was forced to return to the UK as she no longer had any funds to support her in Canada. The claimant found the whole process extremely upsetting and stressful. The claimant allowed the matter to dwell on her mind. The claimant found herself living in Scotland on benefits with her 8 year old daughter. The claimant is a single parent. She found her financial circumstances extremely stressful. She sought support for mental health issues.

6. Whilst still in Canada the claimant had been prescribed antidepressants. On arriving in Scotland she contacted her GP who advised her that the drug she had been on was called Sertraline in the UK and he would continue the prescription. The claimant lodged a letter from her GP (page 41) which states:-

> "Ms M joined the practice on 6th of August 2018. At that time she was on Escitalopram and antidepressants to treat symptoms for anxiety and depression. She has remained on antidepressants since then although the preparation has been changed several times because of a relapse in her symptoms.
>
> On 18th November 2019 she was issued with a fit note to say she was unfit to work due to anxiety and depression between 13th November and 13th January. At the time she felt she really needed to get back into a routine and into a steady job. She came to see me on 17th December 2019. She had started her job the previous week but she was feeling low and anxious and wanted to

know if I thought she'd gone back to work too soon. I advised that she had probably had."

7. By this time the claimant was characterising her brother's behaviour as financial abuse and coercion and control. She reported the matter to the police authorities in England where her brother resides. She was eventually advised that her brother's behaviour did not meet the current legal criteria in England and Wales since in order for financial abuse and coercion and control to be criminal the parties require to be living together. As will be seen the claimant had also reported the matter to the police in Scotland and was interviewed by them in or about January 2019. She was advised that based on the current law in Scotland her brother's behaviour did not meet the test since in Scotland the concept of coercive control is only applied between partners and not between siblings. The claimant has been in touch with her MSP and various others with a view to having the law changed.

8. The claimant felt embarrassed and upset by the situation. She saw herself as a strong competent person and was upset that she had ended up in a situation where she was out of work for a period of time. She also found her financial situation extremely difficult. There were times when the claimant would see her daughter off to school in the morning in her pyjamas and not change out of her pyjamas all day. The claimant would procrastinate and put things off and then feel stressed about having done so. She would allow dirty dishes to pile up in the sink all day.

9. In late 2019 the respondents had identified the need for additional staff. The respondents recruit in one of two ways. They will take on agency staff through an employment agency known as Target. If an employee is recruited on this basis then they are employed by the agency. A fee would be paid by the respondent to the agency and the agency would pay a lesser hourly rate to the employee keeping the balance for their fees. The agency would be responsible for all of the costs of employment such as tax, PAYE, National Insurance, holiday pay etc.

10. The other method of recruitment was to advertise on a jobs website called Indeed. If an employee was recruited in this way then they would be employed direct by the respondents from the outset. It was the respondents' usual practice that if they were taking on the new employee they would initially do so on the basis of a zero hours contract. This would give each party a short time to decide whether or not the employment relationship was working. The respondents believed that in general terms most employees preferred to be on the full time fixed hours contract and if an employee was working out they would offer that employee a full time fixed hours contract fairly quickly.

11. In November 2019 the claimant had been in touch with Target with a view to finding employment. She was being advised by someone called Briony. Briony arranged an appointment for her to meet Ms Crossley of the respondent. In advance of the interview the claimant forwarded a copy of her CV to Ms Crossley. The CV was lodged. (R16-17). The first paragraph of the CV read:

> "An enthusiastic, intelligent, Nebosh Certificate qualified operative seeking to obtain hands on health and safety experience currently unobtainable. Possessing a strong professional and moral commitment to workplace safety and quality management. Self-motivated and used to working in difficult environments with minimal supervision whilst using initiative and a proactive approach to work. Possessing excellent communication skills, delivers results creatively and confidently. Proven organisation and reporting capabilities attained through previous frontline service remits; with hands on experience gained in dealing with challenging situations. Continue development in a wide range of professional subjects, highlights an ongoing desire to be challenged in new areas with the focus of augmenting knowledge and competencies. The claimant set out her key skills which included two highly relevant safety and environmental related qualifications and industry body membership. She stated she was experienced in instructing/training a wide range

of certificated safety courses and toolbox talks to employees within small and large organisations.

Under Education and Qualification she confirmed that she was qualified as an internal auditor on ISO9001 and ISO14001. She also held an award in education and training (formerly PTLLS). This was a qualification which allowed her to train trainers".

12. Ms Crossley was extremely impressed with the claimant. The claimant's skillset appeared to be exactly what the respondent was looking for. She was already trained to ISO 9001 and 14001. Ms Crossley was aware that it would be relatively straightforward to have the claimant trained to ISO 45001 so that she would then have all 3 key qualifications relating to the work carried out by the respondent company. She discussed the claimant's family situation with the claimant and indicated that there would be no difficulty with the claimant bringing her daughter into work if this would assist with child care issues. She indicated that other employees did this on a regular basis.

13. Ms Crossley advised the representative of Target accordingly. On 28th November Briony emailed the claimant stating:

"All good feedback from Sharon with regards to your meeting last night! She wants you to meet with the MD and get a second meeting arranged for next week.

I will be in touch shortly with a proposed date and time (she mentioned if you need to bring your little one along it won't be a problem)". This email was lodged (page 80).

14. The claimant duly met with Ms Crossley and Mr McClusky the following week for a second interview. During the course of this interview there was a discussion between the claimant and Ms Crossley in relation to the fact that if the claimant worked on an agency contract then she would be paid at the rate of £9.60 per hour whereas if she was working directly for the company her

hourly rate of pay would be £11.50. The claimant indicated that she might have difficulty with £9.60 per hour given that she had now worked out how far away the respondents' office was from her home and what her commuting costs were likely to be. Ms Crossley asked the claimant if she had signed a contract with Target. The claimant said she had not. Ms Crossley said that in those circumstances given that the job was also advertised on Indeed then there would be no problem if the claimant decided to take up employment direct with the company rather than through the agency. The respondents were not in any way contractually bound to Target agency. Ms Crossley advised the claimant if she came through Indeed then she would be paid £11.50 per hour.

15. The claimant also raised the issue that she might need some flexibility to take account of her child care arrangements. She spoke of having to sometimes leave early. Ms Crossley said that would not be a problem and indicated that they would be happy to take the claimant on on the basis of a zero hours contract which meant the claimant would not be committed to a set amount of hours each week. The claimant also discussed this might help her over the Christmas/New Year period since she would not be getting any pay for this period from the respondents if she was not working but if she was on a full time contract then this might affect her benefits. As noted above, this also suited the respondent because their usual practice was to hire new starts on the basis of a zero hours contract for the first few months.

16. It was agreed between the claimant and Ms Crossley that the claimant would start immediately on a zero hours contract. Ms Crossley's expectation was that once the claimant had established what hours suited her and provided her employment worked out then this could be converted to a standard fixed hours contract fairly soon.

17. On 4th December Ms Crossley emailed the claimant stating:

"Hi Ms M

Just a quick email to say that we are looking forward to you joining us next week.

I will have a zero hours contract for you next week. This will last until you return in January when you will be issued with a full contract.

Thanks again Ms M. …"

18. On 6th December the claimant wrote to Target turning down the position with them at £9.60 per hour.

19. At around this time there was an exchange of text messages between the claimant and Ms Crossley which was lodged (page 84). On 4th December the claimant emailed Ms Crossley stating:

"Target Recruitment can't claim for breach of contract can they. Ms Crossley responded shortly afterwards saying *"No as you didn't sign one"*.

20. On 6th December Ms Crossley again texted Ms M to confirm that she would be starting on Monday. On 8th December the claimant confirmed this. Ms Crossley then stated:

"*Fundabadozee we are so looking forward to you coming aboard".*

The claimant responded shortly later saying
"Thank you that means a lot to me".

The claimant then went on to say
"I don't think Briony was too happy with me telling her that after a lot of thought I wouldn't take a job at £9.60 per hour …. but I am pleased to hear that you are so happy to still welcome me aboard".

Ms Crossley replied

"*Briony was not happy with me. We are looking forward to seeing you tomorrow to join part of our team.".*

The respondent did not see anything untoward in the claimant deciding to take the job through Indeed as a direct employee rather than through an agency. The respondent continues to use Target and have hired staff since then (including Ms Bell) on an agency contract.

21. At around the same time as this the respondent also hired another member of staff Adam. He was employed as a direct employee and was initially given a zero hours contract just like the claimant.

22. At no time during her two meetings with Ms Crossley, one of which was attended by Mr. McClusky did the claimant mention that she had mental health difficulties. There was absolutely nothing in anything the claimant said which could possibly have given Ms Crossley or Mr McClusky any suspicion that the claimant had such difficulties. On the contrary the claimant presented as an extremely competent person who had a skillset which suited her very much to the job. She appeared to be an excellent communicator with good interpersonal skills. She did not advise them of any difficulty she had in carrying out day to day tasks and activities. The only matter she raised was that she required flexibility in order to look after her child. Ms Crossley was happy to reassure her on this point and repeated that if she wished to bring her child into work at any stage then this would not be a problem.

23. At the respondents' offices are two training rooms. These are generally not used and if a member of staff brings their child into work the normal procedure is for the child to go into the training room where they can work or play on a computer when their parent is at work in the office and the parent can call in and look after the child as and when necessary. If the child's parent is at work then Ms Crossley normally goes in to look after the child herself when necessary.

24. The claimant duly started work. The claimant signed a contract of employment which was lodged (R18-R25). The claimant's role was described as "Health and Safety Consultant". The respondents were extremely impressed with her and thought she was very good at her job. Initially the claimant was mainly involved in working in the office with Mr McClusky updating certain documents which required to be updated due to a change in the Nebosh Regulations. After this, the claimant's job involved delivering training. The claimant had initially been apprehensive about this but after the first time she did it she found that she had got her confidence back and had absolutely no difficulty with the job.

25. On occasions the claimant mentioned to Ms Crossley that she was very angry with her brother. She told Ms Crossley that her brother's behaviour caused her stress and annoyance. She spoke about this often. She did not at any time indicate that her stress and annoyance went anything beyond the normal anxiety which one would experience in a situation where one had fallen out with one's sibling over an inheritance.

26. The claimant brought her daughter into work for a couple of days during the Christmas holidays. At that time the claimant was working in the office. The claimant's daughter used the training rooms and sat in there during the day. The claimant did not mention any issues whatsoever arising from this to the respondents.

27. The respondents normally give their staff a Christmas present. The claimant was included in this despite the fact she had only started on 9th December.

28. At some point between Christmas and New Year the claimant had a conversation with Ms Crossley regarding her zero hours contract. Ms Crossley felt that the claimant was doing well and wished to offer her a full time contract with standard hours. She had decided to offer this to the other employee who had started on a zero hours contract around the same time as the claimant; Adam. She offered this to Adam and Adam had been delighted to accept and moved over to the standard fixed hours full time contract with

effect from 6th January. Ms Crossley offered the claimant the same option of moving to a fixed hours full time contract from 6th January. The claimant indicated that she was still a bit concerned about having to leave early on various occasions and wanted to have the flexibility to leave early if she had issues with child care. Ms Crossley indicated that she was perfectly happy to agree to this and for the claimant to stay on a zero hours contract.

29. At no time through this period did the claimant advise the respondents that she was in fact signed off work by her GP. She did not give the respondents the fit note which she had been given by her GP. She did not at any time advise the respondents that she had any difficulties whatsoever with her mental health.

30. On 9th January the claimant took a day off work. It was the claimant's usual practice to arrive around 8.15. The claimant texted Ms Crossley at around 8:03 stating: "Good morning Sharon I am so very sorry but I am not feeling good enough to come in today or at least right this minute …. will call you at 9am as per the policy requirements (no texts). I wanted to give you the heads up beforehand so you aren't wondering if I was coming in at 8.15 or after 9 etc. I had been all set to be in for 8.15 again. Delaney went to breakfast club at …."

This text was lodged by the claimant (page 66). The final part of the text is missing. On receiving this text and the later call from the claimant Ms Crossley understood that the claimant simply felt unwell and was unable to attend work.

31. On 19th January the claimant sent a text to the respondents stating:

> "Sharon I have to be at the police station for 9am tomorrow to make a statement regarding the issues with my brother. I don't know what time I will be done by. Last time I was at the police station for 5 hours! But hopefully this time it won't be so long, as most of the info is recorded already. I hope to be in work by about 11am.".

This text was also lodged (page 66).

32. The claimant also sent a text on 6th February stating "I am sorry Sharon I am not able to come in today … however I will still finish MOD 8 for Alan today.".

33. On 12th March the claimant sent a text to the respondents stating:

> "Got email from my solicitor late afternoon yesterday. I have now got problems that need addressing as being urgent today. I really hoped I could successfully have completed a full week of work attendance this week but I have to sort this problem today now. It is a very distressing issue and will leave me extremely anxious about it all until I can deal with it. So I won't be in the position to be able to come in today. It is too stressful and upsetting.".

34. The claimant did not advise the respondent that any of these absences had anything to do with any mental health issue or disability. Ms Crossley assumed that the claimant was simply reporting on the normal day to day incidents of a busy life which required her to be off work.

35. In mid-February Ms Crossley and Mr McClusky advised the claimant that they were so happy with her work that they were giving her a pay rise from £11.50 per hour to £12 per hour. By this time the claimant had passed the accreditation necessary to teach courses on ISO45001.

36. In order to obtain this accreditation the claimant had to lodge a CV setting out her relevant experience. Ms Crossley took on the job of preparing a draft CV from the claimant's own CV. She sent this to the claimant for approval on 30th January. She sent it with an email stating:

> "Take a look at this and advise if I have it okay.

Don't worry about the AMC part. I am not lying as you will be involved with this.".

37. Ms Crossley had included in the list of things which the claimant would be doing at ACM some things which the claimant had not as yet actually been doing albeit it was the common intention of the parties that she would be doing these in the future. The claimant was required to sign off the application and the CV which she duly did. At no time prior to these proceedings did the claimant raise any issue about what Ms Crossley had put in her CV.

38. During this period there was another occasion when the claimant brought her daughter into work. Once again there were no difficulties with this and the claimant did not indicate to the respondent that she had any problems with the arrangements.

39. In the week beginning 16th March the claimant was due to teach a 4 day course at a local further education college. At this time, as is well known, the COVID pandemic was about to start and institutions were being urged to take steps to control its spread when an outbreak took place. On 18th March the claimant was advised that there was an outbreak of COVID at the College and that accordingly the College was closing immediately.

40. The claimant contacted the respondents to advise that she had been sent home by the College. Shortly thereafter she contacted them to advise that her daughter had been sent home as the schools were closing from 19th and she would not be able to come in. At that stage the respondents' office was still working as normal. There was an exchange of texts between the claimant and the respondents on 19th March around this issue which was lodged (page 89). In this exchange Ms Crossley suggested that the claimant come in. She indicated that another member of staff who had two children was still coming in. The claimant did not consider this to be a valid comparison as that member of staff was not a single parent.

41. The claimant did not in fact ever return to work for the respondent after 18th March.

42. The respondent carried on working from the office until the national lockdown was announced on 23rd March. Thereafter the respondent tried to continue to give work to some staff who were working from home, however they soon abandoned this as being completely impractical. The claimant was not offered the opportunity to carry out work from home.

43. The respondents at this time were seeking advice from their accountants regarding the Furlough Scheme. Eventually on 17th April they contacted the claimant to advise that they had been told that she would be eligible for this. The claimant was put on furlough from 17th April onwards. On 17th April 2020 the respondents wrote to the claimant formally setting out the terms of furlough. This letter was lodged (pages 91, 92, 93)

44. The respondents furloughed one other member of staff. One other member of their staff was laid off but unfortunately did not qualify for the Furlough Scheme since their start date was a few days too late. In any event by mid-May the respondents were once again having employees working from the office although the claimant remained on furlough at that time.

45. During the period the claimant was on furlough the respondent did not seek to contact her. They had been advised by their accountants that it was important that there was no suggestion that employees who were furloughed would be required to do any work and they took this as meaning that they should not contact either the claimant or the other employee who was furloughed at this time.

46. The respondent started opening up their office to staff from around mid-May as soon as they were permitted to do so. One member of staff who was a single parent brought her daughter into work. Her daughter was the same age as the claimant's child.

47. On or about 12th June the respondents contacted the claimant. Both Ms Crossley and Mr McClusky were on this call. They advised the claimant that they needed her to return to work by 1 August. They advised that the other member of staff who had been furloughed would be returning before this. The claimant advised that she would prefer to remain furloughed. She advised that her daughter's school did not start until 13th August. She advised that she was unable to access her usual child care provision because of COVID and that she would not be able to attend work until 13th August.

48. The respondent indicated to the claimant that they could not continue with furlough after 31st July because there was work for the claimant to do. They did however say that the claimant was on a zero hours contract and if she was unable to start until 13th August then they would accept this.

49. The following Monday 15th June the claimant received an email from her daughter's school. This email was lodged (page 94). The email indicated that when the school reopened after the summer holidays on 13th August it would be required to do so on the basis that risk assessments showed they could only have half of the total number of pupils attending school each day. Each class would therefore be divided into two cohorts. One cohort would attend school Monday/Tuesday. The other cohort would attend school Thursday/Friday. Wednesday would be used for cleaning the school and marking home schooling assignments.

50. The claimant emailed the respondent on 15th June to advise the respondent of this. The email was lodged (page 94). She stated:

> "I have just found out that as from August 13th Delaney will only be attending school 2 days a week. The other 3 days she will be on home schooling with work set from school for those days.

> I do not yet know what days of the week they will be either Monday/Tuesday or Thursday/Friday as Wednesdays will be closed for all pupils for full cleaning.
>
> I don't know how I can come back to work and if furlough ends obviously my income does too yet COVID precautions are controlling this situation where I can't work.
>
> So just to keep you in the loop as communication during these times is important.".

51. The respondent's management were at this time trying to make arrangements to keep their business going. They did not respond to the claimant straight away. Their concern was that they were being required to accept bookings for training courses which in the normal course they would expect to have delivered by the claimant. These courses were, as noted above, of varying lengths from half a day to 4 days.

52. On 17th June the claimant emailed a chaser email to the respondent stating:

> "I am just waiting to check that you received my email as there has been no response.
>
> I am thinking that it must be because you need more time to think about the issue, before making any reply.
>
> I am still waiting to hear which specific 2 day cohort Delaney will be going into. As soon as I know I will pass on the details to you.".

A few minutes later the respondents emailed the claimant stating:

> "Sorry we have just been busy but are planning on phoning you on Friday morning.".

53. On 19th June a telephone conversation took place between the claimant and Mr McClusky. The respondent confirmed that furlough would end on 31st July. The claimant maintained her position that she would be unable to work at all until 13th August and thereafter would only be able to work 2 days per week. She did not know which 2 days in the week this would be. Mr McClusky indicated that he did not think this would be sustainable. The company needed the claimant to work full time.

54. Prior to going on furlough the hours the claimant worked had varied but had amounted to around 30 hours per week. The Tribunal accepted that the hours the claimant had worked were as per those set out in paragraph 6 of their ET3. Generally the claimant would be in for at least 4 days per week. Often she would be in for 5 days albeit she would not work a full 8 hour day on each of these days. The claimant would usually try to come in early and then work through her lunch before leaving early to pick up her daughter. On occasion she left earlier.

55. The respondent considered that the claimant was well aware that if she had issues with child care then she would be able to bring her daughter into the office with her. Their understanding of the position was that the claimant was simply adamant that she was not prepared to work more than 2 days per week. At that time she could not say what those 2 days would be.

56. During this call there was a discussion regarding the repayment of monies which the respondent had expended on training the claimant. In or about January 2020 the respondent had paid the fees for the claimant to attend a training course. Originally they had intended to send one of their other members of staff on this course however he could not attend. It is the respondent's normal practice that when sending employees on such courses they have the employee sign a document undertaking to repay the cost of the course if they leave the employment of the respondent within a period of 3 years. The claimant had discussed this at the time with Mr McClusky. He had indicated that this was a routine matter and hopefully there would be no question of the sum ever having to be repaid. At the discussion on 19th June

the claimant asked about having to repay this sum if her employment ended because she was unable to work more than 2 days.

57. No final decision was made at this meeting. The respondents made it clear that furlough would be ending on 31st July. They also made it clear that it would not be acceptable if the claimant was only available 2 days a week after this.

58. Mr McClusky formed the view that the claimant was quite adamant about not coming back for more than 2 days per week and conveyed this information to Ms Crossley.

59. On 19th June the respondent wrote to the claimant confirming their position stating:

> "With reference to our phone calls on 12th June and today on exiting furlough as discussed with myself and Sharon Crossley we can now confirm to you that of 31st July 2020 your furlough period will end and from 1st August you will revert back to your zero hours contract.
>
> If you have any questions please direct those questions to Sharon Crossley.".

The letter is at C96, the email with which it was enclosed is at R30 and states:

> "Ms M
>
> As per our phone conversation earlier see attached letter confirming the end of your furlough period. As from 1st August you will revert back to your zero hours contract. Can you please advise how you wish to proceed.".

Later that night the claimant emailed the respondent stating: (R31)

> "As per our telephone conversation today I wish to confirm that I am able to work for 2 days a week from 14th August 2020. The exact 2 days will be confirmed on 29th June 2020 as they are directly linked to my daughter's school year requirements and I am waiting to hear which 2 days she will be required to attend school on.
>
> If this is not acceptable for you to accommodate as a business then I would be grateful if you could confirm this in writing by return."

60. There was a further telephone conversation between the claimant and Mr McClusky on 22nd June 2020. The claimant maintained her position that she would only be able to come back 2 days a week and at that point she did not know which 2 days they would be. The respondents advised her that this was simply not acceptable to them as a business. Mr McClusky advised the claimant that the respondents required to make plans for delivering training. If the claimant was only available 2 days per week then the claimant would not be able to take on courses lasting more than 2 days. In addition there would be a problem in the claimant taking on courses that lasted less than 2 days since the client might want the course on a day where the claimant would not be working. Mr McClusky advised the claimant that as a small business this was simply unsustainable. The claimant was adamant in her position that she would not be able to work more than 2 days.

At 22:24 on 22nd June the claimant wrote to the respondent stating: "Thank you for putting it in writing and making the situation clear. Although I had hoped that being able to work 2 days a week would still be of benefit to you being that there is other work you could perhaps have got me to do with the level of work you had said would be coming in. I did not take the position specifically to be a trainer and only a trainer. That was just an extra competency I could bring to the company.

On that note what happens about the course I was sent on with the contract I had to sign about repaying it. If I have to leave because of now being unable to work the hours you need me to do I still repay the money to you?

61. On 23rd June the respondent's Mr McClusky emailed the claimant setting out the company's position (R33). He stated:

> "In response to your query regarding the type of work which you can do which would be of benefit to the company we would confirm that you are employed as a consultant which means that you would be expected to carry out any health and safety consultancy work within your capabilities including training.
>
> When we spoke on the phone last Friday we used training as an example of how the lack of continuity by working only 2 days a week could impact on the company but that could equally apply to other areas of expertise which may result in others having to complete work if you are not available taking them away from their own schedule. Thus it is for those reasons that we have considered that working 2 days per week would not be acceptable.
>
> Unfortunately we can confirm that in accordance with company procedures and the signed agreement we would be looking to recover the cost of the courses which you attended and following payment we would provide you with the original certificate. Taking into account the circumstances we would be prepared to recover the costs (£595) in 2 payments from your June and July salary (£300 and £295 respectively)."

The claimant responded by email in the early hours of 24th June 2020 (C98-C99). Most of this email relates to the claimant objecting to having to repay the monies for the course. It was common ground between the parties that following the termination of the claimant's employment the respondent did not

seek to recover these monies from the claimant and these monies were not in fact required to be paid by the claimant. The claimant does say in her email:

> "As a result of COVID 19 with Delaney's school closed and only looking to open 2 days a week in August you have informed me that I no longer have employment with AMC Safety Management Ltd because I am unable to work the full time hours you want me to be available for.
>
> Even though I am on a zero hours contract and can work 2 full days a week you informed me that there is no facility to employ me any further unless I can work full time hours.
>
> I have made it very clear that I am able to work 2 days a week whilst my daughter is not in school full time and have no intention of leaving the company voluntarily. Therefore I would like to respectfully point out it is yourselves informing me that I have to leave not me leaving the company. Which means it does not seem fair or ethical to deduct any funds from my wages to cover this course."

62. Mr McClusky and Ms Crossley discussed the matter. It was clear to them that the claimant was quite adamant she was not prepared to come back for more than 2 days per week. The respondent's position was that this was not sustainable for them as a company. Although the claimant was on a zero hours contract the claimant and the respondents were in agreement that she was working at a full time position. The zero hours was to enable her a degree of flexibility in relation to start and finish times and allow her to take occasional time off without having to ask permission. All of the respondent's employees were full time. They did not employ anyone on a part time basis. The reason for this was that this was incompatible with the requirements of their business. There was no other work which the claimant could do in the business which could sustainably be done on a part time 2 days per week basis. They decided in the circumstances they should write to her confirming

this and confirming that her employment was at an end. They wrote to the claimant on 26th June 2020 (C101). The letter stated:

> "With reference to our telephone conversation we would confirm that your employment with the company will terminate with effect from 3rd July 2020. We wish you every success for your future.".

This letter was attached to an email which was sent at 18:07 BST on 26th June (page 100). The email stated:

> "Please find attached formal termination of employment letter. A copy will be posted to you along with a copy of your contract and pay slips."

At 18:27 the claimant responded (page C102). She stated:

> "Please may I ask why is there no a reason given for the termination? I would like it made known that the termination decision was due to COVID situation/work availability and not due to my work or other reasons. Being that this is the reason you have given to me."

63. At 21:37 that evening the claimant sent a further email to the respondent (C103). It stated:

> "It has been confirmed that Delaney's school will be returning to 5 days a week from August and I have found someone that will take Delaney on for the summer with her own daughter so that I can come back to work full time for you.
>
> I can now be back to full time hours from Tuesday next week and so I now do not have to be terminated.
>
> I can be back on Tuesday at 8.30am.".

64. The email arrived after close of business. Ms Crossley and Mr McClusky discussed it the following day. Ms Crossley was extremely wary of the email. Mr McClusky simply did not believe it. Both parties contrasted the email with the fact that the claimant had been quite adamant that she was unable to work more than 2 days per week. They considered it extremely suspicious that in the space of 3 hours not only had the claimant's school apparently changed their minds but the claimant had been able to arrange child care to start before 13th August. They decided that they simply did not believe that the claimant would be able to work full time hours. Mr McClusky sent an email to the claimant at 17:57 the following day (27th June 2020) (C104). He stated:

> "With reference to your email we feel it necessary for the avoidance of any doubt to confirm our earlier letter terminating your employment with the company with effect from 26th June with a week in lieu of notice to 3rd July.
>
> We would confirm in response to your earlier email that we are not legally obliged to provide you with written reasons for the termination of your employment.
>
> We would confirm that this brings the matter to a conclusion and that we will not be entering into any further verbal or written correspondence on the subject.
>
> Please make arrangements by appointment to uplift your personal items from our offices."

65. Following the termination of her employment with the respondent the claimant remained unemployed until starting a new post in November 2021. Her salary in her new post is £36,000 per annum which is considerably in excess of what she earned with the respondent.

66. Following the termination of the claimant's employment the respondent hired someone else to do the job formerly carried out by the claimant. That employee was employed full time. The respondents do not have any part time employees.

67. In or about December 2020, some 5 months after the termination of her employment, the claimant was put in contact with an organisation called Penumbra who were assisting her with her tenancy. She met one of their mental health recovery practitioners Andrea Gardener in or about December 2020. On January 2021 Ms Gardener produced a letter in which she set out her understanding and confirmed her involvement with the claimant (C42). In this letter she stated:

> "I have contact with Ms M 2 times a week to provide support within the tenancy. I started to work with Ms M in December 2020. Ms M was referred by Social Work, due to chronic anxiety and panic disorder. There were concerns that she would be struggling to maintain her tenancy and had become very isolated.
>
> I assist Ms M with daily tasks such as making and attending appointments, dealing with any correspondence and making phone calls, budgeting, shopping and non-specific counselling.
>
> Ms M suffers from anxiety which contributes to her poor mental health, she requires reminding and reassurance with daily tasks as she can feel overwhelmed by these causing her mental health to suffer.
>
> Ms M is very isolated. She is extremely anxious and struggles to speak with other people or go outside or answer the phone. I support her to make appointments and engage with others.
>
> Ms M has extreme anxiety over finding a balance between parenting and maintaining a working lifestyle. Her anxiety has further

increased due to being a single mother and having no support network, to help to find the balance between being a parent and the need to be in employment.".

68. At around the same (December 2020) the claimant was also referred to SAMH. This is a mental health charity. They provided a letter dated 18th May 2021 (C45) which stated:

"Ms M was referred by Armed Services Advisory Project to our service in December 2020. As a mental health charity we offer support and guidance along with our partner organisation Veterans First Point Fife and her General Practitioner who are also supporting Ms M with her ongoing mental health.

My role is to support Ms M and to ensure her needs for vocational support, general wellbeing and mental health are all being met. This may include one to one support to help improve confidence, grow self-esteem, and build on the skills to move closer towards the long term goal of future sustainable employment. …."

69. The claimant also provided a letter from Universal Credit dated 12th February 2020 confirming that "following a work capability assessment they had decided she had limited capability for work." (pages C3 and 44). This had never been sent to the respondent before the commencement of these proceedings.

70. Despite not being required to look for work in terms of her benefits the claimant did take some steps to obtain other work. She would have been unable to work in early 2021 due to the fact she required to home school her daughter during the further COVID lockdowns which occurred in 2021.

Matters Arising from the Evidence

71. In this case there was a clear difference in the factual account given by the claimant on the one hand and the respondent's witnesses on the other hand. Both the claimant and Ms Crossley became upset during their testimony and were quite vehement in their protestations that each was telling the truth. The principal dispute between the parties was in relation to conversations which the claimant alleged to have taken place between herself and Ms Crossley and Mr McClusky during the first month or so of her employment. The claimant's position was that she had told Ms Crossley at the initial interview that she suffered from mental health problems. She stated that it was because of her mental health problems that she had been continued on a zero hours contract. She stated that on occasions during the first month she had to go home early because of her mental health problems. She stated that she had made it clear to both Ms Crossley and Mr McClusky that she suffered from mental health problems. She stated that the texts referred to above were evidence of her telling the respondent of her mental health difficulties.

72. Initially the claimant was extremely vague in the evidence she gave about precisely what she had said and when she had said it. Eventually after being pressed by the Employment Judge she stated that there had been a meeting on or about 17th December at which she had clearly made these statements.

73. The claimant also said that during her initial interview she had made a comment about feeling that she was overweight and later told Ms Crossley about being concerned about standing up and speaking to others when delivering training. She stated that Ms Crossley had reassured her on this point. She considered this to be evidence that she had advised Ms Crossley of her mental health difficulties which included low self-esteem. The claimant agreed that she had been offered a zero hours contract. She stated that this was due to her mental health issues. Ms Crossley indicated that the claimant had said that she needed a bit of flexibility. Ms Crossley had suggested the zero hours contract since this accorded with what the respondents normally

did in any event. Ms Crossley's position was quite clear that she understood the claimant wanted flexibility because of her child care commitments. The claimant spoke of leaving early but feeling guilty because of Ms Crossley's "body language". Her position was that Ms Crossley had never said anything to her or behaved inappropriately towards her as a result of these requests but she described Ms Crossley's behaviour in the office as sometimes intemperate. She spoke of sitting next to someone when Ms Crossley upbraided that person about some work they had not completed and feeling concerned about this. She spoke of having various meetings where she mentioned to Mr McClusky that she was concerned that Ms Crossley thought worse of her for having to leave early so often and confirmed that Mr McClusky had been extremely supportive during these meetings and assured that she could leave whenever she wished. Ms Crossley and Mr McClusky denied that all these things had happened. Their position was that the claimant had come with an extremely impressive CV. She was exactly what they were looking for. They were extremely impressed with her since she came over as being more than competent and able to do the job from the first day. They considered themselves lucky to have recruited her. It had never crossed their minds that she had any mental health issues because she never mentioned those words at all. Both indicated that the claimant sometimes "harped on" about her issues with her brother but their understanding was that this was a family dispute over an inheritance and the claimant was quite naturally angry and upset about this family dispute.

74. The Tribunal noted that Mr McClusky gave his evidence in a calm manner and both of the respondent's witnesses were prepared to make concessions where appropriate. We did feel that Ms Crossley was somewhat over emphatic when indicating that the claimant had at no time mentioned that she had issues but at the end of the day the Tribunal's view was that the respondent's management feel extremely upset at the way the claimant had treated them and both appeared to be of the view that the claimant was trying to manufacture a claim for financial reasons. Given that that was Ms Crossley's view it is unsurprising that she was somewhat vehement at points in her evidence. As noted above the claimant was not a particularly

good witness when it came to facts. She would not make concessions. With regard to contemporary documents she was adamant in stating that these carried a meaning way beyond what they actually appeared to. The Tribunal noted that even when specifically asked by the Employment Judge to be specific about her alleged impairment and its effect on her ability to carry out day to day activities the claimant's evidence was still extremely vague and inspecific.

75. On the balance of probabilities the Tribunal preferred the respondent's position that the claimant had at no time mentioned having any mental health issues nor had she been specific in any way to the respondent in saying that these issues had any effect on her ability to carry out day to day activities. The position which the respondents took and were entitled to take from what they were being told was that the claimant was a single parent starting work after a period of absence who whilst naturally apprehensive was in fact extremely competent and had absolutely no difficulty in doing the job. They were aware that she felt under financial pressure but attributed this to the fact she had been on benefits for a considerable period. They were aware that she was angry and upset with her brother and that the matter was to do with a dispute over inherited money but in the Tribunal's view there was no information from the claimant which could in any way suggest to the respondents that she suffered from mental health difficulties at all far less to the extent that she was disabled.

76. There were also a number of other matters of dispute. The claimant's view was that the respondent had behaved dishonestly in relation to the matter of engaging her as a direct employee rather than through the agency and in relation to the matter of the CV submitted to enable her to get accreditation. We would simply observe that on both occasions it was clear that the claimant was the person who had benefitted and that the claimant had been involved in agreeing to both matters. For what it is worth we could also see nothing in either matter which demonstrated dishonesty on the part of the respondent or in any way justified the attitude which the claimant was now apparently taking to these relatively straightforward matters.

77. With regard to child care the claimant accepted that she had been offered the option of taking her child into the office and that there were 2 separate rooms where her child could sit. She indicated that she was not keen on this arrangement because the toilet was in another building and she would have to take her daughter through the entrance to another building every time she was going to the toilet. In addition she initially said that she was concerned about bad language in the workplace being heard by her daughter. She then clarified this to say that none of the other members of staff were guilty of using bad language. She initially stated in evidence in chief that Ms Crossley was. She then retracted from this a little and said that Ms Crossley's behaviour was somewhat intemperate. Ms Crossley vehemently denied this allegation in examination in chief by her own solicitor and the claimant did not put the matter to Ms Crossley direct.

78. The claimant maintained that the job she applied for was as a trainee. She accepted in cross examination that her contract of employment did not say this but simply referred to her as a consultant. She could provide no explanation for the disparity. She stated that the job she applied for via target was a trainee job but she did not seek to lodge any evidence of this.

79. With regard to the issue of whether or not the claimant was expected to work full time albeit on a zero hours contract the claimant accepted several times during cross examination that her job was a full time job. It was put to her that she worked at least 3 or 4 days per week. The claimant corrected this and said that she usually worked 5 days per week.

80. With regard to the events surrounding the claimant's dismissal the claimant initially in her evidence did not refer to the 2 emails which were lodged by the respondent and in particular the email at R31 in which she confirms her position and asks the respondents whether or not it was acceptable to them and the email at R32 in response which confirms the respondent's answer and their reasons for this. The claimant's evidence regarding the phone calls she had with Ms Crossley and Mr McClusky was extremely unclear. She

referred to a number of telephone calls. Despite the best efforts of the respondent's representative to pin her down she was unable to confirm when exactly these had taken place and what she claimed had been said. Her position was that both Ms Crossley and Mr McClusky had been involved in all calls. The Tribunal preferred the evidence of the respondent's witnesses that Ms Crossley had been involved in the first call which had been on a speaker phone but that the subsequent calls had been conducted solely by Mr McClusky.

81. There appeared to be substantial agreement between the parties at what had been the result of these telephone calls. The claimant accepted in her evidence that she had made it clear that she was only prepared to commit to working 2 days per week. She denied the respondent's characterisation of this as her being "adamant" but it was quite clear to the Tribunal that up until the point where she was dismissed the claimant had vigorously maintained this position. When asked by the respondent's representative what had changed in the 3 hours after her dismissal which had led to her writing the email lodged at C103 she was unable to say. She indicated that she understood the position with the school had changed. She thought it had been on the news. She said that she was not in a position to listen to the news 24/7.

82. Finally, on the issue of whether or not the claimant was disabled at the relevant time we have set out above the entirety of the evidence provided by the claimant during the course of the Tribunal which we generally accepted. Unfortunately apart from repeating over and over again that she suffered from mental health difficulties (usually contracted to "mental health") the claimant was extremely inspecific in her evidence. The only medical evidence she provided was the letter from her GP set out above. The 2 other letters clearly post date her employment and she accepted that she had not consulted both organisations until December 2020, some 5 months after her dismissal. She also accepted that these organisations obtained their information from her and from the other organisations which were supporting her. After considerable prompting from the Employment Judge the best evidence the

claimant could give as to the effect on day to day activities was that as stated above she struggled to motivate herself to get up and sometimes stayed in her pyjamas all day. She found it difficult to do her own administration, deal with mail, do housework or even the washing up and she was battling with getting out of the house and mixing with people. She was unclear about precisely when this was.

83. During her evidence the claimant referred briefly to the letter from the Benefits Agency stating that they had decided that she had limited capability for work in February 2020. The date of this letter was not raised by her and we suspect was not picked up by the respondent's solicitor. The claimant did not at any time provide any explanation as to how the situation arose where she appears to have been signed off sick by her GP for practically the whole of her first 3 months employment with the respondent. We accepted the evidence of the respondent's witnesses that they had been entirely unaware of this. In any event the Tribunal felt the letter from the Universal Credit on its own was of little assistance to us in determining the issue of whether or not the claimant was suffering from a disability in terms of the Equality Act. The legal tests are of course entirely different.

84. During her evidence the claimant referred to an allegation that at some point Ms Crossley had come into a meeting where she was speaking to Mr McClusky about her concerns that although Ms Crossley said nothing Ms Crossley was upset with her for leaving early. The claimant indicated that Ms Crossley had then told her "Don't get your panties in a twist". She then corrected that later on to say that Ms Crossley had said "Don't get your own lacy panties in a twist". The claimant was initially vague about how often this had been said but eventually indicated that it had been said by Ms Crossley on 2 separate occasions. She could not give any further detail. Both Ms Crossley and Mr McClusky vehemently denied the allegations. The Tribunal preferred the evidence of Ms Crossley and Mr McClusky regarding this.

85. At the end of the day we consider that all of the respondent's witnesses including Ms Bell were both credible and reliable. We considered that the claimant was endeavouring to tell the truth to the Tribunal so far as she saw it. We did feel that she made assumptions and presumptions about what people would understand which simply did not hold up and did not appear to be based on any realistic appreciation of the facts and for this reason we did not find her evidence to be entirely reliable. We also took into account the contemporary documents. These supported the respondent's version of events rather than that of the claimant.

86. We considered it telling that the documents in the form of texts which the claimant considered clearly demonstrated that the respondents ought to have known of her disability did absolutely nothing of the kind.

Issues

87. As noted above the case was subject to case management. The claims being put forward by the Tribunal were disability discrimination and indirect sex discrimination. The claimant made it clear that she was not making any claim of direct sex discrimination. Her indirect sex discrimination claim appeared to be based on the allegation that the respondents operated a PCP of requiring staff to work full time. It was her view that this placed women at a disadvantage as compared to men. The reason for this being that women tend to bear the predominant burden of child care and as a result are less likely than a man to be able to commit to working full time hours.

88. In her pleadings the claimant had referred to making claims of direct discrimination, discrimination arising from disability, harassment and victimisation.

89. As far as we understood matters from the claimant's Further Particulars the claimant was claiming that the respondent dismissed her because of her disability. She also indicated that her claim of discrimination arising from disability was based on the premise that she had been given a zero hours

contract because of her disability and she listed the various matters which she considered disadvantaged her as a result of being on a zero hours contract.

90. The claimant indicated that Ms Crossley had made it evident by the behaviours displayed when she was indicating a need to leave the workplace earlier on any given day because of her mental health difficulties that Ms Crossley was not in fact genuinely supportive or tolerant of this practice. She also considered that in general the respondents were intolerant of mental health issues. She made various points in her statements about the way that the respondents had conducted their defence of the action. She gave no evidence regarding these during the Hearing and in any event they would appear to be completely irrelevant to her claim. She criticised the respondent for not showing compassion towards her having to reveal her mental health difficulties in more detail. Her victimisation claim appeared to relate to the suggestion that she had been treated less favourably through being on a zero hours contract. She did not mention any protected act and this claim would appear to be mischaracterised. With regard to harassment she claimed that the use of the term “keep your panties on” or “keep your lacy panties on” amounted to sexual harassment. It should be recorded that the claimant gave little evidence in relation to many of these claims during the Hearing. At the end of the day the claimant’s evidence appeared to be that her dismissal amounted to unfavourable/less favourable treatment and was either direct disability discrimination or discrimination arising from disability and that she had suffered indirect discrimination by being dismissed because of the application of the PCP mentioned above.

Discussion and Decision

91. Both parties made full submissions. Rather than set these out at length they will be referred to where appropriate below.

92. The first question in which the Tribunal required to determine in order to deal with the issue of disability discrimination is whether, at the time the

discrimination is alleged to have taken place, the claimant met the tests for being regarded as a disabled person set out in section 6 of the Equality Act 2010.

93. The first issue which the Tribunal required to determine was whether or not the claimant was disabled in terms of section 6 of the Equality Act. Section 6 of the Equality Act states:

> "(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".

94. It is clear from the case of ***Goodwin v The Patent Office*** [1999] IRLR 4 EAT that the burden of proof is on the claimant to establish that she meets the test of disability set out in the Act. In general terms in order to prove disability the claimant requires to show that 4 factors exist namely:

> (1) that there is a physical or mental impairment
>
> (2) that the impairment has an adverse effect on the complainer's ability to carry out day to day activities
>
> (3) that the adverse effect is substantial, and
>
> (4) that the adverse effect is long term.

95. The Tribunal was concerned that far from the claimant accepting that the onus was on her to prove her disability the claimant in general terms sought to avoid giving details at all. In her personal statement which the claimant lodged (but did not actually refer to in evidence) the claimant states that she did not feel that she should be "humouring the respondent with giving them

any further details about my mental health disabilities.". Throughout the Hearing it was extremely difficult to get the claimant to give any evidence beyond stating that she suffered from "mental health". The claimant was extremely reluctant to go into any detail about precisely what her impairment was said to be and what the effects of this were on her ability to carry out day to day activities.

96. The case of ***J v DLA Piper UK LLP*** [2010] IRLR 936 EAT discusses the correct approach to the issue of impairment in cases involving a mental disability.

97. In the case of ***J v DLA Piper*** the claimant claimed that she was suffering from clinical depression. The respondents sought to argue, with the assistance of a medical report, that there was a distinction between on the one hand clinical depression and on the other hand what was described as symptoms of low mood as a normal reaction to adverse circumstances. In that case the claimant had lodged her medical records for a period of several years which clearly showed that her GP had diagnosed her as suffering from mild to moderate depressive disorder on various occasions. The case held that In situations where there may be a dispute about the existence of the impairment it may make sense to start by making findings about whether the claimant's ability to carry out normal day to day activities is adversely affected on a long term basis and to consider the question of impairment in the light of those findings. The EAT pointed out that if the Tribunal finds that the claimant's ability to carry out normal day to day activities has been adversely affected on a long term basis it will in many or most cases fall as a matter of common sense inference that the claimant is suffering from a condition which has produced that adverse effect i.e. an impairment.

98. In this case the medical evidence itself is extremely slight. The letter from the GP does not even go as far as the evidence in the case of ***J v DLA Piper*** in diagnosing the claimant as at any time having suffered from symptoms of a depressive disorder. The most that it states is that when the claimant joined the practice she was on Escitalopram and antidepressant to treat symptoms

of anxiety and depression and that she had remained on antidepressants since then. She does however note that the preparation was changed several times because of a relapse in her symptoms. The GP does state that he issued the claimant with a fit note stating she was unfit to work due to anxiety and depression between 13th November and 13th January which would cover the period during which at least some of the incidents of discrimination were said to have occurred. The Tribunal also considered that it was entitled to draw the inference that the GP would not have prescribed antidepressants without at least a working diagnosis that the claimant was suffering from depression and that these would help. In the normal course we would consider that there would be little difficulty in providing sufficient findings to get the claimant over the bar of demonstrating an impairment by examining the claimant's difficulties in carrying out day to day activities. The problem here is that we got very little in the way of direct evidence from the claimant to assist us. The claimant did not give any specific dates other than to state that her "mental health difficulties" started in 2018 when the difficulties with her brother first arose. She referred to having financial concerns. She said she found it difficult to cope with minor administrative matters and would put things off and then feel bad about this. She spoke of having some difficulty in doing the housework but then went on to say that she felt that she had to pull herself together for the sake of her daughter and that she would then do the housework. She spoke about staying in pyjamas all day but as noted above she was not at all clear as to the timescale when she did this. She then moved on to that to saying how she felt that the lockdown and furlough actually suited her quite well in that it fitted in with her desire not to have to leave the house.

99. The claimant did speak of low self-esteem and concerns about her weight. In her original personal statement which she did not refer to in evidence she also speaks of not being able to motivate herself to prepare meals for herself and that she would then eat unhealthy foods around 11pm at night. She mentions not being able to keep to a diet to lose weight. She states that she worked through her lunch break since she was not sufficiently organised to

bring food in herself and would sometimes buy a roll and sausage from the sandwich truck.

100. The claimant did give evidence that on one occasion she had had suicidal feelings but that she knew that she would not act on these because of her daughter. In her personal statement she refers briefly to speaking to Samaritans on one occasion but feeling they were unhelpful since at that point she required practical help rather than just some-one to talk to.

101. In her statement she also refers to various stressors particularly what she sees as financial coercion and control by her brother and the stress of having to return from overseas. She also spoke of anxiety of being around people in a social gathering. She also spoke of having returned to Scotland and being isolated in an area with no support network.

102. The respondent's representative in submissions urged us to make a finding that the claimant was not disabled. He referred us to the fact that the claimant was clearly very competent at her job, a matter which all of the witnesses were agreed upon. He also pointed out that she had dealt very well with the presentation of her case at the Tribunal and that this was something which caused anxiety in a number of people who did not claim to be suffering from anxiety and depression as the claimant did but where the claimant appeared to have no problem. The Tribunal did not consider it appropriate to take these matters into consideration. We felt that the respondent's representative was simplifying matters and essentially ignoring the fact that mental health issues can often be somewhat nuanced. We also did not consider that it was the job of the Tribunal to effectively try to make clinical findings based on the way that the claimant presented to us at the Hearing. It was clear to us that the claimant does have a great deal of anger directed towards her brother and became upset whenever she spoke of this. She also became upset when her brother's actions causing her and her daughter to have to abandon their long held plans to relocate to Canada. We did not consider that it was for us as a Tribunal to determine whether the

claimant's reaction to these was normal or abnormal. We are not medically qualified to do so.

103. The claimant referred us to the letter from SAMH and from Penumbra but neither of these was particularly helpful. Both of them were talking of the claimant's situation some five months after the alleged discrimination had taken place. In addition it was clear that the authors were basing their assessment on what the claimant told them. One of the authors is described as a mental health recovery practitioner and the other as an employability advisor and it is not clear whether or not any of these authors were medically qualified.

104. One other matter which we should mention at this stage is that at an earlier stage in the proceedings this case had been set down for a Preliminary Hearing to determine whether or not the claimant was disabled or not. The respondents sought discharge of that Hearing on the grounds of unavailability and the postponement was granted. When the time came to relist the case the respondent wrote to the Tribunal confirming that they were now happy for the case to be listed for a Final Hearing. The respondent's reply did not state in as many words that they were no longer disputing the issue of disability however it would appear from the claimant's response at the time that the claimant may have thought that this was the case. At the commencement of the Hearing the Employment Judge raised this matter with the respondent's representative. The respondent's representative confirmed that the issue of disability was very much not conceded and was still being disputed. The claimant did not raise any objections when I indicated that the issue of disability would therefore require to be determined by the Tribunal.

105. Clearly it would have been better had the claimant lodged her medical records or at least a much more full report from her GP but she did not do so. Normally the Tribunal would consider that this was essentially something entirely down to the claimant but in the circumstances we did wonder if the claimant perhaps felt that she did not need to provide any further medical

evidence because the respondents were no longer seeking a Preliminary Hearing on the issue of disability.

106. The Tribunal considered carefully the Judgment in the case of ***Aderemi v London and South Eastern Railway Limited*** [2013] EQI.R 198. In that case the EAT stated that the statute should be given an interpretation that's in line with the intent behind it. Where a broad definition such as that of disability is adopted that requires a broad approach should be taken to what lies behind it. In that case the EAT suggested there was a need for Tribunals to be careful that the purpose of the statute was not defeated by an overemphasis upon the specificity of the label to be attached to a particular situation.

107. The Tribunal was also required in terms of the Guidance on the Definition of Disability (2011) produced by the Secretary of State under section 6(5) of the Equality Act. This expands on the proviso set out in paragraph 5(1) of Schedule 1 of the Act which provides:

> "(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if:
>
> (a) measures are being taken to treat or correct it; and
>
> (b) but for that it would be likely to have that effect."

108. The claimant did give evidence about the level of support which she had been receiving from various organisations. It is also clear from her GP report that she has been on antidepressants since at least 2018. The claimant did not address in any way the concept of deemed adverse effect nor did the respondent. However the Tribunal's view was that it would be reasonable for us to assume on the balance of probabilities that the adverse effects would be worse were she not receiving the antidepressants and were she not receiving the various supports which she mentioned. The Tribunal's conclusion therefore was that at the end of the day the claimant had just done

enough to demonstrate that she did suffer from a disability in terms of the Equality Act at the relevant time albeit this was a conclusion which the Tribunal reached with some hesitancy.

Knowledge of Disability

109. The next question which we required to answer in order to deal with the claimant's claims of disability discrimination was that of whether the respondent had actual or at any rate constructive knowledge that she was disabled at the relevant time. WE required to do this as it is axiomatic that one can only directly discriminate against someone on grounds of their disability if one knows that they are disabled. Similarly one can only harass someone on grounds of disability if one knows that they are disabled.

110. With regard to the claim of discrimination arising from disability section 15(2) of the Act states:

> "Sub section (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.

111. In this case the Tribunal were in absolutely no doubt on the basis of the evidence that the claimant did not at any time explicitly tell the claimant that she suffered from anxiety or depression or that she suffered from a disability of any sort. We accepted the respondent's evidence on this point. We also accepted that there was absolutely nothing in what the claimant said or did which could have possibly put them on notice that the claimant was suffering from any adverse effects of a mental health difficulty. As noted above we accepted the respondent's evidence that they were extremely impressed by her CV. Not only does her CV not mention any disability but it expressly states that the claimant has good people and communication skills and entirely contradicts the picture which the claimant sought to paint at the Tribunal in relation to her disability.

112. The Tribunal was in absolutely no doubt that the respondents had no actual knowledge of her disability. For the purposes of section 15 we require to consider whether or not they had any constructive knowledge of her disability. Again our view was that there was absolutely nothing to alert them to the fact that the claimant had a disability. The evidence relied upon by the claimant in terms of the text messages was considerably short of anything which would put any reasonable employer on notice that their employee was suffering from any impairment in relation to mental health issues at all far less to the extent that she was disabled. We did not find anything to suggest that the respondent could have been reasonably expected to know that the claimant suffered from a disability

113. Given that the respondent had neither actual nor constructive knowledge of the claimant's disability the claims of disability discrimination must therefore fail.

Sex Discrimination

114. With regard to the claim of harassment on grounds of sex the Tribunal did not accept the claimant's factual assertion that Ms Crossley had at any time used the expression "Don't get your panties in a twist" or "Don't get your lacy panties in a twist". This claim must therefore fail. In any event the Tribunal was of the view that even if this had been said by Ms Crossley in the general circumstances narrated by the claimant this would not amount to harassment on grounds of sex. These may be words which few modern Managers would use but on their own they would not constitute sexual harassment.

115. The final claim which the Tribunal had to consider was the claimant's claim that the decision to dismiss her was an act of indirect sex discrimination. We considered this claim carefully and indeed it was the only one of the claimant's claims which was properly articulated.

116. Indirect discrimination is described in section 19 of the Equality Act 2010. It states:

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

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

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

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

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

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

117. The claimant did not specifically narrate the PCP however the Tribunal understood the alleged PCP to be that the respondent required employees to work full time hours (albeit subject to some minor adjustments should they require time off early) and that an employee who became unable to work full time hours would be dismissed. The respondents were quite clear in their evidence that they had applied this PCP. The claimant accepted that she understood the job to be a full time one at numerous points in her cross examination albeit subject to the adjustments that she would be able to get to have some flexibility to attend to issues from childcare as they arose. Essentially the respondent wanted the claimant to work roughly the same hours as she had been working in the period up until the outbreak of the pandemic interrupted things on 18th March. The Tribunal accepted on the evidence that this was a PCP which the respondent applied to all staff. The respondents were clear that they had no part time staff at all. The replacement which they had hired to replace the claimant worked full time.

118. The Tribunal required to determine whether this PCP put women at a disadvantage as compared to men. The claimant did not provide any evidence on the subject but the Tribunal considered that the recent case of Mrs G Dobson v (1) North Cumbria Integrated Care NHS Foundation Trust, (2) Working Families – Intervener UKEAT0220/19/LA(V) provided the Tribunal with sufficient guidance to enable us to come to a conclusion in the matter. The Tribunal accepted that it was a matter of judicial knowledge that currently in our society women are more likely to have child care responsibilities than men. The Tribunal noted that that is something which is hopefully changing over time and would accept that it is not universal but considered that given our view of the present society it was something which is so generally well known as not to require proof. The Tribunal considered that it was therefore correct to say that any PCP which places at a disadvantage those who have child care responsibilities is going to place more women at a disadvantage than men and therefore Parts 2(a) and 2(b) of the definition of discrimination were established. The Tribunal also accepted that the respondent applied this PCP to the claimant and paragraph 2(c) of the definition is therefore met. The principal question for the Tribunal however was whether the PCP had been justified by the respondents showing it to be a proportionate means of achieving a legitimate aim.

119. In this case the burden of proof is on the respondent. The Tribunal's view was that the respondent had met that burden. The Tribunal accepted their evidence that they had a legitimate aim in making their business work. This involved meeting so far as possible the needs of their clients. Clients required training courses and audits to be carried out. These required to be carried out in circumstances where the courses were from half a day to 4 days in length. The respondent would be unable to plan courses if they proceeded on the basis that the claimant would only be able to work 2 days per week and indeed they would not necessarily know which 2 days they were going to be. We accepted the respondent's evidence that it would not just mean that the claimant could not do courses lasting more than 2 days. The claimant would not be able to do courses on days where she was not at

work even if it was a 1 or 2 day course that the client had asked for for a particular day. The respondent's evidence was to the effect that they would often get a call from a client saying that the client had won a particular contract and need a certain training course or audit carried out at short notice. It would not be acceptable to the client to say that the consultant could only do Mondays and Tuesdays if the client wanted the course on a Wednesday, Thursday or Friday.

120. The Tribunal did consider whether there was a non-discriminatory way of achieving this legitimate aim and accepted the respondent's evidence that there was not. Their evidence was that there was no other work which they required to be done which could be done by the claimant. She was employed as a consultant. The claimant's evidence as to what other work she could have done was somewhat vague but in any event we accepted the evidence of both of the respondent's witnesses that the work they required to have done was that of a consultant. They did not have any other vacancy. After the claimant was dismissed they required to hire someone else to do her work.

121. The Tribunal did consider whether the issue could have been dealt with by not dismissing the claimant but by simply leaving her on her zero hours contract and not giving her any work. The Tribunal's view was that this would not have met the respondent's legitimate aim of having staff in place to be able to offer the courses to clients which they wanted to do. Although the claimant was on a zero hours contract it was clear from the evidence that both parties believed that part of that contract was that the claimant would be working more or less full time hours. It was because the claimant would be departing from that that she raised the issue with the respondent in the first place. The Tribunal's view was that from the point of view of fairness and reasonableness it was more appropriate for the respondent to be clear and upfront with the claimant that if she could only work 2 days per week then there would not be any work for her rather than to keep her on a zero hours contract with no real possibility of her being offered any work. This would

particularly be the case given that the respondent would be well aware they would require to recruit someone else to do the claimant's job.

122. We considered whether the respondent could have avoided the negative effect of their PCP on the claimant by responding more positively to the claimant's email sent some 3 hours after her dismissal in which she said that her circumstances had now changed and that she could work 5 days per week and indeed could return to work earlier than 13th August.

123. In considering this matter the Tribunal had to remind itself that this was not an unfair dismissal claim. The claimant does not have sufficient qualifying service to make a claim of unfair dismissal. If it were an unfair dismissal claim then we may have been critical of the respondent's position in this matter. On the other hand we accepted the evidence of both Mr McClusky and Ms Crossley to the effect that they simply did not believe that the claimant was being truthful when she said she would now be able to work full time. This was in the context where Mr McClusky had been in conversation with the claimant during the whole of the previous week where he had made it absolutely clear to her that working 2 days per week was not acceptable. This is reflected in the email correspondence which essentially shows the claimant maintaining her position despite knowing that it may not be acceptable to the respondent and that she risked losing her job. The respondent's view was that her change of position had appeared to come out of the blue and was extremely suspicious. If the claimant had been unable to arrange child care at all up until the point where she was dismissed how come she was able to make arrangements for child care not just for the period when her daughter was at school but also for the rest of the summer holidays immediately thereafter. If the claimant was adamant that she was not prepared to be at work on days when her child was home schooling then what happened in the 3 hours after her dismissal to change her mind on this. The Tribunal accepted that this was genuinely what both Managers thought.

124. We can also see some rationale for the respondent not wanting to accept the claimant's change of position at face value. The claimant was on a zero

hours contract. If the respondents withdrew the letter of dismissal and it transpired that the claimant was not being entirely truthful in saying that she would be able to work 5 days then the respondent would find themselves in the difficult position of having accepted course proposals from clients which they were unable to meet because the claimant changed her mind. The respondent would have no means of ensuring that the claimant did in fact work 5 days given that she was on a zero hours contract.

125. The claimant herself hinted at this in that she felt that the respondents may have by this time been regretting allowing her to be on a zero hours contract. That may well be the case given that the respondent's express need for planning courses in advance is not entirely compatible with the use of zero hours contracts for their consultants on a long term basis. If that was the case however it does not assist the claimant's case on discrimination.

126. At the end of the day the Tribunal accepted that the claimant did impose a provision, criteria or practice to the effect that workers would be required to work full time. They appeared to have applied this PCP in the case of the claimant and indeed a PCP that workers who cannot fulfil this requirement will be dismissed. We have found that this is potentially discriminatory because it does have a disparate impact on women rather than men because women tend to bear the burden of child rearing. We have however found that it is a proportionate means of achieving a legitimate aim particularly in the context of a small employer who had no other work available which they could give the claimant which could be done on a part time basis. For this reason the claimant's claim of indirect sex discrimination fails. All of the claims are therefore dismissed.

Employment Judge: **Ian McFatridge**

Date of Judgment: **22 February 2022**

Entered in Register and Copied to Parties: **22 February 2022**