EMPLOYMENT TRIBUNALS

Claimant: Ms Eleonora Belfiore

Respondent: Loughborough University

Heard at: Nottingham – on the papers

Before: Employment Judge Victoria Butler

Representation

Claimant: Ms R Jiggens, Paralegal

Respondent: Ms L Marsh, Solicitor

JUDGMENT & DEPOSIT ORDER

The decision of the Employment Judge is that:

1. The allegation that the Respondent applied a PCP of not allowing companions from outside the University other than Trade Union representatives is struck out because it has no reasonable prospect of success.

2. The following allegations or arguments by the Claimant have little reasonable prospect of success:

    (i) That the Respondent applied the following PCPs:

        (a) the practice of training which put disabled staff to the particular disadvantage of managers not being sufficiently informed on and therefore unable to effectively implement the Respondent's statutory duty towards disabled staff.

        (b) the Respondent's practice of chaotic and ad hoc workload allocation and amendments without prioritising or implementing

adjustments for disabled staff, a lack of formal process or procedure, lack of clear lines of decision-making authority, led by managers without training in disability or making adjustments

(ii) The following allegations of harassment:

(a) Allegation C: 27th September 2021 - LG said R [CA and DD] had been misled about the status of C's ADHD Coach. LG retracted prior agreement for C's ADHD Coach to attend management meetings, including grievance meetings.

(b) Allegation D: 1st November 2021 DD circulated an announcement that C was unwell and not to be contacted.

(iii) The claim of victimisation.

3. The Claimant is **ORDERED** to pay a deposit of **£150** in respect of each of the five allegations or arguments listed above not later than **14** days from the date this Order is sent as a condition of being permitted to continue to advance those allegations or arguments. I have had regard to Ms Jiggens' submissions as to the Claimant's ability to comply with the Order in determining the amount of the deposit.

4. If the Claimant wishes to withdraw any element of her claim, then she must inform the Respondent and the Tribunal not later than 21 days from the date this Order is sent and will not be required to pay a deposit in respect of that element of her claim. If the Claimant wishes to proceed with all her claims, then she must pay a total deposit of **£750.** If she wishes to proceed with only part or parts of her claim, she must specify which part(s).

REASONS

Background

1. The Claimant presented her claim to the Employment Tribunal on 14 April 2022 following a period of early conciliation between 20 October 2022 and 30 November 2022. She brings claims of constructive unfair dismissal; discrimination arising from disability; indirect disability discrimination; failure to make reasonable adjustments; harassment and victimisation.

2. The Grounds of Claim attached to the ET1 set out the factual background to the complaints. A table is incorporated setting out precisely which facts relate to each head of claim. She relies on four acts of discrimination referred to as acts A, B, C and D as follows:

Allegation A: DD portrayed C's disabilities as unfair to C's colleagues in meetings on 19 July 2021 and 22 September 2021.

Allegation B: 4th August 2021 - DD increased workload allocation from allocation agreed with CA on 2nd August 2021.

Allegation C: 27th September 2021 - LG said R [CA and DD] had been misled about the status of C's ADHD Coach. LG retracted prior agreement for C's ADHD Coach to attend management meetings, including grievance meetings.

Allegation D: 1st November 2021 - DD circulated an announcement that C was unwell and not to be contacted.

The preliminary hearing by telephone on 3 January 2023

3. The parties attended a closed telephone hearing before Employment Judge Ahmed on 3 January 2023 at which he listed the matter for a preliminary hearing to consider Rules 37 and 39 for the following reasons:

> *"4.1 There seems to be an absence of any act of unfavourable treatment, only the Claimant's subjective perception of "feeling berated" and "made to feel guilty". It also seems doubtful that the double causation test required for a section 15 Equality Act 2010 complaint is or is likely to be made out;*
>
> *4.2 The PCPs relied on for the purposes of the indirect discrimination and failure to make reasonable adjustments do not on the face of it appear to meet the legal tests. I pointed out relevant passages from* ***Ishola v Transport for London [2020] ICR1204.*** *The allegations as a group or individual disadvantage for indirect disability discrimination appear unlikely to succeed.*
>
> *4.3 In relation to harassment, it is difficult to see how the Claimant will be able to establish the relevant "effect" under section 26(4) of the Equality Act 2010. One of the allegations of harassment post dates the termination of employment.*
>
> *4.4 The Claimant could not possibly have chosen to resign in relation to "Act D" as that occurred after she submitted her resignation."*

4. Accordingly, the case was listed for 1 March 2023 to determine the following:

> "*5.1 Whether the Claimant was at the material times "a disabled person" within the meaning of section 6 and schedule 1 of the Equality Act 2010:*

5.2 To determine whether any or all of the complaints (or any allegations or arguments) should be struck out if it is considered that they have no reasonable prospect of success within the meaning of Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013:

5.3 Alternatively, to determine whether the Claimant should pay a financial deposit as a condition of continuing with any or all of the complaints (or any allegations or arguments in respect of them) if it is considered that they have little reasonable prospect of success, and if so to decide the amount of the deposit:

(The Claimant must have available evidence of their financial means in the event the Tribunal decides to make a deposit order).

5.4 To identify the issues and make such case management orders as are necessary to the future conduct of the case".

5. Employment Judge Ahmed also made the following order:

"The Respondent shall lodge an electronic copy and two hard copies of the bundle of documents together with any witness statements and any skeleton arguments on which the parties intend to rely with the Nottingham Hearing Centre no later than 24 February 2023".

Disability

6. On 27 February 2023, the Respondent conceded that the Claimant was disabled by reason of ADHD. However, it asked the Claimant to confirm its understanding that any reference to anxiety in the pleadings was not to anxiety as a free-standing disability, but rather as one of the impacts/symptoms of ADHD.

7. Ms Jiggens did not reply to this e-mail but confirmed at the hearing that the Respondent's understanding is correct.

The preliminary hearing before me on 1 March 2023

8. Unfortunately, due to Ms Jiggens' conduct at this hearing, the determination of whether any or all of the complaints (or any allegations or arguments in respect of them) should be struck out or subject to payment of a deposit was not possible. Accordingly, I ordered the parties to provide written submissions, so I could determine the matter on the papers.

9. A fuller explanation of what happened at that hearing is recorded in my case management summary and referred to below.

The Law

Striking out a claim or part of it – Rule 37 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013

10. Rule 37 provides:

> *"At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds:*
>
> *(a) That it is scandalous or vexatious or has no reasonable prospect of success;*
> *(b) That the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
> *(c) For non-compliance with any of these Rules or with an order of the Tribunal;*
> *(d) That it has not been actively pursued;*
> *(e) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."*

11. In dealing with an application to strike out all or part of a claim, I must be satisfied that there is "*no reasonable prospect*" of success in respect of that claim or complaint – it is a high test. It is not sufficient to determine that the chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and if it to be exercised, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

> *"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"*

12. Where there are material issues of fact which can only be determined by a Tribunal it will rarely, if ever, be appropriate to be strike out a claim or complaint on the basis of it having no reasonable prospect of success before the evidence has been heard and tested.

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

13. Rule 39 provides:

> *"(1) Where at a preliminary hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
>
> *(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."*
>
> *(3) The Tribunal reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*
>
> *(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented as set out in Rule 21.*
>
> *(5) If the Tribunal at any stage following the making of a deposit order decides a specific allegation or argument against the paying party for substantially the same reasons given in the deposit order: - (a) The paying party shall be treated as having acted unreasonably pursuing that specific allegation or argument for the purpose of Rule 76 unless the contrary is shown and; (b) The deposit shall be paid to the other party or if there is more than one to each other party (or the parties as the Tribunal orders), otherwise the deposit shall be refunded.*
>
> *(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."*

14. Accordingly, I may make a deposit order where allegations or arguments have little reasonable prospect of success. This is not a mandatory requirement and whether to make such an order, even where there is little reasonable prospect of success, remains at my discretion.

15. I must identify the allegations or arguments that have little prospect of success and to discourage their pursuit by requiring a sum to be paid and placing the party at risk of costs if the claim is pursued and fails.

16. I am not restricted to considering purely legal issues and can have regard to the likelihood of the Claimant being able to establish the facts essential to the case and can reach a provisional view as to the credibility of the assertions being put forward.

The Claimant's position more generally

17. The Claimant submits that I cannot strike out a claim when I do not know what the case is. She refers to ***Cox v Adecco and Ors [2020] UKEAT/0339/19/AT***:

> *"To put it bluntly you can't decide whether a claim has reasonable prospects of success if you don't know what it is. Before considering strike out, or making a deposit order, reasonable steps should be taken to identify the claims, and the issues in the claims. With a litigant in person, this involves more than just requiring the Claimant at a preliminary hearing to say what the claims and issues are; but requires reading pleadings and any core documents that set out the Claimant's case.*
>
> *The issues were not sufficiently identified in this case, which was the backdrop to the errors of law the Tribunal made in determining that the claim of protected disclosure detriment or dismissal had no reasonable prospects of success before the Tribunal: (1) Failed to sufficiently analyse the information the Claimant contended he had disclosed: (2) Failed to consider the context in which the disclosure was made: (3) Misdirected itself as to the test for whether protected disclosures were in the reasonable belief of the Claimant made in the public interest; and (4) Failed to properly analyse to whom the disclosure was made, and whether it was arguable that any qualifying disclosure was protected".*

18. Ms Jiggens also submits that the *"normal course of case management where a claim is not understood by any party, is an order for further and better particulars, a detailed list of issues or a Scott schedule would be ordered, all of which are ordered by EJ's in the East Midlands Tribunal as a matter of course…."*

19. However, the claim as pleaded is clear. The primary difficulty faced by the Claimant is whether she can meet the necessary legal tests on her pleaded case.

20. The Claimant has been on notice of this issue since 4 January 2023. If she felt that further particulars of her claim would assist the Respondent and the Tribunal, there was ample opportunity for her to submit them. The Claimant has also had opportunity to consider the Respondent's submissions and provide any further necessary information in her submissions in response.

21. Furthermore, the Claimant has been represented by Just Reasonable Ltd from the outset and a detailed grounds of claim was attached to the ET1. Accordingly, the Claimant is not a litigant in person, and she has had two opportunities to fully plead her case.

The Respondent's position on Ms Jiggens' conduct

22. The Respondent argues that the Claimant's representative's conduct at the last two hearings is an additional and/or alternative basis for a strike out of all of the

Claimant's claims because of her unreasonable and scandalous conduct. In this regard she refers to the following conduct:

- *Repeatedly shouting at Employment Judge Ahmed and Employment Judge Victoria Butler over the course of the CMPH and Open PH respectively;*

- *Repeatedly interrupting and shouting over both Employment Judges as well as the Respondent's representative despite repeated requests to refrain from doing so;*

- *Accusing the Employment Judges of "judicial bullying";*

- *Making baseless costs/strike out threats at the CMPH towards the Respondent in light of their reserved position on disability in the absence of any impact statement/medical records produced for the purposes of proceedings, not withstanding that the burden of establishing disability is on the Claimant;*

- *Accusing the Respondent's representative of behaving unprofessionally and not adhering to duties to the Court by not producing a skeleton argument in advance of the Open PH (despite no Order being made to this effect);*

- *Insultingly accusing Employment Judge Ahmed of only listing Open PH because he "got angry" and because "he couldn't understand columns within a table";*

- *Refusing to agree to the Respondent's representative being allowed to make verbal submissions at the Open PH on the basis that this would place her/her clients at a disadvantage on the grounds of disability. Subsequently refusing to agree to the Judge's alternative suggestion for both parties to be given the opportunity to present submissions on paper to alleviate the disadvantage described;*

- *Refusing to agree to the Open PH being used to consider whether strike out/deposit order of all the claims was appropriate. Seeking to inappropriately and unreasonably limit the scope of the Open PH which had already been identified by Employment Judge Ahmed as to determine "whether **any or all** of the complaints (or any allegations or arguments) should be struck out if it is considered that they have no reasonable prospect of success within the meaning of rules 37(1)(a) of the Employment Tribunal Rules of Procedure 2013".*

- *Objecting to Employment Judge Victoria Butler making verbal Orders regarding written submissions for no other reason than she did not wish*

to deal with the matter that way and repeatedly interrupting Employment Judge Butler as she attempted to issue those Orders verbally;

- *Shouting "shame on both of you" to Employment Judge Victoria Butler and the Respondent's representative before logging out of the CVP hearing before it had concluded and without leave of the Employment Judge".*

23. The Respondent says that Ms Jiggens behaviour has now been exhibited on two occasions in the context of Tribunal hearings being overseen by an Employment Judge and there is a real risk that her unreasonable and scandalous conduct will continue towards the Respondent and Tribunal in the event of any final hearing. This will significantly impede the ability of the Tribunal to manage the case in a fair and proportionate manner and will place the Respondent at a significant disadvantage in responding to any claim.

24. I share these concerns but do not consider striking out the claim because of Ms Jiggens' conduct is an appropriate sanction at this stage. I have warned her about her conduct in my case management summary. Furthermore, I have ordered the parties to tell the Tribunal about any adjustments they need which may facilitate them in their conduct of future hearings.

25. However, if Ms Jiggens' conduct persists, the claim is at risk of being struck out under the provisions of Rule 37.

Limitation – discrimination claims

26. The Respondent submits that all the allegations under the EQA are time barred. The last act relied on occurred on 1 November 2021 and is out of time because the ACAS certificate was issued on 30 November 2021, but the claim not issued until 14 April 2022. Given that the last act was 1 November 2021, it is not open to the Claimant to rely upon any arguments in relation to a continuing act. Rather, the Claimant must be able to demonstrate that it is just and equitable to extend time.

27. The Respondent says that in circumstances whereby the Claimant was being accompanied and advised by Ms Jiggens in relation to the internal processes, she will be unable to demonstrate the just and equitable requirement. Whilst not legally qualified, Ms Jiggens has informed the Tribunal on numerous occasions over the course of these proceedings of her experience of managing and pursuing disability discrimination claims. She has also informed the Tribunal of her academic work in relation to disability discrimination jurisprudence, and she is also the Founder and Director of Just Reasonable Ltd which describes itself as *"a social enterprise run by and for disabled people. We are specialists in disability and employment law, disability dispute resolution and empowering disabled people to reach their full potential at work".*

28. The Claimant says that she was constructively dismissed pursuant to s.39 EQA and, even if the EQA claims do not succeed individually, the cumulative impact should be

considered. There is no prejudice to the Respondent because the evidence will need to be heard in respect of the unfair dismissal claim in any event. However, the Claimant will argue that it is just and equitable to extend time because the Respondent continues to operate the same discriminatory PCPS and there are important public policy reasons for determining discrimination complaints against bodies subject to the PSED.

29. I cannot conclude that the Claimant has no or little reasonable prospect of success of persuading a Tribunal to exercise its discretion to extend time without hearing full submissions. As such, I decline to strike out the claim or order a deposit on this ground alone**.**

Section 15 Equality Act 2010 – discrimination arising from disability

30. The unfavourable treatment relied on is the Claimant's Line Manager, Mr Deakin, allegedly '*portraying*' her that the adjustments to her workload were unfair to her colleagues in meetings on 19 July 2021 and 22 September 2021. She says that on 19 July 2019, he repeatedly said:

> *"If he was to re-allocate any of her teaching to reduce her workload that he would have to give it to another member of staff and he repeatedly asked the Claimant if she was okay with him giving a colleague extra work and said it would not be fair to other colleagues who had heavy loads if he adjusted her workload… the Claimant felt berated and made to feel guilty for overburdening colleagues with her adjustments"* (para 8 ET1).

31. Ms Jiggens subsequently confirmed that the something arising in consequence of the Claimant's disability was her need for adjustments. The Respondent does not take issue with this.

32. However, the difficulty arises with the allegation of '*unfavourable treatment'*. The Respondent refers to the EHRC Code of Practice at paragraph 5.7 which explains that unfavourable treatment means that the person *"must have been put at a disadvantage"*. The Respondent says that, whilst the threshold to demonstrate unfavourable treatment (by reference to decisions made by a Respondent) is ordinarily relatively low, that threshold is not low enough to cover alleged comments and alleged portrayal which may have caused the Claimant to feel a certain way. This is because the concept of unfavourable treatment must still always be measured against an objective sense of that which is adverse.

33. Nevertheless, the concept of unfavourable treatment needs to be construed widely. I observe that in the table within the claim form the allegations is described as DD's '*portrayal*' that the workload adjustments were unfair to colleagues whereas in the body of the claim form she says that he repeatedly told her that it would not be fair on colleagues. There is a significant difference. It seems to me arguable whether Mr Deakin asking the Claimant if she was '*okay*' with him giving a colleague extra work and telling her that it would not be fair thus making her feel guilty amounted to

unfavourable treatment. The Tribunal will have to decide whether there was an adverse effect on the Claimant, and this can only be done after consideration of all the evidence.

34. The Respondent further submits that even if the Tribunal finds that there was unfavourable treatment, the Claimant will not be able to show that the unfavourable treatment was because of something arising in consequence of her ADHD. I do not rehearse its submission in any detail, but it seems to me again that this is a determination that can only be made after hearing the evidence.

35. As such, I decline to strike out this part of the claim or order a deposit in respect of it.

The PCPs

36. I deal with PCPs 1,2 and 4 first.

37. The Respondent has referred to ***Ishola v Transport for London [2020] ICR 1204*** in which it was stated that:

> *"However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reasonable disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP…..*
>
> *All three words carry connotation of the state of affairs (whether frames positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again…..*
>
> *If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP".*

38. The Respondent also refers to ***Ahmed v Department for Work and Pensions [2022] EAT 107*** in which the EAT observed*: "A PCP, simply put, is where the employer has an expectation of the employee, and either the same expectation is made of other employees or there is an element of repetition in the expectation with the particular employee".*

39. In respect of all three PCPs, the Respondent says that they relate to decisions that the Claimant is seeking to challenge by reference to the specific circumstances of her particular employment and, as such, they are unsuitable and unarguable for the purposes of an indirect discrimination and/or failure to make reasonable adjustments claim.

40. Furthermore, they amount to specific complaints relating to a specific set of circumstances rather than demonstrating an actual practice of the Respondent which has caused a specific disadvantage to the Claimant. They are framed in general terms related to the Claimant's specific circumstances rather than being indicative of something which the Respondent implements holistically and in relation to which there is some form of continuum in the sense that it is the way in which things generally are or will be done.

PCP 1 - "*the practice of training which put disabled staff to the particular disadvantage of managers not being sufficiently informed on and therefore unable to effectively implement the Respondent's statutory duty towards disabled staff*". ***S.19, s.20/21***

41. The Respondent submitted, quite properly, that the PCP is not particularised. The Claimant provided further detail in her written submissions and says that within the Respondent's Mandatory Training and Management Training Programme and Organisational Development learning resources there is no module explicitly on disability and no training, practical advice or guidance for line managers on how to identify, agree and implement reasonable adjustments for staff and avoid disability harassment.

42. The Respondent submits that the Claimant is attempting to seek to artificially create a discriminatory PCP on the basis of a generic reference to "*management training*" with circular reasoning. Furthermore, it says *"This appears to be a challenge related to one off alleged comments made in relation to the Claimant as opposed to there being any allegation of a widespread repetitive practice. The Claimant appears to be attempting to "reverse engineer" the relevant PCP by reference to the disadvantage relied upon".*

43. I agree with this submission entirely. The Claimant relies on her perception of her own managers' failings as a means to informing the PCP which is precisely the point addressed in ***Ishola***. Her complaints stem from her own personal circumstances rather than the application a neutral PCP.

44. I am mindful of course that I have not seen the evidence to which the Claimant refers and cannot say with certainty that the claim enjoys no reasonable prospect of success. However, based on the claim as pleaded, I am satisfied that the Claimant has little reasonable prospect of success in establishing that PCP 1 amounts to a PCP in law. I am also satisfied that it is appropriate for me to exercise my discretion to order her to pay a deposit before being able to proceed with the s.19 and s. 20/21 allegations which rely on it.

PCP 2 "*The Respondent's practice of chaotic and ad hoc workload allocation and amendments without prioritising or implementing adjustments for disabled staff, a lack of formal process or procedure, lack of clear lines of decision-making authority, led by managers without training in disability or making adjustments". **S.19, s.20/21.***

45. The Claimant submits that that she can adduce evidence from disabled and non-disabled academics of repetitive practices that show the chaotic and ad hoc practices or workload allocation operated by the Respondent across the University in different departments – '*specifically the absence of any process for identifying and prioritising individual needs systematically and fairly, the absence of any clear timeline for progression, and absence of any procedure for requesting changes or confirming agreed allocation, the practices in action were ad hoc e-mails and meetings without clear pathways for resolution and agreements being unreliable with final details only being confirmed very shortly before teaching not allowing preparation time*" (para 29).

46. The Respondent submits that this complaint relates to the Claimant's specific set of circumstances. I agree with the Respondent. On the face of it, it seems unlikely that the Claimant will be able to evidence a neutral PCP rather than her own perception/experience of how her work was allocated. By its very nature, an ad hoc and chaotic practice is unplanned and disordered thereby not likely to amount to a state of affairs or have an element of repetition.

47. Furthermore, in her submissions at para 31, the Claimant says that the chaotic and ad hoc workload allocation process is the unwanted conduct to inform a harassment claim. If she says that the conduct was related to her disability it cannot amount to a PCP.

48. Again, I am mindful that I have not seen the evidence to which she refers so cannot say with certainty that the claim enjoys no reasonable prospect of success. However, based on the claim as pleaded, I am satisfied that the Claimant has little reasonable prospect of success in establishing that PCP 2 amounts to a PCP. I am also satisfied that it is appropriate for me to exercise my discretion to order her to pay a deposit before being able to proceed with the s.19 and s. 20/21 allegations which rely on it.

PCP 4 *"not allowing companions from outside the University ……." **s.20/21***

49. The Respondent submits that it is simply not arguable that the alleged practice of not permitting companions from outside of the University other than Trade Union reps is a valid PCP on the facts of this case. Ms Jiggens was permitted to accompany the Claimant to earlier meetings which is not in dispute. Accordingly, there is not a PCP which has the requisite requirement of a continuum or state of affairs given that it was not even continuously applied in the Claimant's situation.

50. The Respondent also submits that the complaint appears to be on the basis of the withdrawal of the agreement for Ms Jiggens to attend rather than a neutral and holistic requirement which could amount to a PCP. This is clearly a *"one-off"* incident, not capable of amounting to a PCP given that it lacks the requisite element of likely repetition/continuum which is required by the case law.

51. I agree with the Respondent. Even on the Claimant's case, this cannot amount to a PCP in law given it was not a practice applied consistently to her. Ms Jiggens was able to attend earlier meetings and, therefore, it cannot amount to a PCP. Accordingly, the claim of failure to make reasonable adjustments relying on PCP 4 is struck out as having no reasonable prospect of success.

PCP 3 "*increasing workloads year on year"* ***s.19, s20/21***

52. I am not satisfied that this PCP can be said to have no reasonable prospect of success. On the face of it, the Claimant may well be able to establish this was a practice applied to a group of people - although she will have to be precise about the group she relies on. It seems a tall order for the Claimant to fulfil, but I do not know how readily available evidence is to her in this regard.

53. The Claimant says in the respect of the s.19 claim that the practice of increasing workloads year on year put disabled staff with stress-exacerbated impairments to the substantial disadvantage of workloads becoming increasingly stressful and exacerbating impairment symptoms. The practice put the claimant to this particular disadvantage.

54. The Respondent submits that the PCP is not neutral in effect because it would have a disparate impact on all employees subject to the practice and therefore the requisite group disadvantage cannot be demonstrated.

55. However, it is arguable that the disadvantage to those with stress exacerbated impairments would be put to a greater disadvantage. At this stage, I cannot say that this argument has no or little reasonable prospect of success.

56. I say the same about the failure to make reasonable adjustments claims in respect of this PCP. It is arguable that the Respondent failed to make reasonable adjustments in respect of the Claimant's workload and, therefore, I cannot say at this stage that this argument has no or little reasonable prospect of success.

Harassment

57. The claimant relies on all four factual allegations as amount to harassment.

Allegation A - DD portrayed C's disability adjustments as unfair to C's colleagues in meetings on 19 July 2021 and 22 September 2021

58. In respect of Allegation A, the Respondent submits that even if the Tribunal were to find that the Respondent had portrayed the Claimant's adjustments as being unfair

to colleagues in the manner alleged within the claim form, it would not satisfy the requirements of unwanted conduct in the context of ongoing discussions regarding the Claimant's request for an adjusted workload. Such a determination would prohibit and unduly restrict an employer from being able to discuss the operational implications of adjustments within the workplace.

59. As above, I suspect there is some confusion about the wording of the allegation. There is of course a big difference between '*portraying*' and outright telling the Claimant that her adjustments were unfair to her colleagues. It seems to me arguable that telling the Claimant this could amount to unwanted conduct. The determination of the relevant effect requires both a subjective and objective consideration which the Tribunal will have to assess after hearing the evidence. As such, I am not persuaded at this stage that the claim has no reasonable or little reasonable prospect of success.

Allegation B: 4th August 2021 DD increased workload allocation from allocation agreed with CA on 2nd August 2021

60. The Claimant says that undermining the workload allocation adjustments agreed by the Respondent was unwanted conduct related to disability that had the effect of demeaning her, creating a hostile environment and violating her dignity as she required the adjustments to keep well enough to work at all.

61. The Respondent says that this was clearly another example of a decision made by the Respondent in attempting to manage and consider the Claimant's request for an adjusted workload which the Claimant disagrees with. The conduct of the Respondent in changing the workload allocation was driven by operational considerations and was an attempt to support the Claimant with her workload. For such conduct to be classified as amounting to harassment in this context would again unduly prohibit an employer from being able to make operational decisions which employees to do not agree with.

62. On the face of it, I struggle to see how the Claimant will determine that any increased workload was unwanted conduct related to her disability and/or had the effect of creating a humiliating, hostile and offensive environment for her and violated her dignity. This allegation is more apt to the reasonable adjustments claim.

63. Despite this, I am mindful that the determination of this allegation will essentially turn on further evidence and submission and I decline to exercise my discretion to strike it out or order a deposit.

Allegation C: 27th September 2021 LG said R [CA and DD] had been misled about the status of C's ADHD Coach. LG retracted prior agreement for C's ADHD Coach to attend management meetings, including grievance meetings

64. The Respondent submits that there was no implication or suggestion by it that it was misled about Ms Jiggens' status. It says that this allegation appears to be an attempt

by Ms Jiggins to manufacture a way by which to pursue her own individual complaint against the Respondent notwithstanding that she does not have standing to do so. As such, this appears to be an attempt to artificially construct a claim under the Equality Act by a third party under the guise of proceedings brought by the Claimant.

65. The Claimant simply submits that the repeated practice of not permitting Ms Jiggens to accompany her is a clear dispute of fact that can only be determined by the evidence. The Claimant was put to a detriment in the refusal to allow her to be accompanied, no detriment or hardship was caused to Ms Jiggens.

66. I note that the Claimant herself says at paragraph 19 of her Grounds of Claim that there was an *implication* that she had misled the Respondent rather than anything expressly said or done. Furthermore, Ms Jiggens is clearly a legal/professional representative in addition to a coach so if that was not disclosed to the Respondent, the Claimant may be in some difficulty criticising the Respondent for saying she misled it (if it did).

67. However, it seems to me that a bigger hurdle will be the ability of the Claimant to establish that any conduct by the Respondent was related to her disability rather than the conduct of Ms Jiggens. On her own case at paragraph 18, she says that DD said that he felt personally attacked by Ms Jiggens. The Respondent echoes this and says that it was unwilling to allow her to attend at further meetings because she was attending in more of a professional advisory capacity and her attitude and conduct was considered to be obstructive, unhelpful and at times aggressive.

68. Given both parties' pleadings, I am satisfied that the Claimant has little reasonable prospect of success in establishing that this allegation amounts to harassment. I am further satisfied that it is appropriate to exercise my discretion and order that she pay a deposit as a condition of proceeding with it.

Allegation D: 1st November 2021 DD circulated an announcement that C was unwell and not to be contacted

69. The Respondent says in its Response:

> *"The Claimant resigned on 19 October 2021 and was signed off as unfit to work from 20 October 2021 until the end of her employment. At the same time as providing notice of her resignation, the Claimant also raised a grievance in relation to the issues surrounding her workload allocation. The Claimant and Rebecca Jiggens (on behalf of the Claimant) raised concerns regarding cover of the Claimant's teaching and queries from colleagues and students during her absence".*

70. The Respondent, therefore, on 1 November 2021 sent an email to the Claimant's colleagues and students to state: *"Unfortunately, Eli has had to take sick leave. If you have any need to contact her about work matters, please direct your queries* to me". It considered this an appropriate response to address the Claimant's concerns

and to alert colleagues and students about her non-availability. Furthermore, the Claimant's own out of office auto-response referred to the fact that she was on sick leave and as such, the Respondent did not consider that such a communication would amount to a breach of confidentiality.

71. The Respondent submits that the sending of an email in response to a specific request to make arrangements for the cover of the Claimant's work is quite plainly not unwanted conduct, if anything it is the opposite. The email was not related to the Claimant's disability, it was related to her absence and the requirement to notify students and colleagues about the appropriate procedures in relation to work matters. The test for harassment claims is that the conduct has to be *"related to"* the protected characteristic and given that the Claimant had requested action be taken and, in circumstances where the Claimant's own out of office hours email response referenced that she was on sick leave, the wording of the email is objectively reasonable and inoffensive. It was therefore not reasonable for the email to have had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

72. I agree with the Respondent's submissions. However, given that I have not had sight of the Claimant's out of office email and other evidence it would not be right to strike it out on the basis that it has no reasonable prospect of success. However, it certainly has little reasonable prospect of success on the application of the law to the facts presented by the Claimant and as such, I consider it appropriate to exercise my discretion to order that she pay a deposit before being permitted to proceed with the allegation.

Victimisation

73. The Claimant relies on two protected acts. Firstly, she says that Ms Jiggens did a protected act on her behalf, namely setting out the reasonable adjustments required by the Claimant in respect of her workload allocation and management communication in the meetings on 2 August and 22 September 2021.

74. Secondly, she says the Respondent believed that she "*would do protected acts connected to the making of allegations or conducting proceedings in relation to breaches of the Equality Act*".

75. The detriment complained of is being accused of misleading the Respondent and Ms Jiggens' status and the retraction of the agreement to be accompanied in meetings by Ms Jiggens.

76. The Respondent submits that Ms Jiggens appears to be pursuing a claim of her own against the Respondent and that the protected act relied upon and detriments, relate to her own individual involvement in the matter as opposed to being relevant to the Claimant's own personal complaints against the Respondent. Further, it does not appear to be alleged that the Claimant has undertaken a requisite protected act but rather the victimisation claim appears to be based on upon an entirely speculative

notion that the Respondent believed that the Claimant would do protected acts. There appears to be no evidential basis upon which this assumption is made rendering the claim entirely theoretical at best.

77. I agree. The Claimant herself did not do a protected act, rather Ms Jiggens set out what reasonable adjustments were required in her capacity as ADHD Coach/representative. Thereafter, there seems to be a leap from requesting reasonable adjustments to a belief that the Claimant would do a protected act with little basis to bridge the gap.

78. In respect of the detriments, Ms Jiggens is clearly a legal/professional representative in additional to being a coach and, based on her conduct in these proceedings to date, and as above, the Respondent is very likely to establish a non-discriminatory reason for her exclusion, namely her conduct. Taking the Claimant's claim at its highest, I cannot say that it has no reasonable prospect of success. However, I am satisfied that it has little reasonable prospect of success and order her to pay a deposit in respect of this allegation.

Constructive dismissal

79. The Respondent argues that given that allegations A to C do not represent any breach of the Equality Act it is difficult to see the basis on which they can be relied upon as repudiatory breaches of contract. Furthermore, it says that the Claimant was considering and pursuing alternative employment opportunities since January 2019, including actively applying for alternative roles, long before the alleged events that she relies upon in support of her constructive dismissal claim.

80. I cannot agree at this stage that the constructive unfair dismissal claim has no or little reasonable prospect of success. This claim is entirely dependent on the evidence as opposed to some of the matters above which are unlikely to meet the legal requirements for certain claims.

The Claimant's ability to pay

81. I originally proposed to reconvene a brief hearing by CVP to hear evidence on the Claimant's ability to pay a deposit. However, I have had regard to the fact that Ms Jiggens was adamant at the hearing on 1 March 2023 that the Claimant did not need to give evidence because Just Reasonable Ltd would be paying the deposit.

82. The Respondent takes the view that the maximum amount would be afforded in these circumstances and suggested that the Claimant should provide information about her means alongside her response to its submissions. No such information was forthcoming, and this is the second opportunity she has had to adduce evidence of her means to pay but failed to do so.

83. I am only obliged to make reasonable enquiries in relation to her ability to pay. Given Ms Jiggens' position that her firm would be underwriting such payment, I am satisfied

that a payment of £150 in respect of each allegation or argument is appropriate and proportionate.

_____
Employment Judge Victoria Butler

Date: 11 May 2023

JUDGMENT SENT TO THE PARTIES ON

.....

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FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTE ACCOMPANYING DEPOSIT ORDER

Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 976 3096. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

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DEPOSIT ORDER

To: **HMCTS Finance Support Centre**
Temple Quay House
2 The Square
Bristol
BS1 6DG

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order

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