IN THE EMPLOYMENT TRIBUNAL

Claim No. 2/2021

BETWEEN:

EVA MARIA MORENO MARTIN

Claimant

-AND-

EVEREST ENTERPRISES LIMITED

Respondent

DECISION

The decision of the Tribunal is that the Claimant's claims that (i) the Respondent contravened the Employment (Bullying at Work) Act 2014 is not well founded and fails and (ii) the Respondent contravened Section 13 of the Equal Opportunities Act 2006 is not well founded and fails.

Chairperson:	Gabrielle O'Hagan
For the Claimant:	Mr Christopher Brunt, with Mr Callum Smith, of Phillips Barristers & Solicitors
For the Respondent:	Mr Freddie Vasquez KC, with Mr Christian Triay, of Triay Lawyers

---

1. The Claimant was employed by the Respondent since 10 May 2004, initially as a sales assistant in its "Planet T-Shirts" stores, and from 2012 in its "Holland & Barrett" stores, until 15 December 2020 when she resigned without notice.

2. The Claimant filed a Claim Form on 15 January 2021 making claims for discrimination by victimisation under the Equal Opportunities Act 2006 and bullying under the Employment (Bullying at Work) Act 2014). Details of Claim were attached. The Respondent filed a Response Form on 8 February 2021, which denied the Claimant's claims with attached details.

3. A Preliminary Hearing took place on 17 January 2022 and a Case Management Order was made. The substantive Hearing took place on 6 and 7 September 2022.

4. The Tribunal heard evidence from the Claimant and one of her friends, Alan Linares, and for the Respondent, from its Operations Manager, Paul Victor, the Managing Director, Kailash Daswani, and Keith Chichon, a Commissioner for Oaths.

The Law

The Employment (Bullying at Work) Act 2014 (**the Act**)

5. Section 4 of the Act (as in force at the relevant times) defines "bullying" as follows:-

   "***Meaning of bullying.***

   4.(1) A person ("A") subjects another person ("B") to bullying where A engages in conduct which has the purpose or effect of causing B to be alarmed, distressed, humiliated or intimidated.

   (2) In subsection (1) the reference to conduct includes –

   (a) persistent behaviour which is offensive, intimidating, abusive, malicious or insulting;
   …
   (c) punishment imposed without justification; …

   (3) Bullying does not include reasonable action taken by an employer relating to the management and direction of the employee or the employee's employment."

6. Under Section 6(1) of the Act: "*An employer (A) must not, in relation to employment by A, subject an employee (B) to bullying.*"

7. There is a defence to claims under Section 6(5) of the Act:-

   "*An employer will not be in contravention of subsection (1) in relation to a complaint of bullying where he can show– (a) that at the time of the act or acts complained of– (i) he had in force a Bullying at Work Policy in accordance with the Schedule; and (ii) he has taken all reasonable steps to implement and enforce the Bullying at Work Policy; and (b) as soon as reasonably practicable, he takes all steps as are reasonably necessary to remedy any loss, damage or other detriment suffered by the complainant as a result of the act or acts of which he complains.*"

8. Under Section 10 of the Act:-

   "***Burden of proof***":

   "*Where, on the hearing of the complaint, the Claimant proves facts from which the Tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent has contravened this Act, the Tribunal shall uphold the complaint, unless the respondent proves that he did not contravene this Act.*"

Interpretation of the Act

9. Outside the Act, no statutory definition of bullying exists; and there is no equivalent of the Act in the law of England and Wales ("**E&W**") – it is a Gibraltar-born animal. Until this year there was only limited previous case law on the Act, including my own decision in *Hancock-v-Coral Interactive (Gibraltar) Limited* (Ind Tri 21/2016). However, on 25 January 2022, the Court of Appeal handed down its judgment in the case of *Stagnetto-v-(1) Cassaglia (2) GHA* (2021/CACIV/3), which provides substantive guidance on interpretation and application of the Act.

10. In the judgment, Sir Patrick Elias JA held:

"54. … bullying is typically understood to involve persistent or repeated behaviour which seeks to harm or intimidate persons perceived to be vulnerable. There is often an abusive relationship where one party deliberately takes advantage of a weakness in the other party. The weakness will sometimes be the victim's inferior position in the hierarchy. The harm may be physical or emotional.

… (2) … did the incident in question amount to bullying as defined? Section 4(3) excludes from the definition certain reasonable managerial acts of the employer directed to the employee; this hardly assists in an understanding of the section since it is inconceivable that this could amount to bullying on any sensible meaning of that term.

(3) Section 4(1) shows that the conduct in question must cause alarm, distress, humiliation or intimidation. These indicate strong feelings. In Majrowski v Guy's and St Thomas' NHS Trust [2006] 1 WLR 125, … Lord Nicholls observed that when courts are considering whether the quality of conduct truly deserves the epithet "harassment":

"…courts will have in mind that irritation, annoyances, even a measure of upset, arise at all times in everybody's day-to-day dealings with other people."

In my judgment a similar approach should be adopted when determining whether the nature and degree of any adverse effect on the victim to alleged bullying is sufficiently grave to merit the description alarm, distress, humiliation or intimidation."

11. He went on to hold:

"*57 … As I read the decision, the Tribunal was not saying that any conduct which subjectively causes genuine distress or alarm is enough to ground liability; there must be conduct capable of being characterised as bullying in its own right. That analysis is supported by the way the Tribunal dealt with the claim by Mrs Smith. The Tribunal accepted that she felt distressed by the conduct of Dr Cassaglia but nevertheless held that the incident in question was not sufficiently serious to justify being treated as an act of bullying as such. Conduct of this nature would need to be persistent to bring it within the scope of section 4(2)(a) so as to amount to*

statutory bullying. The action directed against her could therefore contribute to and be part of bullying conduct, but it did not itself, taken in isolation, constitute such conduct.

… 59. The judge also held that a purely subjective analysis of the effect of the alleged bullying on the individual affected could not be appropriate:

"Applying the subjective test on its own to section 4(1) cannot have been what Parliament intended. If all that is required was a subjective test as to whether an employee felt alarmed etc, then that could give rise to absurd results in the case of an overly sensitive employee who genuinely, but unreasonably, felt any one of the sentiments set out in section 4(1)." (para.82).

60. The judge concluded that for liability to be established under section 4(1), the potential effect of the conduct had to be assessed both objectively and subjectively (para.84):

"…Is the conduct complained of behaviour which, objectively, could cause alarm, distress, humiliation or intimidation? If the answer is yes, then a subjective test needs to be applied to whether it had the purpose or effect of causing those sentiments. When looking at purpose you look at what the perpetrator intended.When looking at effect, you look at what the victim felt. Only one ofeither purpose or effect is required to satisfy section 4(1) although of course both will be present in many cases."

… 70. The purpose of the legislation is to provide a remedy for bullying, not for any conduct or action which in fact genuinely causes alarm, distress, humiliation or intimidation. If one ignores the nature and character of the cause of such alarm etc, it fails to give effect to the Act's objective since a person may genuinely be alarmed or distressed (although probably not so readily humiliated or intimidated) by conduct far removed from bullying and possibly even entirely innocent. … A worker may genuinely cause distress to a colleague by talking about death, for example, without appreciating that the colleague in question has recently suffered bereavement …; a worker may be distressed if coffee is accidentally spilt over his or her new clothes, or if the worker is involved in an accidental collision with a colleague. In none of these cases is there an intention to alarm or distress, and the conduct giving rise to the distress is far removed from anything which could remotely be characterised as bullying. In my view it is inconceivable that the Parliament could have intended that the concept of bullying should be drawn in such a wide and arbitrary way, wholly unrelated to any common understanding of that term, and indeed catching wholly innocent conduct.

71. … it would be absurd to adopt a subjective view such that liability could arise by the abnormal response of an over-sensitive employee. The conduct in question must be such that, objectively viewed, it is capable of causing alarm or distress, or feelings of humiliation or intimidation.

72. Moreover, if a purely subjective reaction to the act or conduct in question were sufficient to establish liability, no other question would be material to determining liability. There

would be no need objectively to consider the nature of the conduct in question at all …. The objective element is an important safeguard both to prevent someone unjustifiably being characterised in law as a bully and to ensure that compensation is not paid to someone who ought not to receive it. …

73. In my judgment, Yeats J was clearly right to conclude that if the alleged conduct falls within the scope of section 4(a) or (b), it must be persistent. It simply makes no sense whatsoever for Parliament to have identified in those examples the need for repetitive conduct if single incidents of that nature would suffice. …

74. In my view, therefore, it follows that the relevant incident, being a one-off matter, could not amount to bullying as defined. … It is a serious matter to characterise someone as a bully and should not be lightly done. Many people in the course of their working lives will lose their temper with a colleague, perhaps in a manner wholly out of character. It is of course important that all employees, and those in a managerial or supervisory position in particular, should seek to control their emotions and respond in a measured way to the behaviour of subordinates, even when that behaviour is challenging. But human nature being as it is, this is not always possible particularly where, as arguably was the case here, there was an element of provocation or perhaps perceived insubordination causing the over-strident response. It would be highly undesirable if every over-reaction in the course of daily work relations could be subject to review by the courts under the auspices of the bullying legislation. It would also unfairly characterise as bullies persons who in my view ought not to be so designated.

75. I would add that it does not in my view follow that two incidents necessarily create the requisite persistent behaviour. Whilst it may be possible to describe two incidents as persistent conduct, particularly if they are closely connected in time, that will not always be the case. Persistent is defined as "continuing to do something over a prolonged period. Two incidents years apart, for example, may very well not give the sense of continuity necessary to amount to persistent treatment. It is ultimately a matter of fact and degree for the relevant court to determine whether the relevant persistence is present."

<u>The Equal Opportunities Act 2006</u> (**the EO Act**)

12. Section 12, "Meaning of discrimination on the ground of disability", provides:

"(3) A person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person."

Section 15(6) provides: "An employer is under a duty to make reasonable adjustments as defined in section 29 … in relation to a disabled person who is– … an employee of the employer concerned."

Section 29 includes examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments.

13. Section 13, "Meaning of discrimination by victimisation", provides:

"(1) A person ("A") discriminates against another person ("B"), in any circumstances for the purposes of this Act, if A treats B less favourably than A treats or would treat other persons in the same circumstances, and does so by reason of the fact that, or by reason of A's knowledge or suspicion that, B has– (a) brought or intended to bring, or intends to bring, proceedings under this Act."

14. To establish victimisation, a claimant must therefore show that they have been treated less favourably in some way than the employer has treated a real comparator, or would treat a hypothetical comparator.

15. Not every difference in treatment will necessarily be less favourable. It is not enough for a claimant to say that they see particular treatment as disadvantageous. Whether it is capable of amounting to less favourable treatment is for the Tribunal to decide. However, there is no need for a claimant to show that, objectively speaking, they are less well-off as a result of the employer's action. Their perception must not be disregarded and It is enough that the claimant "*could reasonably say that he would have preferred not to have been treated differentl*y" (*Chief Constable of West Yorkshire Police-v-Khan* [2001] ICR 1065). If, as a matter of fact, the treatment is less favourable, it matters not that the respondent thought they were conferring an advantage, such as removing the complainant from a possible source of danger (Harvey [238.02]. Further, the test should not be too onerous.

16. Trivial differences in treatment may be disregarded (the de minimis principle), but the de minimis principle should be applied with caution.

The facts

17. The Claimant had been diagnosed with colon cancer in 2017. She underwent surgery and then invasive chemotherapy and returned to work in August 2018, but she still has to have check-ups every 3 months and be vigilant about her diet.

18. The Claimant had previously, on 28 August 2020, issued a Claim against the Respondent in the Employment Tribunal (Claim No. 28/2020) for arrears of pay and injury to feelings due to disability discrimination and in connection with the effects of the Covid pandemic from March 2020.

19. In her Witness Statement, the Claimant makes various allegations of negative treatment by Mr Paul Victor, the Respondent's Operations Manager, in 2019 and pre-October 2020, in respect of the Covid lockdown period in particular, but none of these form part of the claims made in her Claim Form in this matter (filed on 15 January 2021) which are based solely on

an occupational health referral and meetings on 15 and 16 October 2020. The Respondent also made submissions regarding the previous period in its Response Form and in evidence. I make no findings in respect of the pre-15 October 2020 allegations, as these do not form part of the Claimant's pleaded case in this Claim (and to the extent they formed part of the dismissed Claim No. 28/2020 should not be re-opened).

20. I would only say that it appeared from the Claimant's descriptions in evidence that after returning to work in 2018 and more so in 2020 after Covid, she felt very hard done by by the Respondent, including, she alleged, attempts to change her shift patterns and working conditions without thinking about her health and dietary needs and requirements. It was also clear that she liked to run any issue past her Union, which handled her Claim No. 28/2020. On the Respondent's part, Mr Victor gave evidence that the Claimant's attitude to him personally, and at work generally and with her colleagues, deteriorated considerably after she returned to work in August 2018. He said that her reactions to workplace incidents were often disproportionate and that she became angry and lost control easily. She often would not speak to Mr Victor and the situation was frequently difficult and awkward.

21. The Respondent's position is that in October 2020, against the background of Claim No. 28/2020 in which the Claimant had raised disability discrimination, an email from Unite the Union dated 6 July 2020 referring to the need to make reasonable adjustments for the Claimant as an employee with disability, the Respondent's belief that the Claimant was suffering from an ankle injury, the fact that on her return to work in May 2020 she had informed the Respondent that she had a health issue related to her thyroid and gallbladder which affected her dietary requirements, as well as the fact that in October 2020 she had failed to pass 2 modules of the Respondent's "Healthy Essentials" test for employees (despite the length of time she had been working in the shop), the Respondent was concerned that the Claimant might again be suffering from a disability and "*considered that it had a duty to investigate whether reasonable adjustments were required to accommodate the Claimant*". (In respect of the "Healthy Essentials" test module failure by the Claimant, the Respondent thought that it was possible that the Claimant's health related issues might have been affecting her concentration since, as per Mr Daswani and Mr Victor, the level of the Claimant's mark was very low, particularly given her length of employment meaning she should have been able to pass quite easily.) In his Witness Statement and oral evidence, Mr Daswani stated that he checked the Staff Handbook and consulted with the Respondent's legal advisers and "*was advised that in these circumstances the Respondent, as a responsible employer, had a duty to refer the Claimant for an occupational health assessment*", paid for by the Respondent. Mr Daswani states that he thought that this was also in the Claimant's best interests.

22. On cross-examination, Mr Daswani confirmed without hesitation more than once that the occupational health referral was a response to the Claimant's Claim No. 28/2020 – because this (and legal advice) is what had alerted them to the statutory duty of employers to make reasonable adjustments for employees with disabilities. Not making reasonable adjustments would expose the Respondent to claims. In respect of the Claimant in particular, he agreed

with the propositions put to him that the Respondent was "*overly sensitive*" because of her first disability claim, saying he did not want to be exposed to another reasonable adjustments claim or a personal injury claim (for example, if the Claimant fell at work). There was no question that the Respondent wanted to protect itself from any future claims for disability discrimination and failures to make reasonable adjustments, particularly as he felt they had already made reasonable adjustments for the Claimant (in respect of her shifts) and Unite the Union had still written calling for adjustments to be made. On legal advice, the Respondent deemed it "*prudent*" to offer the occupational health referral. He said in re-examination that there was of course no intention to punish the Claimant by offering the referral, but rather to make her life better.

23. Mr Daswani unhesitatingly agreed to the submission made by Counsel for the Claimant several times that in offering the occupational health referral to the Claimant, the Respondent was protecting the Respondent's legal position. This was also Mr Victor's position in cross-examination. He agreed that that there was a suspicion that the Claimant could bring another claim against the Respondent, that the Respondent suspected that the Claimant might be suffering from more medical issues, the Respondent wanted to ensure it was protected against such claims and to be able to demonstrate that it had done all it reasonably could by making the occupational health referral. This was the recommended procedure in such cases. He said that the Respondent also had a duty of care to the Claimant.

24. Mr Victor confirmed this position in cross-examination. He also said that he understood that if an employee did not want to attend an offered occupational health referral, this was the employee's right, and agreed that if the employee later brought a claim then the employer's defence could be that it had made the offer. He said that the goal was to obtain the Claimant's acknowledgement that the offer had been made.

25. Mr Daswani drafted the letter to the Claimant entitled "*Re: Medical Appointments*" dated 14 October 2020, offering an occupational health referral so that the Respondent could consider whether any reasonable adjustments should be made for the Claimant. In the letter, the Respondent referred to a suspected ankle injury suffered by the Claimant, the fact that she had been offered a foldable chair to take rests, the fact that she had asked to attend a medical appointment for thyroid related issues, and that the Respondent had changed around shifts to accommodate this. The letter goes on:

"*We would appreciate it if you could please let us know if you are encountering additional personal health issues and if this would impact your ability to work, and if there are any reasonable adjustments you would like the Company to meet for this.*
Our concern is the overall ability needed when working at our locations. Recently we are not entirely sure if any of your health related issues are causing you to have any issues in concentration especially that we are advising customer for health related products, and in particular last week we were surprised that you were not able to pass one of the first modules of the Healthy Essentials qualification despite working for us many years.

With this end, we would like to offer you an independent health assessment … to identify if the Company can accommodate reasonable adjustments. In the past, whilst you have continued to say you are feeling fine, we as a Company remain concerned and we would like to know if there is anything we can reasonably do to make your environment and surroundings better."

26. In her Details of Claim, the Claimant avers that before Claim No. 28/2020 had settled, on 15 October 2020, Mr Victor came into the shop whilst she was at work, gave her a letter in English and asked her to sign it. This letter from Mr Daswani, headed "*Re: Medical Appointments*", dated 14 October 2020, is exhibited to the Claimant's Witness Statement. At the end of the letter, there is a manuscript statement: "*I have read and has [stet] been explained, in English & Spanish, all the above and understood*", but the spaces for signature and date are blank. There was some debate during the Hearing as to the import of this wording. Mr Daswani's stated position was that this statement, however clumsily put, was only ever intended to be an acknowledgement of receipt and that the recipient had understood the contents of the letter (in either Spanish or English), whereas Counsel for the Claimant submitted that it was an attempt to obtain evidence of the Claimant's agreement that she understood and agreed the contents of the letter. I do not think that this was borne out by either Mr Daswani's or the Claimant's evidence. In cross-examination, the Claimant agreed that it was the Respondent's practice always to ask for a signed confirmation of receipt of a company letter and that this was not the first time she had been asked. In cross-examination, Mr Daswani "*absolutely*" agreed that if the Respondent wanted an employee to attend an occupational health appointment, the Respondent would send them a letter, asking the employee to sign for receipt and that they understood it.

27. In her Details of Claim, the Claimant states that her first language is not English and on 15 October 2020 she refused to sign the receipt confirmation at the end of the letter, asking that the letter be translated first. In her oral evidence, she instead said that Mr Victor read her the letter in English and Spanish and that she refused to sign because she did not agree with some of its contents, including that the Respondent had provided her with a foldable chair allow her to sit down, and that the Respondent had re-arranged the work rota to allow her to attend a thyroid medical appointment (the Claimant said that she had arranged this with her colleagues). The Claimant alleges that Mr Victor was "*insistent*" that the Claimant sign for receipt and offered to explain the contents of the letter, but the Claimant insisted on being allowed to take the letter to her Union and then she left.

28. The Respondent alleges that when Mr Victor gave the letter entitled "*Re: Medical Appointments*" dated 14 October 2020 to the Claimant on 15 October 2020, he first read it to her in English, and the Claimant interrupted after Mr Victor had read the title of the letter and asked whether she was being offered medical retirement. In his Witness Statement, Mr Victor states that the Claimant listened carefully and maintained eye contact throughout without displaying any emotions. The Claimant did not ask for a translation in writing, nor request Union representation, but instead refused to sign the confirmation and stated that she needed to read it fully and confer with her representative. In cross-examination, Counsel for

the Claimant put it to Mr Victor that he had not wanted to engage with or have any discussions about the contents of the letter. Mr Victor agreed and said that his purpose was to give the Claimant the letter, read it to her (in both languages) and obtain her acknowledgement that this had happened.

29. When asked in cross-examination whether she felt intimidated or threatened at the meeting with Mr Victor on 15 October 2020, the Claimant said "*Yes*" without elaborating. However, there is no mention in her Witness Statement or the Details of Claim, or in any of the Claimant's disclosed subsequent correspondence with the Respondent, that she experienced any negative sentiments at that meeting and later in her cross-examination, she stated that the alleged bullying in fact occurred the next day.

30. On balance, I find that the Claimant did not experience any adverse reaction to the meeting on 15 October 2020. The evidence establishes that these kinds of meetings were fairly commonplace for the Respondent's employees and the Claimant offered no evidence showing that she felt this 5-minute meeting was out of the ordinary or that she reacted to it other than normally.

31. The Respondent alleges that Mr Daswani and Mr Victor became concerned after this meeting that the Claimant had refused to sign the letter as an acknowledgement that it had been given to her - because they considered that the occupational health referral to be paid for by the Respondent was in her best interests and also their legal duty, and they wanted the fact of the offer being made evidenced, and because she had already made her Claim No. 28/2020. They agreed that in the circumstances, they would need an independent witness that the Claimant had been given the letter. They did not want to be faced with a situation in the future where the Claimant alleged she had not been given the letter and the referral offered. Mr Daswani adds in his Witness Statement that they were also aware of their duties as employer as set out in their Staff Handbook and were mindful of the representations previously made on behalf of the Claimant by Unite the Union and that this is why he wanted to ensure that the Respondent had evidence that the Claimant had received the letter and also understood that the Respondent was offering to pay for an occupational health assessment. Mr Victor said the Respondent had never previously considered it needed independent evidence that an employee letter was handed over. But in this case the Respondent knew that it had a duty to make the offer of the occupational health referral and felt that it needed a record that this offer had been made, particularly given the Claimant's refusal to sign the acknowledgement of receipt.

32. Mr Daswani and Mr Victor therefore decided to request Mr Chichon, a local Commissioner for Oaths, to attend as an independent witness to delivery of the letter and Mr Victor went back to the shop on 16 October 2020 with Mr Chichon as an independent observer to record the delivery and reading of the letter to the Claimant. In his oral evidence, Mr Chichon confirmed that Mr Victor had requested him to be an independent observer to the handing over of a letter and also said that this was not a task he had been requested to do before. He was not initially told that the Claimant had refused to sign for receipt the previous day and

was not told why. Pursuant to his instructions, he certified that Mr Victor had read the letter to the Claimant and handed it to her.

33. The Respondent alleges that Mr Victor (in Spanish) immediately introduced Mr Chichon to the Claimant and explained that he was a notary who would witness the letter being handed to the Claimant. The Claimant alleges that Mr Victor returned to the shop on 16 October 2020 with another man whom Mr Victor introduced only as a "notario". None of the parties were entirely clear on the difference between a Commissioner for Oaths (which Mr Chichon is) and a notary (which is not). Since Commissioners for Oaths do not exist in the Spanish legal system, it seems that Mr Chichon was therefore introduced to the Claimant as a notary. Mr Chichon was also quite adamant in his oral evidence that it was explained to the Claimant that Mr Chicon was present as a witness, not as a notary.

34. The Respondent alleges that the Claimant stated that it was not necessary for Mr Victor to re-read the letter, but Mr Chichon said that he would not confirm this unless it was done. Mr Victor re-read the letter in English and, at Mr Chichon's request, in Spanish. Mr Chichon said in his evidence that he did not know whether Mr Victor would have translated the letter had Mr Chichon not requested this, but that he felt it did need to be translated. He also agreed in cross-examination that it "*would have been safer*" to ask the Claimant if she understood the letter after it had been read to her in Spanish, which was not done.

35. The Claimant alleges that she requested Union representation which Mr Victor refused. The Respondent denies that the Claimant at any time requested Union representation or anyone else to be present at the meeting, but rather that when Mr Victor asked the Claimant to sign for receipt of the letter, she said that had given the letter to the Union and had been told by her Union representative not to sign anything. Mr Chichon said in oral evidence that the Claimant did not say that she wanted Union representation at the meeting. I find the recollections of Mr Victor and Mr Chichon more convincing on this issue, principally because it would not make sense for the Claimant to say at both the 15 and 16 October 2020 meetings that she wished to take the letter to her Union for advice whilst also asking for their representation at the meeting.

36. The Claimant states that she again refused to sign the letter, this time because she disagreed with its contents as other staff members had also failed to pass modules of the "Healthy Essentials" test (a matter which Mr Chichon and Mr Victor refused to discuss as being confidential to other employees), she did not need the occupational health referral as she was happy with her own doctors, and because she had not received any occupational health appointment, which Mr Victor disputed. In addition, she said she had not used the chair provided by the Respondent to assist with her injured ankle.

37. Mr Chichon endorsed the letter:

"*I certify that this letter has been read in my presence to the said employee, who has understood the contents in English and Spanish, but refused to sign delivery of letter*".

Mr Chichon said in cross-examination that with hindsight it was not safe to state that the Claimant had understood the contents of the letter.

38. In the Details of Claim, the Claimant alleges that Mr Victor had closed and locked the front door of the shop during the 16 October 2020 meeting. In her Witness Statement, she says that he closed, not locked, the door, and that she "*felt extremely upset, shocked, threatened by both of their presence, and because the doors had been closed on [her], cornered.*" The Respondent denies that Mr Victor locked the door, but closed it to prevent customers interrupting them whilst the letter was read to the Claimant. This was confirmed by Mr Chichon in his Witness Statement and oral evidence. He said that Mr Victor had told him this expressly. Mr Victor said that he had not closed the door the previous day because he did not think that that meeting would require much time or privacy. It was only when the Claimant said that she would not sign the letter that he and Mr Daswani agreed on the more formal meeting with Mr Chichon, which was for them "*a first*".

39. In his Witness Statement, Mr Victor explains that locking the door is quite a laborious job, involving a bar lock and keys, and was only done at the end of the day. In cross-examination, it was put to the Claimant that she was well aware of this, with the insinuation that she was trying to make the meeting seem more intimidating. There was perhaps a translation disconnect, but the Claimant did not adequately respond to the simple question of whether the door was locked or closed and simply repeated several times that "*for [her], the door was closed*", but instead queried why the meeting could not have been held in the office (and refused to accept that this would have meant leaving the shop unstaffed). I did not believe that she was unaware that the shop door was not locked.

40. The Claimant also said that she felt threatened by Mr Victor's demeanour because he had come back to give her the letter again even though she had said the day before she would not sign it and she did not agree with its contents, Mr Victor was very "*serious*" and said he would send the letter to the Union, and that she felt very alone and wanted support.

41. The Claimant alleges that she did not know what to do in light of the fact that she was on her own with Mr Victor and Mr Chichon in a locked shop. The Claimant alleges that she felt "*intimidated and bullied by the whole incident*" and that she had an anxiety attack and could not breathe. "*The Claimant was contemplating calling the police.*" In cross-examination, she confirmed that in the course of the meeting, Mr Victor was not shouting, he did not get close to the Claimant, he did not swear and he was not abusive; and that all that happened was that Mr Victor came to the shop, introduced Mr Chichon, read the letter in English and Spanish, and asked her to confirm receipt. She also confirmed that after Mr Victor and Mr Chichon had left, she carried on working for several minutes, serving customers (and this was

also evidenced by the time cards and till receipts in evidence). The Claimant said that she was in delayed reaction shock and that it was only after she left that she broke down (after taking the bus to the frontier).

42. As described above, the Respondent denies that Mr Victor locked the door (as confirmed by both Mr Victor and Mr Chichon), but closed it to prevent customers interrupting them whilst the letter was read to the Claimant. The Respondent alleges that at no point did the Claimant state that she felt uncomfortable or intimidated, or show any signs of distress, breathing difficulties or feeling intimidated or anxious. Instead, "*she spent most of the time staring at the door with little interest and no eye contact*". In his Witness Statement, Mr Victor states: "*In my view the encounter was perfectly normal, cordial and without incident.*" In cross-examination, an entry in Mr Victor's day book in respect of the 16 October 2020 meeting was put to him, "*She started to get emotional*" (this entry followed an entry recording the discussion about the Healthy Essentials test), and that the Claimant thereby did exhibit signs of anxiety. Mr Victor denied this and this line of questioning was not pursued. In re-examination, Mr Victor said that the emotions the Claimant displayed were frustration and anger.

43. Mr Chichon states in his Witness Statement that the Claimant challenged the statement in the letter regarding her failure of modules of the "Healthy Essentials" test and directed questions at him several times, but Mr Victor reminded her that Mr Chicon was there only as an independent observer. Mr Chichon states:

"*15. During the course of Mr Victor reading the letter to the Claimant, she seemed uninterested and turned towards the window of the premises to avoid any form of communication. At no point did the Claimant raise any issue about feeling uncomfortable or intimidated, If that had been the case, then I would have stopped the meeting.*

16. At no point did the Claimant appear to feel intimidated nor bullied by the events that took place as she interacted well during the course of the entire meeting. At no point … did the Claimant show any signs of an anxiety attack nor lack of breath as she appeared to maintain a good composure at all times "

44. In his oral evidence, Mr Chicon confirmed that the Claimant spent much of the meeting looking out of the window, apparently trying to avoid any discussion. He said unhesitatingly that the meeting with the Claimant was not intimidating in his view and did not feel that way to him. The Claimant looked "*normal*", as did Mr Victor. There was "*nothing intimidating or loud*", nothing to cause concern and a perfectly normal conversation took place.

45. In cross-examination, Mr Daswani was asked whether he thought that 2 men standing in front of a woman reading her a letter is confrontational or intimidatory and Mr Daswani replied that this was not intended. It was put to him that the reason for not simply posting or emailing the letter to the Claimant and instead going to the shop with Mr Chichon was to "*cover their backs*" with which Mr Daswani partially agreed, saying that the Respondent had never had

this kind of situation before and that it wanted to make sure it had independent evidence of the letter being given to the Claimant, even though she would not sign for receipt. This is why he had instructed Mr Victor to return to the shop with Mr Chichon. He agreed in cross-examination that this was the first time the Respondent had requested the attendance of an independent witness (and Mr Victor stated in his oral evidence that this was an "*abnormal*" step), but this was not because of the Claimant's first disability claim. It was because she had refused to sign for receipt of the letter and the Respondent was concerned that it had evidence that it had given it to her, or at least tried to, so it could protect itself against any future allegations in relation to the duty to make reasonable adjustments.

46. Mr Daswani clearly stated several times that it was the Respondent's standard, and in Mr Daswani's stated view perfectly reasonable, practice to give these kinds of communications to employees personally, explain the contents in English or Spanish and to ask for them to be signed for; and Mr Victor reiterated this and said that employees are being asked by signing a receipt endorsement to confirm that they had understood the contents of a given letter in English or Spanish.

47. Mr Daswani said that with hindsight things might have been done differently, but consistently denied that there had been any oppressive, threatening or unreasonable behaviour by the Respondent. There was no bullying, simply the handing over of a letter and then reading out of its contents, which was standard practice. When Mr Victor was asked whether he thought that the meeting was intimidating for the Claimant, he emphatically and convincingly denied this and said that there were no signs that the Claimant felt intimidated. Rather, she seemed defiant and spent most of the time looking out of the window.

48. Later in Mr Victor's cross-examination, when he was asked whether, looking back now, he would have dealt differently with the meeting, he said he would not have done as the meeting was purely for the handing over of the letter. He said that he had not considered that the meeting on 16 October 2020 might have intimidated the Claimant and when asked whether he would have allowed the Claimant to have a witness with her, Mr Victor replied that he would have done, but the Claimant did not request this. Like Mr Daswani, he agreed that with hindsight everyone might do things differently, but did not agree that there had been unreasonable or oppressive behaviour on his part and said that there were no visible signs at the time that the Claimant had felt intimidated by the "*unusual attempts to acquire the Claimant's signature*", as described by Counsel for the Claimant, to the letter, and he did not know if she had been.

49. After Mr Victor and Mr Chichon had left, the Claimant says that she saw one of her friends (Mr Alan Linares) waiting outside the shop for her because he had been passing and noticed through the door the Claimant standing at the counter talking to two men. Mr Linares helped to calm her down because she was still very agitated as she could see Mr Victor and Mr Chichon talking close by. Mr Linares' versions of events in his Witness Statement and oral evidence were a little different. He stated that he had passed by the shop and noticed that the door was shut, which was unusual, and when he passed by again shortly afterwards he

noticed 2 men walking away along Main Street and saw the Claimant standing in the doorway "*looking very distressed*". He told her that he would meet her to discuss the problem as her shift was finishing. T

50. he Respondent denies that the Claimant was standing at the counter during the meeting with Mr Victor and Mr Chichon, but rather that they were. The Respondent also denies that after the meeting Mr Victor and Mr Chichon were talking close to the shop, but rather that they walked away from the shop together and that they then parted ways. When they left the shop they did not see anyone waiting (which accords with Mr Linares' statement). Mr Victor stood against a disused door about 30 metres from the shop, he says to check that the change of shift went normally, and saw the Claimant leaving the shop on her own. In his Witness Statement, Mr Victor adds that the shop's electronic records show that the Claimant served 4 customers in the 10 minutes after he and Mr Chichon left the shop and the Claimant's handover employee arrived, to whom the Claimant chatted "*calmly*".

51. When the Claimant came to meet Mr Linares, he states that she was however "*crying and appeared extremely distressed. She explained that her manager and another man came into the shop and had closed the door with her inside and had told her to sign something, and that she had refused. … I told her that she should report the incident.*" The Claimant states that she then telephoned her husband who took her to the doctors and she was prescribed with anxiety medication. A sick note dated 16 October 2020 was put into evidence referring to workplace harassment.

52. The Claimant alleges: "*the whole incident had caused [her] considerable anxiety which has led to further medical treatment.*" In her Witness Statement, she alleges that she "*was thereafter unable to attend work due to the way [she] was made to feel due to the behaviour of [her] employer".* She states she was signed off sick until December 2020. Mr Daswani confirms that the Claimant submitted a number of sick notes with the reason for absence given as "*Anxiety related to harassment at work*".

53. Unite the Union wrote to the Respondent on 20 October 2020 asking for clarification of why the occupational health referral had been "*deemed necessary*", especially considering the mediation process the parties were then engaged in, and what action was considered going forwards. The Respondent replied by email dated 3 November 2020 that the referral was unrelated to the mediation and was in line with the Staff Handbook. "*…given that the claim submitted before … is that the company failed in its duty to make reasonable adjustments due to her alleged disability, which is denied, the company is now … on notice that there may be underlying health conditions that may be affecting her ability to perform her employment duties.*
With this in mind, we are now under a duty to investigate and explore whether reasonable adjustments are required … and if so, how we can best do this, to protect her wellbeing as well as comply with our employment duties. … we are prepared to pay for her to see an independent occupational health adviser who can assist us with this."

54. In December 2020, the Claimant's Claim No. 28/2020 for arrears of pay and disability discrimination settled by mediation and was withdrawn with the proceedings being dismissed by judgment dated 10 December 2020.

55. On 14 December 2020, Mr Daswani emailed the Claimant to offer again an occupational health appointment, given the Respondent's "*duty to investigate and explore whether any reasonable adjustments to your role are required for your wellbeing*".

56. On 15 December 2020, the Claimant emailed Mr Daswani complaining of distress when she had gone past the shop, and some time was spent during the Hearing considering these allegations, including some CCTV footage put into evidence by the Respondent. Given that the Claimant makes no claims against the Respondent arising from this incident, I make no findings. (I think that the allegations may have been intended to support the Claimant's evidence of the negative feelings she experienced at and following the 16 October 2020 meeting.)

Findings

Victimisation

1. All employers are under an express statutory duty to make reasonable adjustments for disabled employees (Section 15(6) of the EO Act) that might help them to do their job or avoid workplace disadvantages. The collection of medical information through medical examinations is a standard and logical course of action for employers to help determine whether and what reasonable adjustments should be made. Not making a referral and so not making any recommended adjustments would put employers at risk of a claim for breach of the duty.

2. The Claimant claims that the Respondent's request that she attend an occupational health appointment and the meetings of 15 and 16 October 2020 for the Claimant to sign an acknowledgement of this request would not have happened if the Claimant had not issued her Tribunal Claim No. 28/2020 and that this constituted less favourable treatment and as a result victimisation under Section 13 of the EO Act.

3. The Respondent admits that, as a result of the Claimant's Claim No. 28/2020 in conjunction with the Respondent being on notice of the Claimant's recent ankle injury, thyroid and gallbladder illnesses, dietary issues and also her failing modules of the "Healthy Essentials" test, as well as Unite the Union's letter dated 6 July 2020 expressing concern that "*reasonable adjustments were not being made for [the Claimant] in light of her condition*", the Respondent was concerned that the Claimant might have been suffering from a new or re-emerging disability. Based on the experience and knowledge it had acquired from the Claimant's Claim No. 28/2020, it knew that it had a duty to investigate and assess whether EO Act reasonable adjustments were required.

Mr Daswani states in his Witness Statement: "*As a result of this, we were being advised that we were under a legal duty to offer the Claimant a local and occupational health assessment as set out in our Staff Handbook*" and this was also offered "*out of genuine concern for the Claimant to ensure that her duties were not too physically onerous for her.*"

4. It was also freely admitted by Mr Victor and Mr Daswani that the occupational health referral was a protective step aimed at reducing the likelihood of further claims by the Claimant for breach of the duty to make reasonable adjustments, taken with the knowledge that they had acquired as a result of the Claimant's Claim No. 28/2020 of the nature of the duty, and against the background of the ongoing Union involvement and the new health issues she appeared to be suffering. The objective of the meeting on 16 October 2020 with Mr Chichon was to ensure that the Respondent could prove if necessary that it had done everything reasonably expected to ensure that it had complied with the duty i.e. making the offer to the Claimant of the occupational health appointment.

5. The Claimant's Claim No. 28/2020 was therefore a significant influence on the decision-making process of Mr Victor and Mr Daswani and was one of the principal reasons (if not the decisive reason) why they decided to make the occupational health referral and to ensure that the offer was evidenced. However, following the reasoning of Lord Nicholls in the *Khan* case, I also find that the reason why the Respondent acted in the way that it did was the existence of Claim No. 28/2020, and the knowledge of the obligations under the EO Act which it had acquired from it, as distinct from the Claimant's conduct in bringing the proceedings:-

   "31. *… Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation. This accords with the spirit and purpose of the Act. Moreover, the statute accommodates this approach without any straining of language. An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings.*"

6. I find that the same principle applies in this case by analogy. As Lord Scott opined at the end of the *Khan* judgment: *"… the success of a … victimisation claim … is justified [if] the employer's reason for singling out the complainant for less favourable treatment is that the complainant has brought the proceedings*." But justice would not be done by a finding of victimisation in the case of an employer "*who, as in the present case, would otherwise be placed by the pendency of the proceedings in an unacceptable Morton's fork, forced to choose between conduct which risked a [victimisation] complaint and conduct which risked*" a further claim.

7. Further, I find that the occupational health referral offer and the meetings on 15 and 16 October 2020 did not constitute less favourable treatment of the Claimant by the Respondent vis-à-vis the way in which the Respondent treats or would treat other persons in the same circumstances, for the following reasons.

8. Although it is the case that less favourable treatment does not have to be prejudicial or harmful in some way, such as a rejected job application, a failure to promote or a pay cut, I must also consider whether any treatment was less favourable objectively by reference to how a comparator in the same circumstances as the Claimant would have been treated. A comparison is required. Was or would someone (with no material differences between them and the Claimant) who began to display potential disability indicators be treated by the Respondent the same or differently?

9. I believe on her evidence that the Claimant felt that the occupational health referral and the way the second meeting on 16 October 2020 with Mr Victor and Mr Chichon was run was not favourable to her. She did not like the situation, she did not want to attend a company doctor, regardless of the fact that the Respondent was paying for it, and she did not like how she felt at the second meeting, in particular because of the attendance of Mr Chichon and the fact that the shop door was closed or locked during the meeting.

10. But no evidence was presented that the Claimant felt, and I do not find, that she was being treated less favourably than the Respondent would treat any other employee who the Respondent considered might require disability reasonable adjustments. In other words, if any other employee had displayed similar potential signs of a disability, then there was no reason to believe that the Respondent would not have made them an occupational health referral, as Mr Victor and Mr Daswani were by then very conscious of their EO Act duty to make reasonable adjustments. Given the sensitivity of the issue, there is also no reason to think that they would not have approached such an employee in exactly the same way as they did the Claimant, including engaging an independent witness to the delivery of the occupational health referral offer letter.

11. The evidence was that all employees were regularly asked to sign for receipt of communications by the Respondent; this was the Respondent's standard practice, and indeed the Claimant had in the past herself signed for receipt of such communications. The second meeting, on 16 October 2020, aimed at obtaining this receipt acknowledgement involving an independent witness, Mr Chichon, was, as admitted by the Respondent unprecedented, but I find that, if any other employee had refused to sign such an acknowledgement of receipt in such sensitive circumstances, then the same or a similar course of action might well have been followed by the Respondent.

12. No evidence in this regard was produced by the Claimant and this was not put expressly to any of the Respondent's witnesses.

13. I have also been unable to identify anything from the evidence that would seem otherwise to constitute *un*favourable treatment generally of the Claimant, other than her own objection to the process being followed by the Respondent. She was not being threatened with demotion, dismissal, a withdrawal of duties or a loss of seniority, nor was there any question

of a financial disadvantage. She was not being deprived of a choice or excluded from an opportunity. Nor was there any evidence of the Respondent trying to demean the Claimant, or of her feeling this. Both meetings were run in a courteous, professional manner. The Claimant stated in evidence only that she was upset after the 16 October 2020 meeting but was only able to justify this by saying that she did not agree with all of the contents of the letter entitled "*Re: Medical Appointments*" dated 14 October 2020 and did not think that Mr Victor should have asked her for a second time to sign it, after her refusal the previous day.

14. Counsel for the Claimant submitted in his Closing that other employees would not have been deprived of the opportunity of time to seek advice before signing the acknowledgment or of the opportunity to have a witness present at the meeting(s), but there was no evidence that either of these things happened. The Claimant never signed the acknowledgment and said that she needed to take it the Union for advice. As I have found above, I do not believe that the Claimant requested a witness to be present at either meeting.

15. Looked at another way, the Claimant was being offered a private doctor's appointment, at the Respondent's expense, with the objective of assessing how her working conditions could be improved and minimise disadvantages if her health requirements called for this. From this perspective, the Claimant was arguably being treated more favourably than any of her colleagues might be in similar circumstances.

16. I also find that it is irrelevant whether the referral was put to the Claimant as an offer or a requirement, since the Claimant's position in her evidence and her Claim Form was that she objected to the referral per se and to the way in which it was presented to her. She makes no mention of whether she felt the referral was refusable or not.

17. Although I accept that the test for less favourable treatment should not be too onerous and all that is required is that the Claimant "*could reasonably say that [s]he would have preferred not to have been treated differently*" (<u>*Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065</u>), the opening of the paragraph of the judgment in which that sentence appears must also be borne in mind: "*76. It cannot, in my opinion, be enough … simply to show that the complainant has been treated differently. There must also be a quality in the treatment that enables the complainant reasonab*ly *to complain about it.*" I find that the Claimant has not succeeded in establishing that her objection to the occupational health referral offer and the way the process was managed by the Respondent was either a reasonable response to the Respondent's treatment or that anything in the way the process was managed gave the Claimant reasonable cause for complaint.

18. I find that the Claimant has not established that the occupational health referral itself or the 2 meetings in which the Respondent requested the Claimant to acknowledge receipt of the letter entitled "*Re: Medical Appointments*" dated 14 October 2020 advising of the same amounts to less favourable treatment by the Respondent vis-a-vis the Claimant as opposed to any other of the Respondent's employees at that time who showed potential signs of

suffering from a disability. The Respondent was (is) under a statutory duty to make reasonable adjustments for all employees who may have a disability. It was well on notice of this as a result of the Claimant's Claim No. 28/2020 and the ongoing correspondence from Unite the Union. I find that it would therefore have made the occupational health referral for any employee displaying potential signs of disability. This was not treatment which would only have applied in the Claimant's case, although it would be understandable if the Respondent were particularly scrupulous with the Claimant, since it was her Claim No. 28/2020 which had first educated it to the law in this regard.

19. For the reasons set out above, I therefore find that the essential element of Section 13 of the EO Act - "Meaning of discrimination by victimisation" - that the Respondent treated the Claimant less favourably than it treats or would treat other persons in the same circumstances, is missing, and on that basis the Claimant's claim of discrimination by victimisation under Section 13 of the EO Act fails.

<u>Bullying</u>

1. For completeness, in his Skeleton Argument, Counsel for the Respondent raised the Section 6(5) Bullying at Work Policy defence. However, this had not previously been referred to by the Respondent, either in its Response Form or its witness evidence, and no evidence was presented to support the submission that the Respondent followed its Staff Handbook Bullying at Work Policy in its dealings with the Claimant.

2. For a finding of bullying to be made under Section 4(2)(a) of the Act there must be conduct sufficiently serious to be capable of being characterised as bullying in its own right, and that conduct must be persistent.

3. The evidence given by both the Respondent and the Claimant was that during both the 15 and 16 October 2020 meetings Mr Victor was nothing other than professional and measured, his only objective being to ensure that the Claimant acknowledged receipt of the letter entitled "*Re: Medical Appointments*" dated 14 October 2020. Further, the evidence of Mr Victor and Mr Chichon, which was not disputed, was that the Claimant showed no signs of distress or any other worrying sentiment. The Claimant confirmed that at the meeting, Mr Victor was not shouting, he did not get close to her, he did not swear and he was not abusive; all that happened was that Mr Victor came to the shop, closed or locked the shop door, introduced Mr Chichon, read the letter in English and Spanish, and asked her to sign the endorsement to the letter.

4. I find that, despite the wording of the endorsement on the letter written by Mr Chichon referring to the Claimant's understanding of the contents of the letter, and the fact that the Claimant did not agree with all of its contents, and indeed said so, the Claimant did not feel that she was being intimidated or threatened, or under any pressure at all, to sign the endorsement. There was no evidence to support this contention, or to support the contention that the Claimant was experiencing any kind of adverse sentiment at the 16

October 2020 meeting save for the one reference in Mr Victor's daybook that she began to be emotional, but all of the other evidence gives a picture of the Claimant being quite the opposite.

5. I find that it is more likely than not Mr Victor did not lock the shop door (which would have been quite a laborious job), as the Claimant alleges in the Details of Claim (but not her Witness Statement); in her oral evidence the Claimant did not respond clearly on this issue. I believe Mr Victor's more credible evidence that he rather closed the door to prevent customers interrupting them whilst the letter was read to the Claimant.

6. The Claimant's evidence that the incident was so serious that it resulted in her having a panic attack was not in my view credible on the evidence. She carried on working for about 10 minutes, serving customers and then took the bus to the frontier and there is no evidence to support this allegation other than the Claimant's own and Mr Linares' evidence that she was "*very distressed*".

7. I find based on the Claimant's evidence that the Claimant did not like the situation (of being given another formal company letter), she did not think that all of the details in the letter were true, she did not want to attend the company doctor, and she did not like the way in which the second meeting was run, in particular the attendance of Mr Chichon and the fact that the shop door was closed or locked during the meeting.

8. However, even putting the Claimant's case at its highest, that the shop door was locked, that Mr Victor was very "*serious*", that Mr Victor said he would send the letter to the Union, and that the Claimant was requested again to sign the endorsement to the letter despite having said the day before that she needed to take it to the Union, none of these circumstances, whether taken alone or together, in my finding, objectively come anywhere near being seriously prejudicial or hostile enough to be characterised as bullying under the Act, and do not, objectively viewed, constitute offensive, intimidating, abusive, malicious or insulting behaviour (under Section 4.2(a) of the Act).

9. I accept that at the 16 October 2020 meeting the Claimant felt alone and wanted support, and also that she felt upset and emotional during and as a result of the meeting, possibly even sufficiently gravely to be characterised as alarm, distress or intimidation under Section 4(2) of the Act. This notwithstanding that I do not find that she showed any of these sentiments at the meeting itself, more resentment and hostility. However, I find that she has not proven that, objectively considered, the Respondent's conduct was capable of causing such sentiments, nor in my judgment did the Respondent's behaviour seek to do so, which in any event is not claimed. On the evidence of both parties, what occurred on 16 October 2020 was the handing over of an employer's letter to an employee offering an occupational health referral appointment, with an independent witness present, in entirely non-confrontational and unemotive circumstances, albeit that the employee objected to being given an employer letter. The Claimant's allegations that she felt intimidated and bullied, that she had an anxiety attack as a result and could not breathe, and was contemplating calling the police in my view

fall squarely within Sir Patrick Eilas' description in the ***Stagnetto*** case of "*the abnormal response of an over-sensitive employee*".

10. In any event, the 2 meetings on 15 and 16 October 2020 also fall within the Section 4(3) exception to the Act: reasonable action taken by an employer relating to the management and direction of the employee or the employee's employment.

11. Further, despite the attempts by Counsel for the Claimant now to connect the 15 October 2020 meeting with the meeting of 16 October 2020, balancing up the evidence, on the one hand the Claimant's statement in cross-examination that at the 15 October 2020 meeting between her and Mr Victor she felt threatened and intimidated by Mr Victor asking her to sign for receipt of the letter entitled "*Re: Medical Appointments*" dated 14 October 2020 (although she had signed such acknowledgements before and it was standard practice) and because she did not agree with its contents, and on the other hand that that there is no mention in the Claimant's Witness Statement or the Details of Claim, or in any of the Claimant's exhibited correspondence with the Respondent, that she experienced any negative sentiments at the 15 October 2020 meeting, as well as her subsequent evidence in cross-examination that the alleged bullying actually occurred the next day, I therefore find that there was no bullying conduct at the first meeting. The two meetings together cannot therefore constitute "persistent" bullying behaviour under Section 4(2)(a) of the Act. It was neither repetitive nor the Respondent continuing to do something over a prolonged period. The 16 October 2020 meeting, if this were to constitute an incident which included bullying, which I have in any event found it did not, was a "*a one-off matter, [and] could not amount to bullying as defined*" (Stagnetto).

12. I therefore find that the Claimant's claim of bullying under Section 6 of the Employment (Bullying at Work) Act 2014 fails.

Gabrielle O'Hagan

____

Gabrielle O'Hagan, Chairperson

27 October 2022