EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000061/2023

Held in Glasgow on 21, 23, 25 and 28 August 2023 & 15 September 2023 (Members' Meeting).

Employment Judge: M Kearns
Members: Ms P McColl
Mr J Gallacher

Ms C McMahon	**Claimant** **In Person**
Unite the Union	**Respondent** **Represented by:** **Mr G Bathgate - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal was to dismiss the claim.

REASONS

1. The claimant - who is aged 60 years - is a member of the respondent union. On 15 February 2023, having complied with the early conciliation requirements, she presented an application to the Employment Tribunal in which she claimed disability discrimination by breach of a duty to make reasonable adjustments. The claimant is a disabled person as defined in section 6 Equality Act 2010 ("EqA"). The respondent is an independent trade union of which the claimant is a member. In her ET1 the claimant states that in 2013 when she presented two Employment Tribunal claims (4103661/2013 and 4103662/2013), she could not cope mentally and emotionally with the required practices of the respondent under its legal advice and assistance scheme ("the Scheme") for members to contact the union prior to commencing proceedings and to use a panel firm. The claimant represented herself in

Employment Tribunal proceedings until 2021, when she engaged McGrade & Co, solicitors to help her. She states that she was able to cope with their help because of their office arrangements. On 17 November 2022, the claimant emailed the respondent to request that the respondent make a reasonable adjustment to their normal Scheme requirements to contact them prior to proceedings and to use a panel firm. The respondent declined. The claimant claims that the respondent discriminated against her in terms of section 57(2)(a) EqA in the way that it afforded her access to its [legal advice and assistance] Scheme. She argues that the respondent failed in a duty to make reasonable adjustments in respect of disabled members under section 57(6) EqA. She states that the respondent ought to have made the adjustment of allowing her access to the Scheme in 2022 and funding her to instruct a non-panel firm of solicitors.

2. The respondent resists the claim. It argues that no such duty to make reasonable adjustments was engaged. Its case is that the PCP of contacting the union prior to commencing proceedings and using a panel firm did not put the claimant at a substantial disadvantage in comparison with persons not having her disability; and that, in the event that the Tribunal is against it on that point and finds that the duty was engaged, the proposed adjustment was not reasonable.

Preliminary matters

3. At the outset of the hearing, the Employment Judge advised the parties that the Tribunal Member, Mr John Gallacher wished to disclose that he had been an ordinary member of the respondent for approximately 32 years from 1989 until his retirement in April 2022. He had never used their services. The claimant was offered an adjournment to consider whether she wished to make any objection to Mr Gallacher being a member of the Tribunal hearing the case. However, she declined the adjournment and stated that she had no objection. Mr Bathgate also raised no objection.

4. The claimant advised the Tribunal that she had not received her copy of the hearing bundle of documents from the respondent. Mr Bathgate said that these had been sent by courier and that he would check what had happened. (It later transpired that the courier had made several attempts to deliver the bundle but there had been no response at the door on these occasions.) The Employment

Judge asked the claimant whether she would like an adjournment to familiarise herself with the bundle prior to beginning her evidence. However, she declined and indicated that she would prefer to proceed directly.

Reasonable adjustments to proceedings

5. The following adjustments were made to the proceedings by the Tribunal at the request of the claimant:

(i) Correspondence from the Tribunal and the respondent to the claimant was sent by post.

(ii) If the Tribunal and the respondent communicated with each other by email, a hard copy of the email/attachment was then sent to the claimant by post.

(iii) The Tribunal copied to the respondent by email any correspondence from the claimant. Rule 92 of the ET Rules of Procedure was not applied to the claimant.

(iv) In addition, this final hearing in person was arranged on alternate days and each alternate hearing day was scheduled to commence at 2pm.

(v) The claimant was provided access to an adjoining private room should she wish a break.

(vi) The claimant was offered additional adjournments at various points in the proceedings.

(vii) At the end of the evidence, the respondent's solicitor made his submissions first, as an adjustment requested by the claimant. When he had finished, the claimant indicated that she did not feel able to make her own submissions and asked to send them to the Tribunal in writing. This was permitted, on the proviso that Mr Bathgate and the Tribunal were to receive them within the next seven days and that the claimant would copy them directly to Mr Bathgate within that time frame. This was necessary to enable Mr Bathgate a right of reply in the four days before his departure on holiday on 8 September 2023.

Issues

6. The issues for determination at the full hearing were discussed and agreed by the parties at a Preliminary Hearing in person before EJ MacLean on 3 May 2023 and amended by slight modifications at the outset of this hearing. They are:

a. Did the claimant have a disability as defined in section 6 of the EqA at the time of the events the claim is about? Unless there is a concession or further clarification by the respondent, the Tribunal will decide:

i. Did she have a mental impairment: the claimant says that the impairment has three aspects: depression, anxiety and PTSD.

ii. If so, did the impairment have a substantial adverse effect on her ability to carry out day-to-day activities? The claimant says that it takes longer (if at all) to carry out day to day activities. She cannot commit to timescales and has difficulty communicating with people and using the telephone.

iii. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment? The claimant is prescribed medication.

iv. Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

v. Were the effects of the impairment long-term? The Tribunal will decide: did they last at least 12 months, or were they likely to last at least 12 months? If not, were they likely to recur?

b. Did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date? The claimant asserts that the respondent knew from 17 November 2022.

c. Did the respondent have the following PCP:

i. To access the respondent's legal advice and assistance scheme ("the Scheme"), the procedure was that the member required to first approach the full-time officer of the union at their branch [in 2013]; and to use a panel firm.

d. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant says that she could not mentally cope with contacting the respondent and using a panel firm in 2013. When she was able to approach the respondent in [2022], she was declined access to the Scheme.

e. Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage? The claimant asserts that she told the respondent of the disadvantage at which she was placed in email correspondence.

f. What steps could have been taken to avoid the disadvantage? The claimant suggests:

   i. Allowing her to access the scheme in [2022] and permitting her to instruct a non-panel firm of solicitors.

g. Was it reasonable for the respondent to have to take those steps and when?

h. Did the respondent fail to take those steps?

i. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

j. What level of compensation is appropriate?

7. Following provision by the claimant to the respondent of a medical report, the respondent confirmed that her disability status at 17 November 2022 was accepted. The respondent confirmed at the outset of the hearing that their knowledge of disability as at 17 November 2022 was not in dispute. It was also accepted by the respondent that it had applied the PCP that to access the Scheme, a union member had to approach the union before commencing proceedings/ instructing solicitors and to use a panel firm.

Applicable law

8. Section 57 EqA provides so far as relevant as follows:

"(2) A trade organisation (A) must not discriminate against a member (B)-

(a) In the way it affords B access, or by not affording B access, to opportunities for receiving a benefit, facility or service.

……

(6) A duty to make reasonable adjustments applies to a trade organisation."

9. Regarding the duty to make reasonable adjustments, section 20 Equality Act 2010 provides so far as relevant:

"(2) the duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4)……"

10. In her written submissions, the claimant states that she also relies on the third requirement:

"(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

11. Section 21 Equality Act 2010 provides:

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

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

Evidence

12. The parties agreed a joint bundle of documents and referred to them by page number ("J"). The claimant gave evidence on her own behalf. The respondent called Hugh Mark Lyon, its Legal Officer for Scotland.

Findings in fact

13. The following material facts were admitted or found to be proved:

14. The claimant is a member of the respondent union and has been a member since approximately 2007.

The respondent's legal advice and assistance Scheme

15. The respondent is a well-known trade union. It has a Legal Officer for Scotland, Hugh Mark Lyon. Mr Lyon's role includes ensuring the legal requirements for industrial action are met and interfacing with members and the respondent's panel solicitors. The respondent offers a legal advice and assistance scheme ("the Scheme") to its members. Advice, assistance and – where appropriate – representation are provided to the respondent's members by a panel of three firms of solicitors: Dallas McMillan, Thompsons, and Allan McDougall. Work is divided among those firms according to the member's branch. The claimant's branch is serviced by Allan McDougall. The Scheme offers assistance to members and their families in respect of personal injury and medical negligence claims. Employment advice and representation may also be available. Finally, members may be able to get initial advice (but not representation) for non-employment cases (for example neighbour disputes). The Scheme offers free wills and discounted powers of attorney.

16. A case may be brought to the respondent in different ways. A member may approach their branch officer in a number of different ways to request assistance. The officer may look at the case and make an initial assessment about whether it has legal merit, and if so, pass it on. Alternatively, the member may be put in touch with the respondent's panel solicitors, who undertake to call the member back within 24 hours. If the solicitors think a claim may have reasonable prospects of success, the branch officer will make enquiries of the member, ask for the documents and may set up a face to face meeting at which a full merits assessment takes place and the solicitor gives an opinion on prospects. If the prospects are favourable, the member may receive

representation and become the solicitor's client. The respondent will monitor the case and receive a report on its success or otherwise.

17. A member can contact the respondent to access the Scheme using the following media: by telephoning the respondent's helpline; by attending one of the respondent's regional offices in Glasgow, Edinburgh, Dundee, Aberdeen or Ayr and speaking to an officer face to face; by contacting their local branch office; by contacting Mr Lyon's office via a 'one click option' on the respondent's website, where members can enter their phone number, email address or both and add text; by Zoom or Teams (not available in 2013); or by posting a letter. Less commonly, the respondent's officers can also visit people in their own homes if they are gravely ill or incapacitated. Family members can make the initial contact on the member's behalf. The claimant could have met the Scheme requirements by contacting the respondent and being referred to and corresponding with their panel solicitors in a number of different ways including by email or letter.

18. Once the matter has been passed to the respondent's panel solicitor, the member can choose how the communication takes place. Some members communicate by letter or email. The panel firm for the claimant's branch, Allan McDougall has an office in Edinburgh but also consults in private rooms at the respondent's office in Glasgow and will make adjustments for members with disabilities. The member receives representation from the panel firm provided the firm assesses the case as having reasonable prospects of success. That assessment may change during the course of a case. The respondent's Scheme only rarely offers support with bringing appeals to the EAT. The test for supporting the bringing of an appeal is more stringent than 'reasonable prospects' and advice would likely be sought from counsel.

19. The respondent does not pay its panel firms for doing employment work on its behalf. The panel firms provide their services free of charge to the respondent for employment work. The respondent does not fund non-panel solicitors to conduct work on its behalf.

The claimant's claims

20. The claimant was employed by AXA ICAS Ltd and its predecessors from 24 January 2000 until 12 September 2013, when her employment terminated by reason of long term sickness absence.

21. The claimant has presented a number of applications to the Employment Tribunal in which she initially represented herself. In 2010 she presented case number 111650/2010. This was a claim of discrimination on grounds of protected belief and victimisation. In 2012 the claimant complained about EJ Gall in relation to case 111650/2010. Her complaint was referred to the President of the Employment Tribunals (Scotland), EJ Simon who dismissed it.

22. In or about 2013, the claimant lost an attempt to interdict her employer from terminating her employment in the Sheriff Court and raised an unfair dismissal claim. The latter was struck out for non-attendance at a case management Preliminary Hearing, a decision subsequently unsuccessfully appealed by the claimant to the EAT.

23. In 2013 the claimant presented case number 4104661/2013 and case number 4104662/2013 to the Employment Tribunal. Case number 4104661/2013 is a claim of unauthorised deductions from wages, which was presented to the Employment Tribunal on 23 June 2013. Case number 4104662/2013 is a claim of discrimination on alternative grounds of protected belief and disability.

24. During the period from approximately 2015 to date, the claimant also submitted an appeal in respect of the strike out in 2015 of claim 111650/2010. The appeal was rejected by the EAT under the Rule 3(7) sift as disclosing no reasonable grounds for bringing an appeal. The claimant's attention was drawn to rule 3(10) of the EAT rules, a copy of which was enclosed (J57). The claimant did not apply for a rule 3(10) hearing. She believed she was entitled to request leave to appeal to the Court of Session directly. There followed correspondence and a further procedure with the EAT. Thereafter, the claimant corresponded with the Court of Session, the Supreme Court and the European Court of Human Rights (J54 – 60) about whether she had a legal right to appeal to the Court of Session notwithstanding having failed to request a rule 3(10) hearing from the EAT.

25. By a Judgment dated 27 February 2022 (J52), case number 4104662/2013 was struck out by EJ S Walker in its entirety on the ground that it was no longer possible to have a fair hearing. In the same Judgment, Case number 4104661/2013 was struck out against the first and second respondents (AXA PPP Health Care and AXA UK plc) on the ground that it was no longer possible

to have a fair hearing against those respondents. However, case 4104661/2013 was not struck out against the third respondent, AXA ICAS Ltd (the claimant's former employer). That case continued against the third respondent and was ultimately successful by Judgment of EJ Hoey dated 28 July 2022. Put shortly, that Judgment held that the claimant was entitled to a sum of money from her former employers in respect of the period beginning 26 weeks after the date of commencement of her sickness absence in 2011 until the date her claim was submitted in June 2013.

26. The claimant appealed to the Employment Appeal Tribunal ("EAT") against the strike out Judgment dated 27 February 2022. Her appeal was initially rejected by the EAT under Rule 3(7) as disclosing no reasonable grounds for bringing the appeal. However, a successful application was made by the claimant under Rule 3(10) that further action should be taken on her notice of appeal and the appeal was allowed to proceed.

27. Notwithstanding that the claimant succeeded with her action against the third respondent in case number 4104661/2013, she appealed against certain aspects of the Judgment dated 28 July 2022 by Notice of Appeal dated 8 September 2022. She made an application in the Employment Tribunal for expenses, which was refused by EJ Hoey in a Judgment dated 11 November 2022 (J88). She also made an application for reconsideration which was considered by EJ Hoey in Chambers and refused by Judgment dated 23 December 2022 (J108). A full two-day hearing of the appeals in both 4104661/2013 and 4104662/2013 has been fixed by the EAT, beginning on 5 December 2023.

28. The claimant represented herself in relation to both the cases referred to above until 8 October 2021 when she engaged Mr Woolfson, solicitor of McGrade & Co to act on her behalf.

29. The reason why the claimant did not contact the respondent before presenting her claims in 2013 was that the respondent was not in her mind at that time. She was not conscious of her union membership or the possibility of seeking support. It was only in 2022, after Mr Woolfson had been representing the claimant for about a year and she had been discussing with him how to fund her claims going forward that the claimant realised that she had been paying

union membership fees through a bank account set up in 2007. It only occurred to her at that point to ask the union for support.

30. After making some enquiries with Thompsons, solicitors about whom to contact at the respondent, Mr Woolfson emailed the respondent's Lynn Maley on the claimant's behalf on or about 16 November 2022. Ms Maley replied by email the same day (J33). In the email she stated: "*I acknowledge receipt of your e-mail below and write to confirm that Unite would not be in a position to fund this case. // We have an approved panel of Solicitors and all work for Unite members is conducted by these firms. If Ms McMahon wished to make use of Unite Legal Services she would have been required to contact Unite at the outset of her case I'm afraid and one of our panel firms would have been instructed at that time…"* The approach to the respondent only concerned case number 4104661/2013, the wages claim.

31. On 17 November 2022, the claimant emailed Ms Maley herself (J37). In the email, the claimant informed Ms Maley: "*I am emailing you because my mental health disability makes it difficult for me to speak by phone. // Because of my particular disability I could not cope with contacting Unite Legal Services in 2013, as per your normally required procedures. // I have been able to deal with Mr Woolfson because I had prior contact with him and because he made reasonable adjustments that I need in his services to me. // Since 2011, and continuously since then, I am diagnosed with mental health impairments that bring me under the protection of the Equality Act 2010. // Earlier this year with Mr Woolfson's help and support for my disability I successfully argued in tribunal that I am entitled to 2 years of wages from my ex-employer under their PHI Scheme (from my claim raised in 2013). // …… I understand from your email that in normal circumstances you would have required me as a member of Unite, within normal procedures, to contact the union for assistance in 2013, and in normal circumstances I would have done so, but my mental health disability meant I could not do that at that time. // As my circumstances are very different than normal, due to my disability, I would ask that you agree to adjust the services you would otherwise provide to me so that I can pursue my PHI claim that has recently passed the EAT sifting procedure. // I hope in the light of the above and by appreciating my disability difficulties you can accept Mr Woolfson with whom I have been able to build trust and is also a specialist employment lawyer, as appropriate to continue to assist me with union*

membership funding. My understanding is that he is suitably indemnity insured. In this way I will not suffer the potential significant disadvantage I otherwise will do. // Medical evidence of my long term disability including during the period when I would otherwise have contacted the union, is available, please let me know what information you require to verify...."

32. Ms Maley responded to the claimant shortly thereafter (J36) in the following terms: "*Hi Carol // I acknowledge receipt of your e-mail below and write to confirm that Unite would not be in a position to provide funding to allow your claim to continue to be supported by McGrade & Co Solicitors. Here in Unite Scotland we have an approved panel of Solicitors and all work for Unite members is conducted by the Solicitor firm assigned to the member's branch. // We have a process in place to support our members experiencing employment related issues and any support/ assistance you required would have been provided to you if you had made contact with us at the outset and allowed us that opportunity. I appreciate your circumstances at the time did not allow for this but your case is well in progress now, therefore this is not something we can pick up/ support at this very late stage. I am sorry to advise that on this occasion we are unable to assist you."*

33. The claimant responded by email to say: "*I don't think it is an answer to say that despite my inability because of my mental health disability I should have contacted you anyway. // I do not believe that I should suffer substantial disadvantage because of my disability but substantial disadvantage is what I will suffer without the reasonable adjustment requested."* She requested details of a more senior person with whom she could take the matter forward. Ms Maley replied (J35) to say that she had already discussed the claimant's request with the respondent's Regional Legal Officer before responding to the claimant's request. She stated: "*Unite Legal Services can't fund a case which is being run by a non-panel Solicitor. The Unite Legal Scheme does not allow for this."* She provided the claimant with the contact details for the Regional Secretary for Scotland, Pat Rafferty.

34. The claimant emailed Pat Rafferty on 21 November 2022 (J38). In the email she referred to her "*wages claim raised 2013*" which had only recently been heard. She gave some information about the tribunal's judgment. She explained that she was disabled as a result of a long-term mental health impairment and stated: "*I was unable at the outset of my claim, due to my*

disability, to ask the union for help as per normal union procedure….If my mental health had not been so badly adversely affected at the time I would have been in contact but it was and I could not. I could not follow the procedures because of my disability." The claimant stated that the cost of the work for the successful ET Judgment had already been covered and she was not asking the respondent to fund her retrospectively. Rather, she was asking for support moving forward to complete her wages claim. She stated: "*The specific support I need is to assist me to obtain a further judgment on wages due for a later period incapacity to work."* She stated that this later period had already been assessed as having prospects of success.

35. Mr Rafferty responded to the claimant by email dated 23 November 2022 (J40). He confirmed that the claimant's request was not something the respondent would be prepared to grant. The claimant then contacted Stephen Pinder, Acting Legal Director (J41). Mr Pinder requested the claimant to provide the ET1 in relation to the current (wages) claim, the Tribunal's "Order", Notice of Appeal to the EAT and EAT sift decision.

36. By email dated 1 December 2022 (J44), Mr Pinder stated: "…*you state that the PCP engaged by the union is to require members to contact the union at the start of a legal process to receive legal support. I have known of several cases when this requirement has been varied by the union, although I accept that it is an expectation for most cases. Although I accept that you are suffering from a mental illness and have been for some time, I am not sure why you were unable to engage with the union at the start of the process, but you were well enough to engage with non-panel solicitors and to instruct them to act on your behalf. We are though dealing with a request to vary our standard procedure nearly 10 years after the event, and for the reasons set out below, I do not believe that this would be a viable procedure."* Mr Pinder explained to the claimant in the email that he did not accept that the PCPs operated by the respondent disadvantaged the claimant as a disabled person. He further explained that the respondent did not pay its panel firms for employment work. The panel firms ran personal injury claims for the respondent and provided their services free of charge to the respondent for employment work. He stated that the claimant's request for adjustments was not accepted as being reasonable.

37. Upon receipt of Mr Pinder's email, the claimant inquired whether her request could be considered by the respondent's Executive Council. By email dated 12 December 2022, the claimant was sent an email from Matt Smith, Head of Member Relations (J51) stating that the respondent's Executive Council Chair had now considered and reviewed the matter and that the outcome received from Mr Pinder was indeed correct.

38. The adjustment the claimant seeks in respect of using a non-panel firm of solicitors would involve a cost to the respondent of several thousand pounds which would not be incurred if they used their panel solicitors.

39. The claimant presented an ET1 to the Employment Tribunal on 15 February 2023 (J1). In the ET1 at un-numbered paragraph after 4. on (J7), the claimant stated: "*The claimant could not cope mentally and emotionally with following the required practices of the respondent involving contacting the respondent and being referred to their solicitors at the outset of her employment tribunal claims in 2013, to receive the support she otherwise would have through them.*"

40. The Note of the case management Preliminary Hearing before EJ MacLean on 22 May 2023 reiterates this at paragraph 5 on page 3 (J24) and it is further set out in issue d.

Discussion and decision

41. In Environment Agency v Rowan [2008] IRLR 20 the EAT gave general guidance on the approach Tribunals should adopt in reasonable adjustment claims. The EAT held that "*An employment tribunal considering a claim that an employer has discriminated against an employee .... by failing to comply with the ... duty must identify:*

    (a) the provision, criterion or practice applied by or on behalf of an employer, or;

    (b) the physical feature of premises occupied by the employer;

    (c) the identity of non-disabled comparators (where appropriate); and

    (d) the nature and extent of the substantial disadvantage suffered by the claimant.

They observed that "*An employment tribunal cannot properly make findings of a failure to make reasonable adjustments under ss.3A(2) and 4A(1) without going through that process. Unless the employment tribunal has identified the four matters at (a)–(d) it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.*"

42. With regard to issues a. to c. from the list of issues above, the respondent concedes that the claimant was disabled as defined in the EqA as at 17 November 2022 when she emailed them for the first time requesting access to their [legal advice and assistance] Scheme. The respondent accepts that it had knowledge of her disability as at that date, based on the content of the email exchange with her. The respondent also accepts that it applied to the claimant the PCP that to access the Scheme, the claimant was required to first approach the full-time officer of the union at her branch [in 2013] (i.e. prior to commencing the proceedings for which she was requesting their support) and to use a panel firm [of solicitors]. However, the respondent disputes that the PCP put the claimant at a substantial disadvantage in comparison to non-disabled members.

d. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant says that she could not mentally cope with contacting the respondent and using a panel firm in 2013. When she was able to approach the respondent in [2022], she was declined access to the Scheme.

43. Section 20(3) EqA states that: *"The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."* In this case, the question for us, having accepted that there was a PCP applied to the claimant requiring her to approach the respondent prior to commencing proceedings [in 2013] and to use a panel firm, was whether that requirement placed her at a substantial disadvantage in comparison with non-disabled people. This is a question of fact assessed objectively and measured by comparison with what the position would be for non-disabled people.

The claimant's comparator

44. As Mr Bathgate submitted, the claimant conceded in cross examination that had the same PCP been applied to a non-disabled union member, the same disadvantage (refusal of funding) would have arisen. Thus, his first argument is that the claimant cannot succeed in the comparative exercise required by the Equality Act 2010.

45. The Tribunal considered this submission. However, as the claimant submits, there is no requirement that the comparator's circumstances be the same as those of the disabled claimant in a reasonable adjustments case. Its only purpose is to establish whether the claimant is substantially disadvantaged because of the disability. In Sheikholslami v University of Edinburgh [2018] IRLR 1090, at paragraph 52 Simler LJ said this regarding the issue of comparators in reasonable adjustment claims: *"It was not necessary for the claimant to satisfy the tribunal that someone who did not have a disability but whose circumstances were otherwise the same as hers would have been treated differently since a like-for-like comparison is not required in a reasonable adjustments claim. Even in a case where disabled and nondisabled employees are treated in the same way and are both subject to the same sanction when absent from work, that does not eliminate the discrimination: if the PCP bites more harshly on the disabled employee, putting that employee at a substantial disadvantage compared to the non-disabled, that is sufficient (see Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, [2016] IRLR 216 (Court of Appeal))."*

46. The claimant submitted that the correct comparator in this case was a member of the respondent who was not suffering from depression, anxiety and PTSD. We accept that submission.

Date of application of the test

47. The claimant submits that the comparison with persons who are not disabled should be carried out as at 2013. The claimant did not cite any authority for applying the test in the manner she suggested. Mr Bathgate submits that this is misplaced and that the comparative exercise requires to be carried out at the point at which the PCP was applied in November or December 2022. The Tribunal are of the view that the comparison test which measures the impact of the PCP ought to be considered at the date the PCP is applied. (The

alternative of moving the relevant date for application of the whole test back to 2013 would raise issues of limitation and especially knowledge (both of disability and disadvantage)). However, in this case, the test has to be applied in relation to something the claimant failed to do in 2013. Rather than become bogged down in complex questions of limitation and knowledge, we have simply asked ourselves whether the requirement to contact the respondent prior to commencing proceedings [in 2013] (and use a panel firm) put the claimant at a substantial disadvantage in comparison with non-disabled persons.

Substantial disadvantage

48. It is necessary to identify the substantial disadvantage in fact relied upon by the claimant. (Substantial means more than minor or trivial.) In her submissions, the claimant states that she was "*substantially disadvantaged by the loss of support for her tribunal claims*" or "*not having the union's support for my wages and disability discrimination claims with my employer"*. By 'support', the claimant accepted that she meant funding. In her submissions she also mentioned representation. Thus, the disadvantage asserted by the claimant was that funding and/or representation would not be provided by the respondent's Scheme to support her tribunal claims going forward. Her case was that as a disabled person with depression, anxiety and PTSD, she was unable to follow the procedure in the respondent's Scheme by first approaching the full-time officer of the union [in 2013]; and she was unable to use a panel firm. Whereas, she submitted, a non-disabled member could comply [in 2013]; and use a panel firm. This is a question of fact to be assessed objectively.

49. On balance, the Tribunal did not conclude from the evidence it accepted that the PCP - in fact - put the claimant at the substantial disadvantage relied upon by her in comparison with non-disabled people for the following reasons: (1) The claimant's evidence on the matter was inconsistent; (2) On the unchallenged evidence of Mr Lyon, the requirements of the Scheme were, in fact, much less onerous than the claimant's case assumed; and (3) the other activities the claimant accepted carrying out from 2010 to 2021 were much more onerous and taxing than the requirements of the Scheme. (4) We address the issue of the panel solicitors below.

(1) *The claimant's evidence was inconsistent* - In her ET1 (the un-numbered paragraph after 4. on (J7)) and at the Preliminary Hearing (see PH Note paragraph 5 (J24) and issue d.), the claimant's case was that she was unable to approach the respondent before commencing proceedings in 2013 because she could not cope mentally and emotionally with following their required practices, involving contacting them and being referred to their solicitors. In her evidence in chief, the claimant stated that the respondent's PCP put her at a substantial disadvantage in comparison with persons not suffering from her disability because they would be able to go along to the respondent at the outset of their case, explain their situation, answer legal questions and discuss the legal points but the claimant could not do these things because of her mental health. She said she would not have been able to hold a conversation with someone or explain herself at the level of detail required and they would not be able to get the information needed. She said that she could not do what the Scheme requirement asked her to do because her mental health impairment made it too difficult to go through processes such as going to the respondent's solicitors. She said she could not do that with anyone in 2013. On balance, we did not accept her evidence on this point because it was inconsistent with a second case which she went on to also advance in her evidence that actually, she had not approached the respondent in 2013 because (put shortly) she had not remembered that she had the membership.

Having made the first case described above in some detail, the claimant then explained (still in her evidence in chief) that her approach to the respondent in 2022 had come about because she had spent a lot of her money and was discussing with Mr Woolfson how to fund the case going forward. She said that it was at that point (around November 2022) that she realized that she had been paying union dues to the respondent automatically through a bank account she had set up in 2007 and that she should ask the union for support. She later said that when she got to 2021, she was not making a choice between Mr Woolfson and the respondent. She said that she was not consciously aware of her [union] membership at that time. She was not making any connection between her payments and legal services. Under cross examination by Mr Bathgate, the following exchange took place: Mr Bathgate asked the

claimant: "*You wrote six times in corresponding with the Employment Appeal Tribunal. Why could you not drop the respondent a letter to say 'I'm about to start employment tribunal proceedings?"* The claimant replied: "*You have to appreciate Unite wasn't in my mind at that time. I was not conscious of it. Only after I had had Mr Woolfson represent me for about a year I realised I had this membership I hadn't used but at the point when I was doing this it was not something I was thinking about."* Mr Bathgate asked: "*So your not contacting Unite was not due to your disability, it was because you didn't know you had membership and weren't aware of it?"* The claimant replied: "*I think you need to appreciate my health at that time and I was not thinking very clearly or straight and that was a matter of my mental health - concentration focus, memory, with the particular impairments that I have. I wasn't able to think of the things that in normal circumstances I would have thought of and I realised my health was such that I wasn't thinking of those things."* In re-examination, the claimant reiterated that the reason she did not approach the respondent in 2013 was because her memory, concentration and focus were adversely affected by her disability and that it was her disability that caused her not to remember that she was a member of the respondent and had access to their Scheme. She stated that if it had not been for her disability, she would have remembered. The Tribunal felt that this evidence was different from and inconsistent with the position in her pleadings and early evidence in chief that she had not followed the respondent's required practices involving contacting the respondent and being referred to their solicitors at the outset of her claims in 2013 because she could not cope mentally and emotionally with them. It seemed to us that these two passages of the claimant's evidence were in conflict because not following the Scheme rules because one cannot mentally cope with them at a particular time implies that one is conscious of them; whereas not following them because one is unaware one has membership of the union is unconscious and the two are mutually exclusive.

(2) The second reason why we did not accept the claimant's evidence on substantial disadvantage was that the unchallenged evidence of Mr Lyon (which the Tribunal accepted) was that the claimant could have met the Scheme requirements by contacting the respondent and being referred

to and corresponding with their panel solicitors in a number of different ways including by email or letter, which, on the evidence, the claimant was able to do in 2013 and from 2013 going forward.

(3) Furthermore, under cross examination by Mr Bathgate, the claimant accepted that she had presented a number of Employment Tribunal and other applications/correspondences in all of which she had, until 2021 represented herself. In particular, she accepted: (i) that in 2010 she presented case number 111650/2010, a claim of discrimination on grounds of protected belief. (ii) that in 2012 she submitted a letter of complaint to the Employment Tribunal about EJ Gall. (iii) that in or about 2013, she lost an attempt to interdict her employer from terminating her employment in the Sheriff Court. (iv) that in or around the same year (2013), she presented an unfair dismissal claim (J66 - paragraph 74) and (unsuccessfully) appealed a strike out decision in that case to the EAT. (v) that in 2013, she presented case number 4104661/2013 and case number 4104662/2013 to the Employment Tribunal. In all these matters, the claimant accepted that she had represented herself. The claimant also accepted that for several weeks at some point in the period between 2013 and 2021, she had engaged in detailed argument with the Employment Appeal Tribunal, the Court of Session, the Supreme Court and the European Court of Human Rights over whether she had a right to appeal to the Court of Session. All these things involved a level of written and sometimes oral communication far greater than a letter or email to the respondent or their solicitors about access to the Scheme.

(4) With regard to the issue of panel solicitors, the claimant explained that when she had engaged Mr Woolfson in 2021, he was empathetic and sensitive to her problems. She found it difficult to communicate by telephone and he did not require that. He was able to communicate with her face to face and by email. She said she had made an arrangement whereby Mr Woolfson would email her in the evening because she was able to cope later in the day. She could speak with him direct and not go through secretaries. She could meet with him in the afternoon and not the morning. She said that all these things were adjustments Mr Woolfson had made so that she could make use of legal services. Mr Lyon testified (and the Tribunal accepted) that it would have been possible for the

claimant to make contact with the respondent and their solicitors remotely and that this could have been done by correspondence only. It was put to the claimant in cross examination that all the adjustments made by Mr Woolfson could also have been made by Mr Bathgate. He regularly travels through to Glasgow and consults in the respondent's office etc. She said she had no idea about that. Again, the Tribunal concluded that the claimant's case rested on erroneous assumptions about the respondent's Scheme requirements and panel firm. The claimant also submitted that Mr Woolfson's services amounted to an auxiliary aid for the purposes of the third requirement (section 20(5)) and that the absence of this auxiliary aid had put her at a substantial disadvantage in comparison with persons who are not disabled. This was not part of the claim the claimant had made to the Employment Tribunal, nor was it among the issues for determination. For completeness, had it been an issue, we would have rejected it for the reasons set out in this paragraph.

50. The claimant in this case relies on her disability of depression, anxiety and PTSD. The claimant's submission was that her disability made her unable to comply with the Scheme rules in 2013. She submitted that her disability had adverse effects on her memory, concentration and sleeping. She stated: "*Being unable to comply in 2013 because of her impairment and its adverse effects (her disability) puts the claimant at a substantial disadvantage compared to the non-disabled member who has no such impairment or adverse effects and who could therefore comply. // The claimant loses her entitlement to the Scheme, whereas the non-disabled person retains entitlement and all the Scheme benefits…*"

51. On balance, standing all the above points, the Tribunal did not find the claimant's testimony that the PCP put her at the disadvantage she asserted (whether in 2013, in November 2022, or at any point in between) to be credible. The claimant accepted that she had been able to write letters, initiate and take part in court and tribunal proceedings, including at least one appeal and the Tribunal concluded that this evidence was inconsistent with her testimony that she would have been unable to contact the respondent in 2013 by at least one of the available methods such as email or letter. There was no cogent evidence that the reason the claimant had not remembered about her union membership earlier was related to her disability. The claimant did not even make this point

until Mr Bathgate put it to her in cross examination that on her evidence, she had not approached the respondent because she did not know she had the membership and not because of her disability.

52. It follows that the duty to make reasonable adjustments was not engaged in this case. The Tribunal concludes that no such duty arose. It therefore follows that the case is dismissed.

53. Even if we had found the duty engaged, we would not have concluded that the adjustment(s) sought by the claimant were reasonable. The duty, once triggered, is *"to take such steps as it is reasonable to have to take to avoid the disadvantage."* The Tribunal must look at whether the adjustment proposed by the claimant is itself reasonable. The sorts of factors which a Tribunal might consider in making that assessment are listed in paragraph 6.28 of the EHRC Code of Practice on Employment (2011):

- Whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work]; and
- the type and size of the employer.

54. In the claimant's written submissions – (un-lettered paragraph after (m)), the adjustments sought are: *"To relax the rule on being required to approach the union in 2013 and relax the closely connected rule of using panel solicitors."* By the time she approached the respondent in 2022, approximately nine years had elapsed since the inception of her claims, during which the claimant's discrimination claim had been struck out and the strike out was under appeal to the EAT. A final hearing had already taken place in her wages claim, and that too was under appeal to the EAT. Aside from the Scheme rules to which the claimant is seeking an adjustment, the Scheme also requires an assessment that the claims have reasonable prospects of success. Furthermore, the Scheme rarely supports appeals, and then only in limited

circumstances. Even if we had found the duty engaged, we would not have held that the adjustment was likely to have been practicable or effective in preventing any disadvantage, since the claimant did not produce evidence that she would have met the other requirements of the Scheme in relation to prospects. Although the claimant stated that both her appeals had been assessed by counsel as having reasonable prospects of success, no supporting evidence was produced and one of the appeals had initially been rejected by the EAT under rule 3(7). The respondent also does not pay its panel solicitors for employment work. Thus, the adjustment sought by the claimant would impose on the respondent a significant cost that it would not incur under the Scheme. Whilst that is not a determining or even an important factor, it does not assist the claimant.

Employment Judge: **M Kearns**
Date of Judgment: **28 September 2023**
Entered in register: **28 September 2023**
and copied to parties.

I confirm that this is the Tribunal's Judgment in the case of Ms C McMahon v Unite the Union 8000061/2023 and that I have signed the Judgment by electronic signature. M Kearns