EMPLOYMENT TRIBUNALS

Claimant: Miss C Liney

Respondent: 1. Department for Work and Pensions
2. Philip Royle

HELD AT: Manchester **ON:** 6 - 9 March 2017

BEFORE: Employment Judge Slater
Miss L Atkinson
Mrs C A Titherington

REPRESENTATION:

Claimant: In person
Respondents: Ms C Knowles, Counsel

JUDGMENT

1. The Tribunal does not have jurisdiction to deal with the following complaints which were presented out of time.

1.1. The complaint of direct disability discrimination in relation to the allegation that, in March 2015, Catherine Walsh told the claimant that she could not have the Business Support role because due to equality it would have to be offered to everyone.

1.2. The complaint of failure to make reasonable adjustments.

1.3. The complaint of victimisation in relation to Mr Royle's email of 5th August 2015.

2. The other complaints of direct disability discrimination, harassment and victimisation are not well founded.

3. The Remedy Hearing provisionally listed for 24th May 2017 is cancelled.

REASONS

Claims and Issues

1. The claimant claimed direct disability discrimination, failure to make reasonable adjustments, victimisation and harassment related to disability.

2. The respondent conceded that the claimant was disabled by reason of depression in the period 13th March 2015.

3. The claimant was not represented at this hearing, but she had had some assistance from solicitors.

4. The claimant set out the matters about which she wished to complain in a Scott Schedule. Many of these were matters not raised in the claim form. At a Preliminary Hearing conducted by Employment Judge Ryan on 12th September 2016, some amendments were allowed but many were not. The only complaints set out in the Scott Schedule which were to be determined by the Tribunal were those set out in the agreed list of issues below.

5. The claimant's solicitors had written to the Tribunal and the respondent on 5th March 2017, setting out the provisions, criteria and practices (PCPs) said to be applicable in the case. The first PCP was described as follows: "a requirement that the claimant take incoming telephone calls. This PCP applied up to 17 June 2015 after which the claimant no longer took the calls." The respondent had no objection to this PCP. The second PCP was identified as "a requirement that the claimant attend work." The claimant's solicitors wrote: "Her case is that special leave was a reasonable adjustment in the circumstances of her request. She was not sick but wanted to avoid becoming sick as a stressful situation at work could have triggered her underlying disability of depression and anxiety." The respondents objected to the second PCP on the grounds that no such complaint of failure to make reasonable adjustments was included in the list of complaints to be determined by the Tribunal, although there was a complaint of direct discrimination in relation to the refusal of special leave.

6. The claimant made an application to include a complaint of failure to make reasonable adjustments in relation to the matters set out at point 35 of the Scott Schedule. This application was refused for the following reasons which we gave orally. Whilst the respondent had come prepared to deal with the special leave matter as a complaint of direct discrimination, addressing this in the context of failure to make reasonable adjustments claim would require a different approach and other witness evidence. Whilst we appreciated the difficulty for unrepresented claimants in trying to understand the different categories of disability discrimination and in correctly categorising their complaints, the claimant had had the benefit of legal assistance since after the second Preliminary Hearing; no further application to amend the claim was made until the final hearing and there had been no suggestion of such a reasonable adjustments complaint until the claimant's solicitors' email of 5th March 2017. In the circumstances, we considered the interests of justice lay against allowing the amendment at such a late stage.

7. The agreed list of issues to be considered by the Tribunal was as follows.

Direct Discrimination (Scott Schedule items 23 and 35) Section 13 Equality Act 2010

(1) Did the respondent treat the claimant as alleged:

(a) In March 2015 did Catherine Walsh tell the claimant that she could not have the Business Support role because due to equality it would have to be offered to everyone?

(b) In January 2016 did Keith Bembridge refuse special leave with pay?

(2) Did the respondent treat the claimant less favourably than it treated or would have treated someone without her disability whose relevant circumstances were not materially differently?

(3) If so did the respondent treat the claimant less favourably in this way because of disability?

(4) Insofar as the allegation concerning Catherine Walsh is concerned, was this part of an act of discrimination that continued up to 21st December 2015? If not, is it just and equitable to disapply the primary limitation period?

Failure to make reasonable adjustments (Scott Schedule Item 23) – Sections 20 - 21 Equality Act 2010

(1) Did the respondent apply a provision, criterion or practice (PCP) which was a requirement that the claimant take incoming telephone calls, this PCP applying up to 17th June 2015 after which the claimant no longer took the calls?

(2) Did that PCP place the claimant at a substantial disadvantage in comparison to someone without her disability?

(3) If so, did the respondent know that it placed the claimant at that substantial disadvantage?

(8) Did the respondent take such steps as were reasonable to avoid that disadvantage (the claimant contends that she should have been given the Business Support role)?

(9) Was this part of an act of discrimination that continued up to 21st December 2015? If not, is it just and equitable to extend time?

The respondent conceded that the claimant was disabled by reason of depression in the period 13th March 2015 to 26th January 2016 and that it knew that the claimant was disabled by reason of that condition.

Harassment (Scott Schedule Item 34) - Section 26 Equality Act 2010

(1) Did Mr Royle conduct himself as alleged by the claimant in the meeting on 21st December 2015?

(2) If so, was that conduct unwanted?

(3) Did it have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

(4) If not, did it have that effect, taking into account the claimant's perception in the other circumstances of the case and was it is reasonable for it to have had that effect?

(5) Was the unwanted conduct related to disability?

Victimisation (Scott Schedule Items 32 and 34) - Section 27 Equality Act 2010

(1) Did the claimant do a protected act (the claimant relies on her grievance dated 27th July 2015)?

(2) Did the respondents subject the claimant to a detriment:

(a) by the terms of Mr Royle's email dated 5th August 2015 specifically stating "your complaint is against the Department rather than the individuals themselves" and "you have made some potentially serious allegations and I need to consider carefully how we proceed".

(b) did Mr Royle conduct himself as alleged by the claimant in the meeting on 21st December 2015 and if so, was that a detriment?

(3) Did the respondent subject the claimant to a detriment because she had done the protected act?

(4) In relation to the allegation concerning the email, was that part of an act of victimisation continuing up to 21st December 2015? If not, is it just and equitable to disapply the primary limitation period?

Facts

8. The claimant began employment with the respondent on 24th May 2001 as an Administrative Assistant based in the respondent's Benefit Centre in Bolton. She was responsible, in that job, for processing benefit claims. Her duties were mainly filing, photocopying and basic data input prior to changes made in April 2013.

9. The claimant has a history of depression, stress and anxiety dating back many years. The claimant accepted in evidence that, as part of her condition, she has an overwhelming need for order, organisation and routine and any job needs to accommodate this.

10. In April 2013, the Benefit Centre where the claimant worked was changed into a Service Centre with the introduction of Universal Credit in that area. Due to this change, the claimant's role was to become a telephony role, answering telephone calls from benefits claimants. The claimant raised concerns with her managers from before the change took effect and continuing afterwards, expressing concern as to how she would cope with this work, given her condition. The claimant's role changed to a telephony role in July 2014. As she had anticipated, the claimant found taking incoming calls from claimants to be very stressful. The claimant could cope with making outward calls because she could then prepare what she was to say.

11. The claimant was absent from work due to illness in the period 15th July 2014 to 8th August 2014. During her absence, a referral was made to Occupational Health who produced a report on 29th July 2014. The claimant was recorded as reporting that her anxiety and depression were generally triggered by any change which she did not cope well with. The report noted that the claimant was stressed about the changes within her role within work. The report noted that Miss Liney had advised them that she coped well with making calls to clients but not with receiving calls as she did not know what the calls would be about and this caused huge anxiety for her.

12. In October 2014, the claimant had a one to one with her then manager, Sue Speck. In this one to one, the claimant raised the issue of her role exacerbating her symptoms. She suggested that she should be given an Account Developer role. She expressed the view that her current role exacerbated her symptoms and this could be deemed an equality issue; she referred to the Disability Discrimination Act.

13. Around the Christmas period in 2014, the claimant had a further absence from work, this time due to pleurisy. She returned to work on 6th January 2015. Following this absence, the claimant was given a first written warning for absence.

14. On 20th January 2015, the claimant was moved to the Failure to Attend team within the Account Developer team. Although it had been anticipated that this team would not be required to take calls from claimants, after a very short period of the claimant being with them, the team started having to take incoming claimant calls when the telephony team could not cope with the number of incoming calls. The claimant, as a result of this, took some calls from claimants in January 2015. The claimant stopped taking calls on 2nd February 2015 and took no calls until her sickness absence began on 27th February. The claimant gave evidence that this was because she had refused to take calls rather than as a result of the respondent offering this as an adjustment to her role. There is no cogent evidence that this change was initiated by the respondent. We accept the claimant's evidence that she refused to take incoming calls rather than the respondent initiating an exemption from the need to do so. However, no disciplinary action was taken against the claimant as a result of her not taking calls. It appears that, by 21st February, as

recorded in an occupational health report dated 22nd February, it had been agreed that, temporarily, the claimant would not be required to take telephone calls.

15. The claimant had a further one to one with Sue Speck on 10th February 2015. During this one to one, Sue Speck told her that there were no non-telephony roles. A further referral to occupational health was made and a report dated 22nd February 2015 produced. The report recorded that the claimant was currently at work but suffering from a flare up from symptoms triggered by inbound telephony jobs within her new Telephone Agent role. It recorded that the claimant had informed them that she had been temporarily moved to a non-telephony role as a reasonable adjustment but that calls being made by colleagues from work stations surrounding her were affecting her concentration levels. The claimant reported to them that she did not deal well with changes and this exacerbated her symptoms. The advisor expressed the view that the claimant was fit to continue on the current adjusted duties to avoid exacerbating her current symptoms until medication and counselling had made good effect. They advised "if management are able to support I would advise a relocation of her current DSE workstation to a quieter area or an area with less telephone callers around her to avoid distractions". Under the heading “Outlook”, the advisor expressed the view that the claimant was likely to remain vulnerable to further episodes of the condition if triggered. In answer to a specific question as to whether there was anything that could be done to alleviate the claimant's stress to help her remain in her role as a Telephone Agent, the occupational health advisor advised that they had re-referred the claimant for counselling to help alleviate the symptoms and that the claimant was planning to see her GP to have her medication reviewed. They wrote "it is not possible to predict how early the interventions will take to make positive impact in rebuilding her resilience to the telephone agent work". At this stage, therefore, it appears that occupational health was not ruling out the possibility of the claimant being able to resume a telephony role at some point in the future.

16. The claimant began a further period of sick leave on 27th February which continued until 12th April 2015. We accept the evidence of Philip Royle, the Universal Credit Service Centre Manager that he became aware of the claimant's absence during this period and the reasons for this and that he started looking at the possibility of moving the claimant permanently to a non- telephony role. We accept that there were very few non-telephony roles at the Service Centre. However, the Decision Maker Team was being created or extended so there would be an increase in people in Decision Maker Administration, which is the role to which the claimant moved in May 2015. Although we accept Mr Royle had this in mind as a possibility for the claimant, there is no evidence that anyone spoke to the claimant about this possible role at this stage.

17. The claimant had a series of keeping in touch conversations with her line manager during her absence on sick leave. On 3rd March 2015, she had a discussion with Sue Speck. Sue Speck told the claimant that there were no roles which did not involve inbound telephony. The claimant said that the thought of having to go back on the phones was making her ill and stressing her out and said she felt discriminated against. She complained about not having been moved to a quieter desk when there were empty desks she could have been sat at. She asked that future keeping in touch discussions be done by someone else. Catherine Walsh

then took over as the claimant's line manager, dealing with the keeping in touch discussions and continuing to line manage the claimant when she returned to work until the claimant moved to the Decision Maker role. Catherine Walsh herself had been on sick leave in the period 4th November 2014 to 15th February 2015. She obtained information about the claimant's situation in a handover with Sue Speck.

18. Catherine Walsh had her first keeping in touch discussion with the claimant on 6th March 2015. The claimant said to Catherine Walsh that she felt she had done everything expected of her with regard to informing her manager of her concerns with regard to telephony work and where she was located within a busy noisy team. Reasonable adjustments had not been made and she was just told that things were not feasible. She said she had been given a temporary change of duties to Failure to Attend Work but her desk was not moved and she remained in a noisy environment which affected her concentration. Catherine Walsh told the claimant that a desk move had now been arranged by Sue Speck and that her new desk was waiting for her on her return. The claimant expressed concern that she would just come back and be expected to go straight back on the phones. She said she was ok with outgoing calls but not inbound telephony work. Catherine Walsh advised her that they would have to work together on this but that she could not give the claimant a guarantee that this would be possible.

19. On 13th March 2015, Catherine Walsh had her second keeping in touch discussion with the claimant. This included a discussion of a job vacancy which had arisen in Business Support. Catherine Walsh said she was emailing the details to the claimant for her to look at and the claimant said she would consider applying but that it seemed strange that the job was on offer which obviously did not include inbound telephony from claimants but that it couldn't be offered to her. Catherine Walsh said to the claimant that they had to be fair to everyone when new opportunities became available. Catherine Walsh told the claimant that, on her return to work, they would look at supporting her in order for her to undertake some inbound calls. She told her that they had moved her to a quiet area and they had arranged for a buddy to be available and that, when she returned initially, she would not take calls but then, in agreement with her, they would gradually increase the calls from one hour per day with buddy support available. They would then de-brief each afternoon to see how things were going. The notes record that the claimant got upset at this point and Catherine Walsh explained that they needed to try, in order to see what impact taking calls was having on Clare on her return to work. The claimant said that she was scared that she would come back to work and quite quickly be expected to take calls again and that, if she couldn't cope with this, it would result in her going off again; she was concerned about the impact that this could have on her job. Catherine Walsh said that they would discuss this further once the occupational health report was received and that she would possibly have to take HR advice on the issue.

20. Following the keeping in touch discussion, Catherine Walsh emailed the job advert for the Business Support role to the claimant, together with a blank expression of interest form. We accept the evidence of Catherine Walsh that she felt it important to give the claimant an opportunity to say whether she wished to be considered for the Business Support role and that Catherine Walsh would not have been aware whether there would have been others in the service with the need for

reasonable adjustments. Catherine Walsh was waiting for the claimant to complete an expression of interest form if she was interested. The claimant did not submit an expression of interest form or contact Catherine Walsh further about interest in this role. There was another post in SPS (a technical assistance role) which was advertised at the same time as the Business Support role; the claimant's evidence was that she would not have been interested in this role.

21. The first respondent's selection procedure includes a section entitled "Equality Act moves" which states: "We are legally obliged to give first consideration for any vacancy to individuals who require a reasonable adjustment move under the Equality Act." The section on "Priority groups" states: "Following consideration of Equality Act moves before advertising a vacancy internally or externally, priority for vacancies must then be given to people in the following categories (in order)…." The section then goes on to list certain categories of people which are not relevant to this case. This suggests that, before advertising a vacancy, the first respondent should consider whether there is anyone requiring a reasonable adjustment move under the Equality Act, for whom the role would be suitable.

22. Catherine Walsh was not responsible for the decision to advertise the Business Support role. We did not hear any evidence from anyone responsible for advertising the role as to what, if any, consideration they gave before advertising the vacancy to the claimant or anyone else who might require a reasonable adjustments move within the business. However, Mr Royle's understanding was that the claimant would only have been considered for the Business Support role had she completed an expression of interest form.

23. We accept the evidence given by Mr Royle about the Business Support role, which is consistent with the job description for the role. Although this would not have involved incoming claimant telephone calls, it would have required dealing with other incoming calls. If a senior manager did not answer their telephone, it would come through to the team. The telephones ring a lot and the team needs to answer them. The nature of the calls is variable and unpredictable because of the variety of the work. This is a demanding role in a pressured environment. The work is diverse, changeable and unpredictable. It is driven to a large extent by the needs of the senior management team, which change a lot as priorities shift. It requires significant flexibility such as dropping one task and picking up another task immediately due to its urgency. Deadlines are often tight. At the time, it was a small and busy team, run on a shoe string, with not enough people. Due to the number of calls and the small number in the team, everyone present would need to cover the telephones. Mr Royle's view was that it would not have been possible to exempt one person from taking incoming calls.

24. An interim occupational health report was produced on 18th March 2015. This recorded that the claimant was unfit for work in any capacity at the present and a full report would follow. A GP's statement of Fitness for Work dated 18th March 2015 recorded that the claimant might be fit for work taking account of the advice. The GP wrote that, if available and with the employer's agreement, the claimant may benefit from amended duties "no inbound telephone work as this exacerbates her anxiety and low mood".

25. Also on 18th March, the claimant had a further keeping in touch discussion with Catherine Walsh. During the course of this discussion, the claimant did not express any interest in the Business Support job. The claimant referred to the GP's statement of fitness and informed Catherine Walsh that her GP had done an urgent referral to Fairfield Hospital Mental Health Services for the claimant to see a psychiatrist. Catherine Walsh's note of the conversation records that the claimant felt the need to talk at some length and was tearful throughout the conversation. The claimant went through the history of her difficulties with the change to the telephony work. Catherine Walsh, who had taken the call at home when she was on leave, informed the claimant that she would review her occupational health report on her return to work and would take advice, if necessary, on the way forward. Catherine Walsh told the claimant there were no guarantees. The claimant re-iterated that she was happy to do outbound calls as she was in control of the conversation and was prepared even if delivering a negative message.

26. There was a further keeping in touch discussion between the claimant and Catherine Walsh on 27th March 2015. During this conversation, Catherine Walsh told the claimant that her twenty eight day review was due on 1st April 2015 i.e. a meeting under the sickness absence procedure. She told the claimant that, if she had returned to work by this date, the meeting would not be needed. Catherine Walsh told the claimant that she had discussed reasonable adjustments with her Band D manager following receipt of the last sick note. The desk move requested had been done and was waiting for the claimant; the claimant would be tasked with doing Failure to Attend tasks which did not involve inbound telephony. The note of the conversation records "I did tell Clare that she may be required to do outbound calls when necessary to free up telephony agents. I also explained that although this reasonable adjustment is available now I could not guarantee that at some point in the future Clare would never be asked to do inbound telephony if that role was required by the business".

27. Catherine Walsh had a meeting with the claimant on the 1st April 2015 under the sickness absence procedures.

28. A further occupational health report was produced on 1st April 2015. This recorded

> "I understand that following welfare reforms last year changes were made to the job roles. She tells me that she raised concerns with management in relation to her starting telephony work. She reports long standing particular difficulties associated with incoming calls. These tend to provoke significant anxiety which appears to be due to a sense of lack of control. She has no issues relating to outbound calls. Despite her concerns management advise that she continue with the proposed role.
>
> This has resulted in a progressive deterioration in her mental health culminating in her current absence".

29. The report recorded that the claimant felt more optimistic following a recent telephone conversation with her line manager who had agreed to the following changes in principle:

(1) That she may be taken off incoming telephony work;

(2) That she be moved to a quieter area of the office;

(3) Introduce a buddy system.

The advisor wrote "provided these adjustments can be introduced I would anticipate a return to work within the next two to four weeks".

30. During the claimant's absence, Catherine Walsh prepared to make a reference to Mr Royle under the sickness absence procedure if the claimant did not return to work. She intended recommending the claimant's dismissal. However, the reference was not made because the claimant returned to work on 13th April 2015. The claimant was not required to do inbound telephony work on her return to work.

31. On 22nd April 2015, Catherine Walsh sought advice from HR as she was considering given the claimant a final written warning. She was advised that normally a warning should not be given in the circumstances where progress was being made and the employee being constructive in their rehabilitation, however, the decision was for Catherine Walsh.

32. On 22nd April 2015, the claimant was given a final written warning for her absence. The claimant appealed this decision and the decision was upheld on 8th July 2015 by Keith Bembridge.

33. Around the end of May 2015, the claimant moved to an administrative role in the Decision Maker team. In this role, she was not required to take incoming calls. The claimant confirmed in her evidence to this Tribunal that she was happy in this role and had no complaints about it. In this role, she knows from a rota published in advance what she will be doing for the week and no changes will be made to the rota unless these are notified to her in advance. The claimant accepted that if she did not know her duties or, if there was unexpected change, this could cause difficulties for her.

34. The claimant agreed a reasonable adjustments passport with her new line manager Lynne Astley. Information in this included the following:

> "Incoming telephony duties seriously exacerbate my long term mental health condition due to the uncertainty of the nature of the call and the lack of control I have over it (not knowing what the claimant is going to ask etc etc). As part of my condition, I find it extremely difficult to deal with change and uncertainty due to my OCD issues - I need structure, routine and order in all aspects of my life and feel out of control and severely anxious if I am required to deviate from these 'routines'".

She further recorded "regular changes to my duties, especially many changes within the same day affect my anxiety as I do not cope well with change and not being able to be in control of my work and not being able to work methodically due to lack of experience/knowledge".

35. In a review of the claimant's stress reduction plan on 24th July 2015, it was agreed that measures that had been put in place were no longer necessary as she had moved from telephony to DM Admin on 27th May. Her new manager wrote "I am aware of the need to support Claire as she learns new areas of work and that at present she would not respond well to jumping to and from different jobs within admin".

36. On 27th July 2015, the claimant raised a grievance against Sara Fishwick, Susan Speck and Dawn Pennington. She sent this to Philip Royle and Janet Stringer. This included complaints about the respondents failing to make reasonable adjustments for a disabled employee. This is the protected act relied upon for the claimant's victimisation claim. The claimant does not name Catherine Walsh in this grievance as someone she is complaining about. The claimant does refer to a job role in Business Support having a vacancy and being told to put in an expression of interest if she wanted to be considered for it. She wrote that she was not well enough and did not have access to all the necessary resources to be able to do this. However, she referred to the Business Support role in the same sentence as the vacancy in SPS. She did not write in her grievance that she considered the Business Support role would have been suitable for her. She made no distinction between the vacant roles in Business Support and SPS, although the claimant has accepted in evidence that she would not have been interested in the SPS role. The claimant did not refer specifically to failure to offer her the Business Support role in the bullet points where she summarised her grievance.

37. On 28th and 31st July 2015, the claimant sent disability questionnaires to Sara Fishwick and Susan Speck.

38. On 28th July 2015, Philip Royle sought advice by email from Martina Clayton and Samantha Craig in HR as to whether to accept the claimant's grievance out of time. Samantha Craig gave advice first, by email, saying that they needed to be careful to make sure they were reasonable and she suggested that Mr Royle should take advice from the Civil Service HR case work. Martina Clayton subsequently advised that it would be not be unreasonable not to accept the grievance out of time. Mr Royle decided to deal with the grievance out of time.

39. Some time prior to August 2015, the claimant spoke to Nick Lane in HR with a whistleblower referral about treatment of a disabled employee. Nick Lane subsequently spoke to Mr Royle and they agreed that the issues raised with Mr Lane by the claimant would be dealt with in the investigation of the claimant's grievance.

40. On 5th August 2015, Mr Royle sent an email to the claimant. He wrote that he was aware that the claimant had sent a disability discrimination questionnaire to Sara Fishwick and Sue Speck in addition to the grievance she had sent to him. He wrote: "in my experience it is not usual for individual managers to reply to these questionnaires as your complaint is against the Department rather than the

individuals themselves who act on behalf of the Department. I am currently taking HR advice on whether I investigate your grievance given that it is out of time and if so, who I ask to conduct the investigation. I will let you know by the end of this week my decision. I will also take advice on the response to the DL56. You have made some potentially serious allegations and I need to consider carefully how we proceed". The claimant alleges that, by sending this email, the respondent subjected her to a detriment because of doing a protected act. The claimant did not make any complaint about Mr Royle's email at the time. We note also that when the claimant wrote in her witness statement about the meeting with Mr Royle on 21st December 2015, she wrote that, although she was concerned about there being no mediators present, she decided to continue the meeting "based on the fact that all my contact via email with Mr Royle had been as expected and he had been very accommodating and responsive throughout up to this point". The claimant does not explain in her witness statement why she considers this email subjected her to a detriment. We see nothing untoward in Mr Royle's email.

41. On 7th August 2015, Mr Royle sent a further email to the claimant, informing her that he would deal with her grievance out of time and that he was appointing Lesley McCarthy to conduct a management investigation. He informed the claimant that Lesley McCarthy was the SEO Group Business Manager for UC and was not part of the Bolton Service Centre. On the same date, Mr Royle sent an email to Lesley McCarthy thanking her for taking the case and forwarding the claimant's grievance. He also wrote that Nick Lane had received the same complaints through the whistleblowers' hotline and that he had agreed with Nick and Martina Clayton that they would conduct a management investigation rather than through HRMIS.

42. On 1st September 2015, the claimant sent an email to Lesley McCarthy because she had not heard anything from her. Lesley McCarthy replied the same day, apologising for not having contacted her and explaining that she had been on leave. She confirmed that Mr Royle had passed the claimant's case to her to undertake a management investigation and wrote that she would write to the claimant again in the next day or so to arrange a meeting.

43. On 2nd September 2015, Mr Royle wrote to the claimant by email, writing that he had received advice from HR confirming that individual members of staff should not respond to a request for completion of a disability questionnaire and he had advised them not to respond. We accept that Mr Royle had received such advice from HR and that this email set out his understanding of the position. Mr Royle wrote that the questions that the claimant raised in her questionnaires related to the complaints set out in her grievance and confirmed that Lesley McCarthy would be conducting the management investigation into her allegations and any issues relating to the members of staff the claimant had named.

44. Lesley McCarthy carried out her investigation and, on 17th November 2015, she sent her completed investigation report to the claimant. A further version correcting a typographical error was sent on the 18th November. Lesley McCarthy had met with the claimant before sending the report to discuss her findings.

45. As part of the investigation, Ms McCarthy had a meeting with Ms Liney. During this meeting, there was no discussion about the claimant not being offered the position in Business Support. The Business Support role had been included in what the claimant had written in her grievance about what was described as incident three. The part of the report dealing with incident three did not refer to the Business Support role.

46. Ms McCarthy wrote in the conclusion of her report:

> "The crux of this complaint is that, despite being aware of the claimant's mental health condition and OHS report that inbound telephony was not a suitable role for this individual, an inbound telephony role was allocated once business within this centre moved to delivery of Universal Credit.
>
> There is no evidence to support that any of the individuals named in this complaint were directly involved or responsible for this decision".

She also wrote:

> "Overall, the crux of this complaint goes back to the original decision to allocate an inbound telephony role and, whilst none of the named individuals in this complaint were responsible for that action, the investigator finds evidence to uphold this complaint on the grounds of discrimination in that Claire was treated less favourably by the department than her peers in the same situation on account of the protected characteristic of disability given Claire's health condition was long standing and documented".

47. In the grievance decision letter dated 16th November 2015, Ms McCarthy summarised the main reasons for the claimant's grievance as follows:-

* “you were allocated a job role that put you at a disadvantage compared with your peers
* you were put under undue and unnecessary pressure due to line manager not carrying out specific action agreed in the stress reduction plan
* experienced harassment from line manager during a Keep In Touch meeting".

48. Ms McCarthy wrote that the decision was to uphold the claimant's grievance. She wrote:

> "As per the investigation report and its attachments, the basis for the decision is that the crux of this complaint goes back to the original decision to allocate an inbound telephony role and, whilst none of the named individuals in this complaint were responsible for that action, the investigator finds evidence to uphold this complaint on the grounds of discrimination in that Claire was treated less favourably by the department than her peers in the same situation

> on account of the protected characteristics of disability given Claire's health condition was long standing and documented".

49. Ms McCarthy wrote that the following actions would be taken to address concerns raised in the claimant's grievance: "A full report has been passed to Phil Royle who will consider the findings in my report and any remedial action". Ms McCarthy did not suggest that disciplinary action against anyone would be appropriate.

50. Mr Royle wrote to the claimant on the 3rd December 2015 with the outcome of the investigation into her grievance complaint. In accordance with normal practice, Mr Royle gave the letter to the claimant's senior officer in command, Liz Hughes, to give to the claimant and it appears this was done on 4th December 2015. Mr Royle wrote

> "I have now considered what action needs to be taken as a result of the grievance and that you were treated less favourably than your colleagues when you were posted to the Universal Credit telephony team in November 2014 despite your long standing mental health condition. A more appropriate course of action by the management of Bolton Benefit Centre would have been to post you to an Account Developer Role in the UC Service Centre. I am sorry if this decision has caused you increased anxiety.
>
> Training for team leaders and managers has been held over the past six months to improve knowledge of mental health issues, well being, how to handle change and difficult conversations with staff. These learning and development opportunities are part of a strategic plan to develop the skills of team leaders. Any individual learning needs arising from this investigation will be discussed with their line manager. I am satisfied that there is no potential for misconduct".

51. Mr Royle also wrote that he had decided that the final written warning issued on 21st April 2015 should be rescinded. This meant that the first written warning issued on 26th January 2015 expired on 25th July 2015 and the subsequent sustained improvement period was from 26th July 2015 to 25th July 2016. He wrote that the absence from 27th February 2015 to 10th April 2015 would not be included in the consideration of future formal managing attendance action; any future absences would be considered in the usual way. Mr Royle noted that the claimant had not worked as a telephony agent since 29th May 2015 when the claimant was posted internally to the Decision Maker Admin Team.

52. On 3rd December 2015, a notice appeared on the respondent's internal system about the promotion of Sara Fishwick to Group Business Manager. The claimant was upset to see this notice and writes in her witness statement that she was shocked at the appointment because she had not had a decision outcome on the management investigation but was being told that one of the named managers had been promoted to a senior management grade whilst being part of this investigation.

53. The claimant had conversations with Samantha Craig in HR on 8th December. It is not necessary for us to make a finding as to exactly what Samantha Craig said to the claimant. However, it is apparent from later correspondence that the claimant understood from this conversation that Samantha Craig was suggesting a mediation meeting. Samantha Craig did not use the word mediation when she wrote to Phil Royle on 8th December to inform him about the telephone conversation with the claimant. She wrote to Mr Royle that she had advised a conversation with the claimant's HEO/Mr Royle would be best to dispel any confusion and open that communication channel again. She wrote that the claimant felt that her HEO may not be privy to the information which helped Mr Royle to come to his decision in the letter she has received about the disability discrimination grievance. Ms Craig wrote that, if this was the case, she urged Mr Royle to have a chat with the claimant and explain the reasoning behind the letter and they could take it from there.

54. Mr Royle replied to Samantha Craig the same day, informing her that the claimant's HEO Liz Hughes was aware of the mental health issues the claimant suffered from and that he had briefed Liz Hughes before he issued the letter to the claimant via Liz Hughes and her team leader. He wrote that, if the claimant felt that her HEO was not privy to the information, she should have gone to her and asked her and not phoned HR. He asked Ms Craig to remind the claimant of the proper protocol if she received further calls.

55. On 9th December 2015, the claimant emailed Mr Royle. She wrote that she had contacted HR to discuss the outcome of the recent internal investigation and to raise her concerns that one of the managers implicated in her complaint was considered and accepted for promotion whilst under investigation. She wrote that she was extremely disappointed that no consideration was given as to how the announcement of the manager moves memo would affect her. She also wrote that she had been advised by HR to arrange a mediation meeting with Mr Royle and Keith Bembridge, her Band D, to discuss the matter in more depth. She asked that a meeting be arranged as soon as possible. The claimant wrote that she would attend with her trade union representative.

56. Mr Royle did not consider the claimant understood what was meant by mediation. He considered that mediation was not appropriate but that he should have an informal meeting with the claimant. However, he did not contact the claimant before the meeting to explain his views on mediation or to clarify that the meeting would not be a mediation meeting.

57. On 9th December 2015, Liz Hughes wrote to Mr Royle to inform him about a lengthy conversation she had had with the claimant. She wrote: "I think she is just upset that you didn't speak directly to explain the outcome and that Sara has got promotion. I have been through with her that any action you take she could not be privy to anyway and any action you did take wouldn't necessarily debar Sara from being promoted". She wrote that the claimant had told her that internal investigations had advised her to ask for a mediation meeting with Mr Royle so she was going to do that. Ms Hughes wrote "I don't know but I think if you had a one to one chat with her it might clear up some of this?". She also wrote that the claimant was still talking about legal proceedings. Ms Hughes wrote that she thought she had helped the claimant to see that this would not give the resolution she wanted. She

wrote: "I have asked her to have a think about where this all ends, especially as she won't get the assurance she is looking for, other than from you and me verbally. I hope I haven't misled hers in terms of the DPA preventing release of any "consequences". I said that even HR don't get these by individuals".

58. On 21st December 2015, the claimant, accompanied by her trade union representative, Steve Gibson, attended a meeting with Mr Royle. The claimant said in evidence that she was concerned that there was no mediator present. However, neither the claimant nor her representative referred in the meeting to the absence of a mediator, neither did they ask for mediation meeting to be arranged.

59. We find that the claimant found Mr Royle hostile and intimidating during the meeting and was upset afterwards. Mr Gibson, the claimant's trade union representative, when interviewed later about this meeting, said that Mr Royle was not hostile from his point of view but was, in the claimant's opinion, due to her mental health issues. We find, based on what Mr Gibson said in the investigation meeting, that Mr Royle behaved as he would have done with anyone else "PR was just being PR". We find, based on what Mr Gibson said in his interview, and our own observation of Mr Royle giving evidence, that Mr Royle was calm throughout the interview.

60. The claimant alleges that Mr Royle accused her of putting all the people involved in the Management Investigation through a very uncomfortable process. Mr Royle denies this. He says he made a general remark about some investigations taking a long time and not being a comfortable process for those involved. The claimant has not satisfied us, on a balance of probabilities, that Mr Royle made an accusation against her, as she alleges.

61. The claimant alleges that, on two occasions during the meeting, the claimant was trying to respond and Mr Royle told her that what she needed to do was to be quiet and listen to him as he was her senior manager, thus preventing her from responding. Mr Royle denies that he prevented the claimant from responding or that he told her to “be quiet.” He does accept that he asked the claimant to listen to him as a senior manager. Based on the evidence of Mr Gibson in the investigation, which is not inconsistent with the evidence of Mr Royle, we find that Mr Royle said to the claimant, when she got upset: "Clare, you need to calm down. I need to remind you that I am your manager". The claimant has not satisfied us that Mr Royle prevented her from saying what she wanted to say in the meeting.

62. The claimant alleges that Mr Royle made an underlying threat to remove her reasonable adjustment by asking her if she was happy in her current role and, when she said she was, then saying “who do you think put you in that role?” to which the claimant acknowledged that it was Mr Royle. Mr Royle accepted in evidence that he asked the claimant whether she was happy in her new role and who put her in the role but denies that he made any express or implicit threat to remove her from the role. We find that Mr Royle did not make any express or implied threat to remove the claimant’s reasonable adjustment; if the claimant did gain this impression, it was not based on reasonable grounds.

63. Mr Royle accepts that he told the claimant that he had thirteen years experience as a Decision Maker. However, he said this was in the context of trying to explain to her that, in his experience, this was a very reasonable outcome to her grievance.

64. Mr Royle accepts that he asked the claimant whether she had read the outcome letter but says this was because he could not see that the claimant knew and understood that the outcomes were in her favour.

65. Mr Royle did not accept that he used the phrase to the claimant that she had no right to say whether a line manager was inexperienced or not but accepted that this was something they touched on, since he did not think the claimant had the right to be openly critical without evidence or discussion.

66. Mr Royle accepted in the subsequent investigation interview that he might have said "what has SF's promotion got to do with you".

67. The claimant has not satisfied us, on a balance of probabilities, that Mr Royle told the claimant she needed to draw a line under the matter.

68. The claimant alleges that Mr Royle accused the claimant of being a liar in relation to what Lesley McCarthy had said to her. We do not understand the claimant to be alleging that Mr Royle used the word “liar” about her. We find that, when the claimant said that Lesley McCarthy had told her that Mr Royle had said disciplinary action would be taken against the named managers, he said he had not said that. Ms McCarthy’s outcome letter refers to remedial, not disciplinary action. We find it is more likely than not that Ms McCarthy had not said this to the claimant and, therefore, accept Mr Royle’s evidence that he was seeking to explain to the claimant her misunderstanding, rather than accusing her of being a liar.

69. The claimant has not satisfied us, on a balance of probabilities, that Mr Royle accused the claimant of having malicious intent towards one of the named managers in her original complaint.

70. The claimant was very upset after meeting with Mr Royle. Because she was upset, Andrea Hill, her line manager, took the claimant into a meeting room and then sent the claimant home for the rest of the day.

71. On 20th January 2016, the claimant sent a complaint by email to Emma Marshall relating to Mr Royle and Sara Fishwick. The complaint included a complaint about Mr Royle's conduct in the meeting on 21st December. The complaint also included a request that the management investigation decision and the senior managers’ DM decision be reconsidered in relation to the finding that there had been no misconduct.

72. On 22nd January 2016, the claimant sent her manager, Andrea Hill, an email expressing concern about a read receipt which she had understood as meaning that Emma Marshall had deleted her grievance without it being read. It now appears that the deletion related to one email and the claimant had sent a second email with her grievance attached which was not deleted. The claimant wrote to Ms Hill: "the

complaint relates to bullying, harassment and victimisation on the grounds of making an original complaint about disability discrimination. I am nervous, anxious and frightened about coming to work at present as a senior manager is responsible. I am requesting that special leave be considered under the special leave policy "disability and health related leave" until this matter is considered".

73. Andrea Hill sent the claimant home for the rest of that day. Since Andrea Hill was unable to contact any more senior managers that day, she made a decision herself, without reference to the relevant policy, that special leave should be given for that day. Ms Hill telephoned the claimant that afternoon, telling her that special leave had been given for absence that day. Although Ms Hill could not recall whether she told the claimant that special leave had been refused for the next week, we find that she did say this. The claimant recorded that she had been told this in her email of 26th January 2016.

74. Andrea Hill and Keith Bembridge discussed the claimant's request for special leave on at least one occasion and possibly before and after the claimant's email of 26th January.

75. On 26th January 2016, the claimant sent an email to Keith Bembridge and Andrea Hill. She wrote:

> "I have requested special leave via RM on the grounds of disability and health. Due to the ongoing disability discrimination I am being subjected to and now harassment, bullying and victimisation I have had to visit my GP and as a result my medication has been increased. I need this time to remove myself from this unnecessary pressure and allow my medication to take effect. I have tried to resolve this every which way I can but to no avail.
>
> I was told on Friday that I could not have any more special leave but am unsure why as my situation fits the criteria to be considered.
>
> Please can this be looked at ASAP"

76. Andrea Hill and Keith Bembridge considered the respondent's special leave policy. Under the heading "disability and health related leave" at paragraph 48, the policy provides "managers may grant special leave with pay to help employees manage a disability or long term health condition for which ongoing treatment is needed after the employee is fit enough to work. In the case of disabled employees this might be a reasonable adjustment or one of several reasonable adjustments made to help the person participate equally at work".

Paragraph 50 provides:

"Examples of when paid disability and health related leave will usually apply are:-

* non-routine appointments/treatments such as infertility treatment, fitting a prosthesis, radiotherapy, psychiatric therapy/counselling, treatment for facial disfigurement;

* situations where employees are not ill but required to refrain from work based on professional/specialist advice - typically when they have had contact with a notifiable communicable disease and might be infectious;

* situations where the only thing keeping someone off work is delay in installing a workplace reasonable adjustment without which the employee cannot work. These cases are likely to be the exception".

Paragraph 51 provides: "Disability and health related leave must not be used to mask sickness absence. If employees are unable to attend work due to sickness or injury or the remaining symptoms of sickness or injury they must take sick leave. Disability and health related leave must also not be used for routine treatments that most people experience in order to maintain good health such as doctor, dentist check ups and non-disability related hospital outpatient appointments".

77. Ms Hill and Mr Bembridge concluded that the claimant's circumstances did not come within the terms of the respondent's special leave policy. We accept that the decision not to allow special leave was technically that of Andrea Hill, although the decision was taken on advice from Keith Bembridge.

78. Emma Marshall acknowledged the claimant's complaint on 27th January.

79. On 28th January, Andrea Hill sent an email to the claimant rejecting her special leave request. Ms Hill explained her decision as follows: "This is due to it not fitting in to an allowable category but also personally I think if you did have time off you would find it harder to then return to work".

80. Alison Hunt was appointed to investigate the claimant's grievance and gave her outcome on 15th April 2016. The grievance was not upheld.

81. On 19th February 2016, the claimant gave notification to ACAS under the Early Conciliation Procedure. On 29th February 2016, an early conciliation certificate was issued in relation to the second respondent Mr Royle. On 18th March 2016, an early conciliation certificate was issued in relation to the respondent company. The claimant presented her complaint to the Tribunal on the 22nd March 2016.

82. The claimant, when asked why she had not submitted her claim to the Tribunal earlier, referred to wishing to follow internal processes first, to her health and to her having received bad advice. There is no medical evidence before us to suggest that the claimant would not have been able to submit a claim to the Employment Tribunal at the relevant time. In relation to alleged bad advice, the claimant referred only to advice from a solicitor about her only being able to refer to matters in the previous three months which she took just before she submitted her claim. We note that the claimant was advised by her trade union throughout the relevant periods. We note that the claimant had access to the internet, albeit at home this was only on her phone.

Submissions

83. Ms Knowles, the respondent's representative, provided outline submissions in writing to which she added orally. In summary, the respondent's submissions in relation to the complaints are as follows. In relation to the complaint of direct discrimination about Catherine Walsh telling the claimant she could not have the Business Support role as due to equality it would have to be offered to everyone, the respondent submitted that the claimant had not proved facts from which the Tribunal could conclude that she was treated less favourably because of disability. Even if she had done, it was clear that the reason why Ms Walsh advised as she did was because she genuinely believed that was the case, not because of disability. In any event, the complaint was out of time. It would not be just and equitable to extend time.

84. In relation to the complaint of failure to make reasonable adjustments, the claimant argued that the PCP was the requirement to take incoming calls and the reasonable adjustment sought was to be given the business support role. The respondent accepted that the requirement, if applied to the claimant, would place the claimant at a substantial disadvantage because the calls tended to provoke significant anxiety due to her sense of lack of control. The respondent submitted that the requirement was not applied to the claimant in March 2015; the last inbound call was prior to 2nd February 2015. Alternatively, the respondent took such steps as it was reasonable in the circumstances to avoid the disadvantage by confirming to the claimant that she would work on the FTA Team without inbound calls. The respondent submitted that it would not have been a reasonable adjustment to have expected the respondent to offer the Business Support role to the claimant. The claimant did not complete an expression of interest form but, crucially, the role would not have avoided the substantial disadvantage. The role involved inbound telephone calls and was diverse, changeable and unpredictable. It would not have been reasonable to require the respondent to allocate that role to the claimant bearing in mind the medical evidence regarding the nature of her condition. In any event, the claim is out of time and could not be said to be continuing beyond June 2015 at the latest because that was when the claimant moved to a new permanent role not involving inbound calls. It would not be just and equitable to extend time.

85. The respondents did not dispute that the claimant's grievance dated 27th July 2015 was a protected act.

86. The respondent submitted, in relation to the complaint of victimisation, that Mr Royle's email did not subject the claimant to a detriment. The claimant did not view it as such or, alternatively, any sense of detriment or grievance was unreasonable, there being some objective element in determining whether there was detriment. If there was any detriment, this would not be because the claimant had done a protected act. Mr Royle was just trying to explain the proper process and that he was taking the grievance seriously and that it would take some time. In any event, the claim is out of time and it would not be just and equitable to extend time.

87. The complaints in relation to the meeting on 21st December 2015 and the refusal of special leave are agreed to have been brought in time.

88. In relation to the complaint of harassment about Mr Royle's conduct on 21st December 2015, Ms Knowles invited the Tribunal to prefer Mr Royle's account of the context and manner of the meeting. The respondent submitted that Mr Royle's conduct did not have the purpose of creating the relevant environment and it should not be regarded as having that effect, taking into account the context and the fact that it would not be reasonable to regard it as having that effect. Further, Mr Royle's conduct was not related to disability and, in so far as Mr Royle said things that the claimant did not like, or in a firmer manner than the claimant would have liked, that was not related to the claimant's disability but because Mr Royle was trying to convey his reasoning and response to points raised and to understand some of the claimant's concerns. If Mr Royle was just behaving the way he would normally do, as suggested by Mr Gibson, his behaviour was not related to disability.

89. In relation to the complaint of victimisation about Mr Royle's conduct on 21st December, the respondent submitted that the conduct did not amount to a detriment. Further, to the extent that Mr Royle said things that the claimant did not like, or in a firmer manner than she would have liked, that was not because she had done a protected act.

90. In relation to the complaint of direct discrimination about the refusal of special leave, the respondent submitted that there was no evidence to suggest that someone without disability, but whose circumstances were otherwise the same, would have been treated any differently. Ms Hill and Mr Bembridge did not refuse the request because of anything to do with the claimant's disability but because of a genuine belief that the reasons advanced by her did not fit into an allowable category in the special leave policy; the refusal was nothing to do with disability.

91. Initially, the claimant said she had nothing to say when invited to put her arguments. At the Judge's suggestion, we adjourned for half an hour so the claimant had an opportunity to read again what Ms Knowles had written and consider whether there was anything she wanted to say. After the adjournment, the claimant made some oral submissions.

92. The claimant re-iterated her evidence that, in relation to the Business Support role, Ms Walsh had told her she would have to complete an expression of interest and that she had been extremely ill at the time. She said she had no resources at home and would have been at a disadvantage doing an expression of interest. She also reiterated that, on a number of occasions when she was off sick, she was told that she would have to take calls in the future and this was a barrier to her return. Ms Walsh decided to issue her with a final written warning although this was against HR advice.

93. The claimant said she was a disabled person with a long history of depression; she was at a disadvantage because she was unable to do telephony work and the respondent should have made reasonable adjustments. There were no steps to remove the disadvantage until 29th May 2015 when she moved to the Decision Maker Administration team.

94. The claimant said Mr Royle subjected her to unwanted behaviour on 21st December 2015 he refused her request for a mediator; he acted in a hostile and

intimidating way. Mr Royle had become aware of her illness during her absence. In relation to the August email from Mr Royle, the claimant said that this was an attempt to make her feel as if she had done something wrong in making a complaint and issuing a questionnaire. She referred to the tone of Mr Royle's email to Martina, reprimanding the claimant for not following protocol prior to the meeting. The claimant said Mr Royle had admitted saying "what's SF's promotion got to do with you" and "did you even read the letter". Ms Hill stated, after the meeting, that she had witnessed the claimant was very distressed. The claimant said Mr Royle was aware of her complaints and her health conditions and that she was vulnerable prior to the meeting; his conduct on 21st December left her deeply anxious and frightened to attend work and made her feel isolated.

95. In relation to the refusal of special leave, the claimant said Ms Hill and Mr Bembridge had accepted that they did not apply discretion, sensitivity or common sense or seek HR advice.

96. In reply, Ms Knowles reminded the Tribunal that they could not go back beyond 13th March 2015; this was not part of the claim before this Tribunal which the respondent had come prepared to deal with. The respondent did not accept that Mr Bembridge and Ms Hill had accepted that they did not apply common sense in dealing with the special leave request.

97. In response to a point the Employment Judge raised earlier about whether it may have been a reasonable adjustment to consider a trial period in the business support roles, Ms Knowles responded that a trial period is not of itself a reasonable adjustment and so failure to arrange a trial period was not itself a failure to make a reasonable adjustment. She referred to the case of *Salford Primary Care Trust -v- Smith UKEAT 0507/10/JOJ* as authority that failure to have a trial period does not lead to a failure to make a reasonable adjustment. She submitted that the Business Support role was not a role it was reasonable to allocate the claimant to and it was not reasonable to adjust it.

The Law

Direct discrimination

98. Section 13(1) of the Equality Act 2010 (EqA) provides: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". Section 4 lists protected characteristics which include disability.

99. Section 23(1) EqA provides that "on a comparison of cases for the purposes of section 13….there must be no material difference between the circumstances relating to each case."

100. Section 39(2) provides, amongst other things, that an employer must not discriminate against an employee by subjecting that employee to a detriment.

Failure to make reasonable adjustments

101. Section 20 EqA and Schedule 8 contain the relevant provisions relating to the duty to make adjustments. Schedule 8 imposes the duty on employers in relation to employees. Section 20(3) imposes a duty comprising "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."

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

103. The PCP does not necessarily have to be applied to the claimant for it to place the disabled employee at a substantial disadvantage when compared to people who are not disabled: *Roberts v North West Ambulance Service EAT 0085/11.* This may apply where a disabled employee is personally exempt from a PCP but the effect of the PCP on other employees or the public places the disabled employee at a substantial disadvantage.

Harassment

104. The relevant parts of section 26 EqA provide:

> "(1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) The conduct has the purpose or effect of –
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> ……
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect."

Subsection (5) lists relevant protected characteristics which include disability.

Victimisation

105. Section 27 EqA provides:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act –
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act."

106. An unjustified sense of grievance cannot amount to detriment: *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.*

107. Where a protected act and detriment are established, the tribunal must ask why the alleged discriminator acted as they did; what, consciously or subconsciously, was the reason. The test is not a simple "but for" test: *Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830.*

Proving discrimination

108. Section 136 EqA provides:

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

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

109. The special burden of proof rule applying in discrimination cases recognises that proving discrimination presents special problems. Discrimination is often covert; discriminatory motivation may be unconscious. Tribunals may need to draw inferences of discrimination from surrounding facts to decide whether there are facts from which the tribunal could conclude there was unlawful discrimination and,

therefore, whether the burden of proof shifts to the respondent to prove a non-discriminatory explanation.

110. The burden is on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible.

111. If the fact of the alleged treatment by the respondent is proven, the tribunal must then consider, at stage one of the process, whether there are facts from which the tribunal could conclude that the treatment was discriminatory. All material facts, not just facts proved on the claimant's evidence, are to be taken into account. This can include facts adduced by the employer.

112. The burden will only shift at stage one on the basis of facts proved on a balance of probabilities. "A mere intuitive hunch…. that there has been unlawful discrimination is insufficient without facts being found to support that conclusion": Lord Justice Peter Gibson in *Chapman v Simon [1994] IRLR 124, CA.*

113. The tribunal must look at the totality of its findings of fact and decide whether they add up to a sufficient basis from which to draw an inference that there was unlawful discrimination. The tribunal should not take a fragmented approach to a series of allegations. *Qureshi v Victoria University of Manchester and another [2001] ICR 863, EAT* endorsed by the Court of Appeal in *Anya v University of Oxford and another [2001] ICR 847.*

114. In a case of less favourable treatment, a claimant can establish a prima facie case of discrimination by showing that he or she has been treated less favourably than an appropriate actual comparator. If there is no actual comparator, the claimant must establish that a hypothetical comparator would have been more favourably treated. This will involve the tribunal having to draw inferences as to likely treatment from the surrounding facts.

115. In considering whether facts have been proved from which the tribunal could conclude, in the absence of an adequate explanation, that there had been unlawful discrimination, the tribunal must consider all relevant circumstances. The fact that a respondent has acted unreasonably, if that be the case, is not enough to prove such facts, although it is a factor that, taken with other relevant factors, may be considered in deciding whether an inference of discrimination could be drawn.

116. Discrimination cannot be inferred from unreasonable conduct alone. In *Glasgow City Council v Zafar [1998] IRLR 120 HL,* Lord Browne Wilkinson considered that 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' However, discrimination may be inferred if there is no explanation for unreasonable treatment; "this is not an inference from unreasonable treatment itself but from the absence of any explanation for it": *Bahl v Law Society [2004] IRLR 799, CA.*

117. If an employer acts in a wholly unreasonable way, this may assist in drawing an inference that the employer's purported explanation for its actions was not in fact the true explanation and that it was covering up a discriminatory intent. The tribunal must make it clear whether and why it rejects the explanation offered by the employer: *Rice v McEvoy [2011] NICA 9, Northern Ireland Court of Appeal.*

118. An employer's failure to follow its own equal opportunities policy can support an inference of discrimination: *Anya v University of Oxford and another [2001] ICR 847 CA.*

119. The authorities approve the approach of a Tribunal moving straight to the second stage in some cases e.g. where there is a comparison with a hypothetical comparator. In such cases, the Tribunal may go straight on to consider the explanation given by the respondent, although they are not required to take this approach. If the tribunal is satisfied that the respondent has proved that their actions were for non-discriminatory reasons, the claim must fail. If the tribunal is not satisfied by the respondent's explanation, the tribunal would have to go back to stage one, to consider whether there are facts from which they could conclude the respondent had committed an act of unlawful discrimination. If there are such facts, the claim would succeed since the respondent had not proved they had not committed the act of unlawful discrimination. If there are no such facts, the claim would fail, even though the respondent has provided an unsatisfactory explanation for their actions.

Time limits

120. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

121. Time limits are extended to take account of time spent in the early conciliation process with ACAS, if notification to ACAS is made within the primary time limit.

122. In deciding whether an acts extends over a period, a distinction is to be drawn between a continuing act and a one off act with continuing consequences.

123. If a complaint has been brought outside the primary time limit, the onus is on the claimant to persuade the tribunal that it would be just and equitable to extend time to allow the complaint to proceed.

Conclusions

In reaching our conclusions as to whether the complaints are well founded, we have considered the allegations individually but also the totality of our findings of fact in deciding whether these provide a sufficient basis from which to draw an inference that there was unlawful discrimination.

Business Support Role

Direct disability discrimination

124. The claimant complains that it was an act of direct disability discrimination for Catherine Walsh in March 2015 to tell the claimant that she could not have the Business Support role because, due to equality, it would have to be offered to everyone. We found that, on 13th March 2015, during a keeping in touch discussion with the claimant, Catherine Walsh told the claimant she was emailing her the details of a job in Business Support to look at and the claimant said she would consider replying but that it seemed strange that the job was on offer which obviously did not include inbound telephony from claimants but that it could not be offered to her. Catherine Walsh said to the claimant that they had to be fair to everyone when new opportunities became available. Following the keeping in touch discussion, Catherine Walsh emailed the job advert to the claimant together with a blank expression of interest form. We accepted the evidence of Catherine Walsh that she felt it important to give the claimant an opportunity to say whether she wished to be considered for the Business Support role and that she would not have been aware whether there would have been others in the service with the need for reasonable adjustments. Catherine Walsh was waiting for the claimant to complete an expression of interest form if she was interested. The claimant did not submit an expression of interest form or contact Catherine Walsh further about interest in this role.

125. We conclude that there are not facts from which we could conclude that this was an act of direct disability discrimination. The claimant has no actual comparator. There is no direct evidence that the claimant was treated less favourably by Catherine Walsh than anyone without the claimant's disability whose relevant circumstances were not materially different would have been or that the way Catherine Walsh behaved was because of disability. We do not consider that there are facts from which we could draw an inference of discrimination. Catherine Walsh has arguably misunderstood the "Equality Act moves" part of the first respondent's selection procedure, if she was aware of it, in considering that the claimant needed to complete an expression of interests form before she could be considered. If she did, Mr Royle shared the same misunderstanding. It appears to us that the policy required the person responsible for advertising the vacancy to consider possible reasonable adjustment moves before the position was advertised. Catherine Walsh was not involved in the decision to advertise the post. She spoke as she did to the claimant because she felt it important to give the claimant an opportunity to say whether she wished to be considered for the Business Support role and that she would not have been aware whether there would have been others in the service with the need for reasonable adjustments. Since the claimant expressed no interest in the role after the discussion on 13 March 2015, Catherine Walsh took no action to investigate whether the role might be suitable for the claimant. We do not consider that Catherine Walsh's possible misunderstanding of the first respondent's policy is sufficient basis for drawing an inference that the reason for speaking as she did to the claimant may have been because of disability. We do not consider that any other facts found provide a basis for drawing an inference of discrimination.

126. We conclude, therefore, that the burden does not pass to the respondent to satisfy us that the reason for the treatment was not unlawful discrimination. If it had done, we would have found that the reason Catherine Walsh told the claimant what she did was because she genuinely believed that the claimant needed to complete an expression of interest for the post before she could take this any further. We would have been satisfied that this was not because the claimant was disabled. The complaint is not well founded on its merits.

127. We have to consider whether the complaint was part of an act of discrimination that continued up to 21 December 2015 and, if not, whether it would be just and equitable to disapply the primary limitation period. If the complaint was presented out of time and we do not consider it would be just and equitable to extend time, then we have no jurisdiction to consider this complaint.

128. This was an event which occurred in March 2015. The complaint in relation to this matter was only presented in time if it formed part of a continuing act of discrimination. After reaching our conclusions in relation to the other complaints which we record below, we returned to the question of whether this act formed part of a continuing act of discrimination. We concluded that it does not. The acts complained of which were presented in time involved different people and were of a different nature. For reasons we explain, we conclude that none of the complaints are well founded on their merits. This complaint cannot, therefore, form part of a continuing act of discrimination. The complaint was, therefore, presented considerably outside the normal time period. No extension of time because of early conciliation applies since notification to ACAS was after the primary time limit in relation to this complaint had expired.

129. We turn then to the question of whether it would be just and equitable to extend time in all the circumstances. The claimant explained her failure to present this and other complaints earlier because she wished to follow internal processes because of the state of her health and because of bad advice she said she received.

130. In relation to the argument about internal processes, we note that, although there was some reference to the Business Support vacancy in the claimant's grievance, the grievance did not specifically identify Catherine Walsh’s treatment of her in relation to this vacancy as the subject of a complaint. The Business Support vacancy was referred to at the same time as the SPS vacancy, which the claimant said to the tribunal that she would not have been interested in. The written grievance did not identify this matter expressly or by implication as a complaint of direct discrimination and the claimant did not, in her interview with Lesley McCarthy during the grievance investigation, identify this complaint. We conclude, therefore, that the claimant was not going through any internal process in relation to this complaint.

131. We have no medical evidence that the claimant was not fit to put in her claim within the relevant time period. We note that, at this time, the claimant was able to submit a lengthy internal grievance, albeit not including this complaint. The claimant returned to work on 13 April 2015 and remained at work during the remainder of the relevant time period. We note, therefore, that she was fit to work during most of the time period during which a claim should have been presented to the tribunal.

132. In relation to the argument about bad advice, there was no evidence that bad advice from anyone prevented the claimant from putting in her claim in time. The claimant referred to advice from a solicitor, but that was only obtained shortly before she presented her claim. We note that the claimant had assistance available from her trade union throughout the relevant period. The claim was presented nearly a year after the normal time limit had expired. We note that, as at 9th December 2015, in her email to Mr Royle and Samantha Craig, the claimant makes a reference to further legal action that she may wish to pursue. She clearly had legal proceedings in mind at that time but still did not present her complaint until 22nd March 2016. In all the circumstances, the claimant has not persuaded us it would be just and equitable to extend time. We, therefore, have no jurisdiction to consider this complaint although, for the reasons we have given, had the complaint been presented in time, we would have found that the complaint failed on its merits.

Failure to make reasonable adjustments

133. The claimant also complains of a failure to make a reasonable adjustment, the reasonable adjustment sought being to give her the Business Support role. In the claimant's schedule of complaints, she identifies the complaint as being one relating to 13 March 2015 and relating to being told that she could not have the Business Support role. The relevant provision, criterion or practice (PCP) was identified by the claimant in her solicitor's letter of 5 March 2017 as being a requirement that the claimant take incoming telephone calls.

134. The claimant was not required to take calls from early February 2015 onwards so the PCP as defined by the claimant i.e. a requirement *for the claimant* (our emphasis) to take incoming telephone calls, could not have placed the claimant at a substantial disadvantage from March 2015 until June 2015 in comparison to someone without her disability. If we are constrained to take the PCP exactly as defined by the claimant, the complaint would fail on the merits for this reason.

135. However, we conclude that we should consider the position if the PCP is a requirement to take incoming telephone calls rather than specifically a requirement that *the claimant* take incoming calls. The respondent's submissions appear to take this approach by referring to the PCP as "the requirement to take incoming phone calls". Applying the approach taken in *Roberts v North West Ambulance Service EAT 0085/11*, that PCP could be regarded as putting the claimant at a substantial disadvantage despite the fact that an exemption for the claimant was allowed from early February 2015 onwards. The respondent has accepted that the PCP, if applied, would put the claimant at a substantial disadvantage because such calls tended to provoke significant anxiety due to a sense of lack of control. We agree with the respondent's reasons for accepting this. We also conclude that the requirement being applied to others in the team and being told that she may be required to take calls in future meant the claimant was put at a substantial disadvantage by the PCP because this increased the claimant's anxiety. Taking this approach to the PCP, we conclude that the duty to make reasonable adjustments was triggered.

136. The respondent did make adjustments of temporarily taking the claimant off calls and moving her desk. However, we note that the claimant remained anxious

because she was told specifically that no guarantees were given as to the future. The claimant has identified only the offer of the Business Support role as being a reasonable adjustment in respect of the PCP. The occupational health report of 1 April 2015 recorded about the claimant: "She reports long standing particular difficulties associated with incoming calls. These tend to provoke significant anxiety which appears to be due to a sense of lack of control." The claimant accepted in evidence that, as part of her condition, she has an overwhelming need for order, organisation and routine and any job needs to accommodate this. The claimant recorded in the reasonable adjustments passport that, because of her condition, she found it extremely difficult to deal with change and uncertainty and needed structure, routine and order and felt out of control and severely anxious if she was required to deviate from those routines and regular changes to her duties, especially many changes within the same day, affected her anxiety. Given what the occupational health reports recorded about the claimant's condition, what the claimant accepted in cross examination about what she needed to be able to manage her condition and what was written in the reasonable adjustments passport, and the nature of the Business Support role, we conclude that the business support role would not have been a suitable role for the claimant. The Business Support role involves incoming calls. These would not have been of the same nature as claimant calls so, if that had been the only difficulty with the Business Support role then there might have been a prospect that the claimant could have done that job. However, given that the Business Support role also required working under pressure and being flexible, we conclude that there was no real prospect that working in such a role would alleviate the disadvantage to the claimant. We do not consider there would have been any adjustment which could reasonably have been made to the role to make it suitable for the claimant. It was a small team of people in Business Support, who needed to be able to adapt, on short notice, to the changes of tasks required. The complaint of failure to make reasonable adjustments would fail on its merits.

137. However, we also conclude that we do not have jurisdiction to deal with this complaint since it was presented out of time and it would not be just and equitable to consider it out of time. The complaint related to a state of affairs which continued until the end of May 2015. For the same reasons given as in relation to the complaint of direct discrimination, we conclude that it did not form part of a continuing act of discrimination. The complaint was presented considerably out of time. For the same reasons as given in relation to the complaint of direct discrimination, we are not persuaded that it would not be just and equitable in all the circumstances to extend time.

Email 5th August 2015

138. The claimant complains of victimisation in relation to this email. The claimant complains that Mr Royle, by the terms of his email dated 5 August 2015, subjected her to a detriment and that he did so because she had done a protected act.

139. The claimant relies on her grievance dated 27 July 2015 as the protected act. This grievance included allegations of disability discrimination. The respondent accepts, and we conclude, that the claimant did a protected act by submitting this grievance.

140. Mr Royle wrote in his email: "in my experience it is not usual for individual managers to reply to these questionnaires as your complaint is against the Department rather than the individuals themselves who act on behalf of the Department. I am currently taking HR advice on whether I investigate your grievance given that it is out of time and if so, who I ask to conduct the investigation. I will let you know by the end of this week my decision. I will also take advice on the response to the DL56. You have made some potentially serious allegations and I need to consider carefully how we proceed". The evidence does not suggest that the claimant was upset by the email at the time. The claimant did not make any complaint about Mr Royle's email at the time. We note also that when the claimant wrote in her witness statement about the meeting with Mr Royle on 21st December 2015, she wrote that she decided to continue the meeting "based on the fact that all my contact via email with Mr Royle had been as expected and he had been very accommodating and responsive throughout up to this point". The claimant does not explain in her witness statement why she considers this email subjected her to a detriment. We see nothing untoward in Mr Royle's email. Even if the claimant was upset by the email, we conclude that she cannot reasonably be said to have been put at a disadvantage by that email. An unjustified sense of grievance cannot amount to detriment. We conclude that the claimant was not subjected to a detriment by Mr Royle's email. We also conclude that Mr Royle did not write as he did because of the claimant having presented her grievance; her grievance provided part of the context of Mr Royle writing the email but he did not write as he did because she had done a protected act. The complaint would therefore fail on its merits.

141. We also conclude that we do not have jurisdiction to consider the complaint because it was presented out of time. This does not form part of any continuing act of discrimination. It could potentially have formed part of a continuing act if later acts by Mr Royle were found to be acts of discrimination. However, we do not, for the reasons given below, find the complaints about later matters to be well founded. We are not persuaded that it would be just and equitable to extend time. This matter was not raised in any internal proceedings, there is no medical evidence that the claimant could not have presented the claim in time and no evidence that bad advice led to a delay in bringing the complaint.

<u>Meeting on 21st December 2015</u>

Harassment

142. This complaint relates to the conduct of Mr Royle at the meeting of 21 December 2015.

143. We found that Mr Royle was calm throughout the interview. We found that Mr Royle told the claimant that he had thirteen years experience as a decision maker. Mr Royle did not accept that he used the phrase to the claimant that she had no right to say whether a line manager was inexperienced or not but accepted that this was something they touched on. He asked the claimant whether she had read the outcome letter. He said to her "Clare, you need to calm down. I need to remind you that I am your manager". Mr Royle accepted in the subsequent investigation interview that he might have said "what has SF's promotion got to do with you".

144. We found that the claimant found Mr Royle hostile and humiliating and she was upset by the meeting.

145. We conclude that some of the things Mr Royle said e.g. have you read the letter, constituted unwanted conduct. We conclude that Mr Royle did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. However, we conclude that Mr Royle's conduct did have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The claimant perceived Mr Royle to be hostile and humiliating. The circumstances of the case include that the claimant had a known medical condition, she was anxious and upset in the meeting, there was a considerable difference in the status within the organisation between Mr Royle and the claimant and the claimant was not used to Mr Royle, given they had had no previous dealings. In these circumstances, we conclude that it was reasonable for Mr Royle's conduct to have the requisite effect.

146. We conclude, however, that the conduct was not related to disability. The evidence of Mr Gibson in the investigation was that this was Mr Royle being Mr Royle, suggesting that Mr Royle behaved in the same way to everyone. There is no direct evidence that Mr Royle's behaviour related to disability. There are no matters from which we are able to draw inferences that Mr Royle's conduct related to disability. The complaint is, therefore, not well founded.

Victimisation

147. The claimant also complains that Mr Royle's conduct in the meeting on 21 December 2015 was an act of victimisation.

148. As recorded in relation to the complaint of victimisation relating to Mr Royle's email of 5 August 2015, the respondent concedes, and we conclude, that the claimant did a protected act by submitting her grievance dated 27 July 2015.

149. We conclude that the claimant was subjected to a detriment by reason of Mr Royle's comments in the meeting. Mr Royle could have been more sensitive to someone who is vulnerable in his choice of words. The claimant sense of grievance about his behaviour was not wholly unjustified. However, there is no direct evidence that Mr Royle behaved in that way because the claimant had put in a grievance nor are there any facts from which we can draw an inference that he behaved in that way because the claimant had done a protected act. Indeed, the evidence in the form of Mr Gibson's evidence in the investigation points to Mr Royle behaving in the same way he would to anyone i.e. whether they had brought a grievance or not. The grievance formed part of the context for Mr Royle's behaviour but there is no evidence that it formed any part of the conscious or unconscious motivation for it. We conclude, therefore, that the complaint is not well founded.

<u>Special Leave</u>

150. The claimant complains of direct disability discrimination in relation to the refusal of special leave in January 2016. There are no facts from which we could conclude that the claimant was subjected to direct disability discrimination by being

refused special leave. There is no direct evidence from which we could conclude that the claimant was treated less favourably than others without the claimant's disability, whose relevant circumstances were not materially different, had been or would have been treated. The claimant has relied on no actual comparators. There is no direct evidence or matters from which we could draw inferences that a hypothetical comparator, without the claimant's disability, would have been granted special leave in comparable circumstances. The examples in the special leave policy, whilst not an exhaustive list, do not deal with the type of situation in which the claimant was requesting special leave. The burden has not, therefore, passed to the respondent. However, if it had done so, we would have concluded that the respondent had shown that the reason for refusing special leave was because Ms Hill and Mr Bembridge considered that the request did not fall within the scope of the respondent's policy and that this was a non discriminatory reason. We, therefore, conclude that this complaint is not well founded.

Employment Judge Slater

27 March 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 March 2017

FOR THE SECRETARY OF THE TRIBUNALS