Case Numbers: 2208496/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms S Gupta		**Legal & General Investment Management (Holdings) Ltd**

REASONS FOR THE RESERVED JUDGMENT SENT TO THE PARTIES ON 24 JULY 2017

Introduction

1 The Respondents are a wholly-owned subsidiary of Legal & General Group Plc, a multinational financial services company with headquarters in London.

2 The Claimant, Ms Sangeeta Gupta, who is some 38 years of age, describes herself as of Indian origin and identifies her relevant racial characteristics as her colour and her country of origin. She also contends that she is and was at all material times disabled by depression. She was continuously employed by the Respondents from 5 January 2015 until 25 November 2016 as a Grade 3 Fund Manager's Assistant within the Portfolio Management Group ('PMG'). The employment ended with dismissal on notice, on the stated ground of 'some other substantial reason', namely her refusal to engage in mediation and return to her substantive role in circumstances where it had not been possible to identify suitable alternative employment for her.

3 By her claim form presented on 30 November 2016 the Claimant brought complaints of 'automatically' unfair dismissal on public interest disclosure ('PID') grounds or for asserting a statutory right, direct race and sex discrimination, disability discrimination in various forms, victimisation, and an unparticularised money claim.[1] For the purposes of the discrimination and victimisation claims, a second Respondent, Ms Sarah Renshaw, was named. In the response form all claims were resisted on their merits and some were met with the further, jurisdictional defence that they had been brought out of time.

4 At a preliminary hearing for case management before Employment Judge Goodman on 6 March this year the Claimant withdrew her claim against Ms Renshaw, applied successfully to amend her case to add a complaint of direct discrimination because of race and/or sex based on the dismissal (strictly, against

[1] The particulars of claim have confusing paragraph numbering. For example, para 11.11 is followed by para 1.12. If one ignores the first number, it makes perfect sense. Accordingly I will refer to *eg* paras 1.37 and 4.40 simply as paras 37 and 40.

the rejection of her appeal against dismissal) and to put pleaded allegations of discrimination and victimisation in the alternative as harassment, withdrew the PID claim and explained that the unfair dismissal claim rested on the Employment Rights Act 1996 ('the 1996 Act'), s104 (dismissal for asserting a statutory right), the right asserted being the right not to suffer discrimination, and clarified the money claim as one under the 1996 Act, Part II (unauthorised deductions from wages), and/or the contractual jurisdiction, for payment of a bonus. In a document sent to the parties on 8 March the judge set out the issues for decision at the final hearing. It is not necessary to recite them in full, but it may be useful to reproduce the following list of the acts or omissions relied upon as instances of harassment and/or detriments:

> **10.1.1 Refusal of time off for Diwali October 2015**
> **10.1.2 Refusal of time off for anniversary of father's death October 2015**
> **10.1.3 Criticism on 28.1.16 …**
> **10.1.4 Shouting on 4.3.16 …**
> **10.1.5 Low bonus 9.3.16 …**
> **10.1.6 Low mark on appraisal …**
> **10.1.7 Putting her on a PIP 16.3.16 …**
> **10.1.8 Compiling an error log …**
> **10.1.9 Remarks about time off for Diwali and bereavement 6.4.16 …**
> **10.1.10 Suggestions she was exaggerating her concern because unwell 6.4.16 …**
> **10.1.11 Overloading her with work January 2016**
> **10.1.12 Insisting she work late in January and February 2016**
> **10.1.13 Failing to investigate a complaint of race discrimination …**
> **10.1.14 Insisting she engage in mediation following her grievance**
> **10.1.15 Insisting she attend meetings about redeployment**

The list was designed to run chronologically, but some items are in fact out of sequence, as we will explain in our narrative below. We will refer to these complaints by their final numbers (1-15)

5 The matter came before us on 17 May this year, with five days allocated. The Claimant appeared in person and the Respondents by Mr Saul Margo, counsel. We reserved judgment on day four and completed our deliberations in private on day five, but there was not sufficient time to dictate the reasons and accordingly further time was made available to the Employment Judge on 10 July for that purpose.

The Legal Framework

The unfair dismissal claim

6 By the 1996 Act, s104, it is stipulated (so far as material) that:

> **(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) is that the employee –**
> **(a) [n/a] or**
> **(b) alleged that the employer had infringed a right of his which is a relevant statutory right.**
>
> **…**

> **(4) The following are relevant statutory rights for the purposes of this section –**
> **(a) any right conferred by this Act …**
> **(b) [n/a]**
> **(c) [n/a]**
> **(d) [n/a]**
> **(e) [n/a].**

The Equality Act claims

7 The Equality Act 2010 ('the 2010 Act') protects persons who are 'employed' (as defined) from discrimination and other forms of unlawful treatment on grounds of, of related to certain 'protected characteristics' These include disability, race and sex. By s6 it is provided (so far as material) as follows:

> **(1) A person (P) has a disability if –**
>
> **(a) P has a physical or mental impairment, and**
> **(b) the impairment has a substantial and long-term adverse affect on P's ability to carry out normal day-to-day activities.**

'Substantial' means more than minor or trivial (s212(1)). Sch 1, ara 2 states:

> **(1) The effect of an impairment is long-term if –**
>
> **(a) it has lasted for at least 12 months,**
> **(b) it is likely to last for at least 12 months, or**
> **(c) it is likely to last for the rest of the life of the person affected.**
>
> **(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.**

8 By the 2010 Act, s13, direct discrimination is defined thus:

> **(1) 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.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

9 The protection from discrimination arising from disability is defined by the 2010 Act, s15 in these terms:

> **(1) A person (A) discriminates against a disabled person (B) if –**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

10 The failure to make reasonable adjustments claim is based on the 2010 Act, s20, the material part of which is in these terms:

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

A 'relevant matter' includes employment by A (sch 8, para 5(1)). A failure to comply with a duty to make reasonable adjustments is a form of discrimination (s21(2)). It is for the disabled person to make out a duty to make adjustments. That involves two things. First, he must identify the relevant provision, criterion or practice ('PCP'). Second, he must demonstrate substantial disadvantage. If a duty is shown, the Tribunal must then consider the third element of the test, namely whether any step (*ie* adjustment) contended for would have been reasonable.

11 By sch 8, para 20(1) a defence is provided to an employer who "does not know and could not reasonably be expected to know … that an interested disabled person has a disability and is likely to be placed at the [relevant] disadvantage" .

12 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(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.**
>
> **…**
>
> **(3) In deciding whether conduct has the effect referred to in sub-section (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.**
>
> **(4) The relevant protected characteristics are –**
> **…**
> **disability …**

13 In *R (Equal Opportunities Commission)-v-Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording (in the Sex Discrimination Act 1975) did not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection was sufficient. Burton J did not doubt or question the concession. To similar effect, the EHRC Code of Practice on Employment (2011), which does not claim to be an authoritative statement of the law (see para 1.13), deals with the 'related to' link at paras 7.9 to 7.11. It states

that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.

14 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are, we think, ensured by the other elements of the statutory definition. Two points in particular can be made. First, the claimant must show that the conduct was unwanted. Secondly, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit entailing one subjective factor, the perception of the complainant (s26(4)(a)). Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

15 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry-v-Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

16 By the 2010 Act, s27, victimisation is defined thus:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because –**
>
> **(a) B does a protected act …**
>
> **(2) Each of the following is a protected act –**
>
> **…**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

17 Employees are protected against discrimination, harassment and victimisation by the 2010 Act, ss 39(2), 40(1) and 39(4) respectively. The s39 provisions protect employees from discriminatory treatment, *inter alia*, in the form of being subjected to 'detriments'. In the employment law context, a detriment arises where, by reason of the act(s) complained of, a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment (see *eg Shamoon-v-Chief Constable of the RUC* [2003] IRLR 285 HL).

18 The 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(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.**

19 On the reversal of the burden of proof we bear in mind the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd-v-Wong* [2005] IRLR 258 CA, *Madarassy-v-Nomura International plc* [2007] IRLR 246 CA and *Hewage-v-Grampian Health Board* [2012] IRLR 870 SC. In the last of these Lord Hope warned that the significance of the burden of proof provisions could be overstated. But in so far as the burden of proof is a material consideration, we take as our principal guide the straightforward language of s136. Where there are facts capable, in the absence of any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. In deciding whether the burden is transferred, all relevant material, other than the employer's explanation relied upon at the hearing, must be considered. We remind ourselves that s136 is designed to confront the inherent difficulty of proving discrimination and must be given a purposive interpretation.

20 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. 'Conduct extending over a period' is to be treated as done at the end of the period (s123(3)(a)). Failure to do something is treated as occurring when the person in question decides not to do it (s123(3)(b)). Absent evidence to the contrary, a person is treated as deciding not to do a thing when he does an act inconsistent with it or, if he does no inconsistent act, on the expiry of the period within which he might reasonably be expected to do the thing (s123(4)). The 'just and equitable' discretion is to be used with restraint: its exercise is the exception, not the rule (see *Robertson-v-Bexley Community Centre* [2003] IRLR 434 CA).

Oral Evidence and Documents

21 We heard oral evidence from the Claimant and her supporting witness, Mr Andrew Kennedy, a former employee of the Respondents, and, on behalf of the Respondents, Mr Kevin Chessum, Associate Director, Multi Asset Funds, Ms Sarah Renshaw, a Manager in the PMG and at all relevant times the Claimant's line manager, Mr Dylan Hughes, Head of Investment Process & Implementation, Ms Liewen Chan, Head of Portfolio Management & Manager Oversight, Mr Richard Field, Senior Project Manager, Mrs Samina Vernon, Head of Transitions & PMO, Ms Kelly Spiteri, Head of Trade & Asset Services and Mr Mario Alphonso, HR Consultant. All gave evidence by means of witness statements.

22 In addition to witness evidence we read the documents to which we were referred in the two-volume bundle of over 600 pages.

23 Further documents were handed up separately. These included the Claimant's closing submissions and Mr Margo's opening note and closing submissions.

The Facts

24 The evidence was detailed and extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision, either agreed or proved on a balance of probabilities, we set out below.

Setting the scene

25 The PMG exists to support fund managers in relation to the formulation of investment strategy and the execution of transactions. It sits within the Transitions & PMO Team. We were told without challenge that that team numbers 21 and is diverse, containing members with a range of racial backgrounds including three of Asian descent. Eight are women.

Medical matters

26 In her claim form, para 37, the Claimant states that she was "under a psychological condition" from March 2016 until her dismissal and that the Respondents knew about it because she was off sick during that time.

27 She also pleaded (para 40):

> **I have real difficulty concentrating, retaining information, anxiety leaving the house for essentials such as food shopping or attending medical appointments or doing laundry and cleaning at home etc. A drastic change from last year when I got in at work by 7.30 a.m. and left at 6-6.30 p.m.**

28 These assertions were not easy to reconcile with the way in which the Claimant presented before us. She was lucid, articulate and wholly in command of the detail of the case. In her oral evidence she acknowledged that point, claiming that the symptoms referred to in the claim form had substantially abated by about December 2016 or January this year.

29 It was common ground that the Claimant had no history of any form of mental health problem prior to the events with which this case is concerned. Her evidence (witness statement, para 130) was that she was diagnosed with depression in December 2015. This is not, however, borne out by the contemporary records. In a letter of 7 March 2016 her GP referred to "stress at work" and said nothing about depression. Sick certificates are consistent with this, referring to "work-related stress" or "work-related stress and anxiety". In striking contrast with all the other GP evidence is a letter of 20 March 2017 (almost four months after the proceedings were issued), in which it was said that the Claimant had, on an unspecified date, been diagnosed with depression. The letter also included the assertion that her condition had deteriorated as time went by, which

was in direct conflict with her evidence (just mentioned) that she had seen a substantial improvement since the end of 2016 or the very beginning of 2017.

30 In an occupational health ('OH') report of 21 April 2016 the Claimant was described as experiencing "disturbed sleep, tearfulness and anxiety in relation to work activities". It noted that she had been prescribed "mood-stabilising" medication and stated that she was not suffering from any long-term condition.

31 A further OH report, dated 30 August 2016, is consistent with the first. It refers to the Claimant's "embitterment" towards her employer and to a "loss of confidence" and includes these further remarks:

> **This is very much a work related issue and I would ask you not to look at it as a medical issue despite the medical implications that are involved … she is able to make rational decisions, she is able to take on responsibilities and she is able to organise … both at home and at work …**

32 Both OH reports were shown to the Claimant at the time and she raised no challenge to the content of either.

33 The Claimant does not rely on any specialist (*eg* psychiatric) evidence.

Refusal of time off/insensitive remarks – complaints 1, 2 and 9

34 As to the last of these complaints, the parties were agreed that the material events occurred in November 2015, not April 2016 as recorded in the case management document.

35 In 2015 the festival of Diwali was from 11 to 15 November.

36 On 20 October 2015 the Claimant asked Ms Renshaw for permission to take leave from 24-27 November and 21-24 December. The earlier period was granted at once and the December days approved on 23 October. That left the Claimant with only a half day remaining of her annual leave entitlement for 2015.

37 Contrary to the Claimant's evidence, we are satisfied that she made no request to take annual leave over the 2015 Diwali festival period.

38 Early in November 2015 the Claimant told Ms Renshaw that she wished to take compassionate leave for a few days over Diwali. Either then or around that time she gave Ms Renshaw to understand that her request was because of the grief which she continued to feel as a result of the death of her father on 3 November 2013, which had coincided with Diwali. Ms Renshaw discussed the Claimant's request with senior colleagues and accepted the advice of Mr John Roe, Head of Multi-Asset Funds, that the Respondents' compassionate leave policy did not cover absences of the sort requested. She then reverted to the Claimant and advised her that she could take the time off as sick leave. It was in that conversation that she made an unfortunate reference to "mental health". The remark upset and offended the Claimant and she immediately withdrew it and apologised. In the same conversation Ms Renshaw commented that it might have been better (for the Claimant) if she had not become aware of the date(s) on which Diwali fell that year. This was a reference to the association between Diwali dates

and the anniversary of her father's death. We reject the Claimant's allegation that Ms Renshaw made a further unkind remark to the effect that she ought to have got over the loss of her father by then.

39 The Claimant attended work on 3 November 2015. She took some days (probably two or three) over the Diwali festival, which were recorded as sickness absence.

40 It was not in dispute for us that Ms Renshaw supported the Claimant's efforts to deal with her grief by approving her early departure from work to attend counselling sessions. She also sent her some information about a bereavement charity - a gesture which the Claimant gratefully acknowledged.

Low mark on appraisal – complaint 6

41 Ms Renshaw conducted the Claimant's end of year appraisal for 2015. She awarded her an overall 'Successful' marking and included a number of very favourable remarks but assessed her as 'Under Performance' in one area, 'New Business'. She had been trained by a senior employee in what was referred to before us as the 'New Business task' but had not executed it successfully. At that point Mr Chessum took the decision that such work should not be allocated to her in future. She was made aware of that decision but not the reasons for it. Witnesses for the Respondents acknowledged in evidence that she ought to have been given the reasons.

Bonus – complaint 5

42 Under the Respondents' bonus scheme, guidance ranges are circulated to the relevant managers but they are at liberty to make awards outside the ranges offered. For the bonus year 2015 the guidance range for a 'Successful' performer was 10 to 17% of salary. Mr Chessum was the manager with responsibility for the Claimant's bonus. He decided upon a figure of £3,500, representing 7.4% of salary. He told us that his election to make an award below the bottom of the range was based on the fact that her work load completion had been "slimmer" than that of her peers. He discussed the matter with two senior managers who shared his view.

43 Mr Chessum told us that he took account of the fact that the Claimant had spent less time at work than some of her colleagues because of the course of (early evening) counselling sessions which she had attended (see above). Nonetheless, he judged that, even if due allowance was made for that factor, her productivity remained a negative consideration which needed to find expression in the selection of the bonus award.

44 The Claimant complained that Mr Carl Pudney, a white male colleague, received a bonus of £11,000. He did. His performance was rated "Great Performance" for 2015 and the two preceding years. In his case, Mr Chessum selected a figure at the top of the indicative range.

Criticism on 28 January 2016 – complaint 3

45 At a meeting on 28 January 2016, Ms Renshaw drew the Claimant's attention to a number of errors which she had made recently. The gist of what was said was captured in an email from Ms Renshaw to the Claimant sent the following day, in which she recorded that she had counted seven mistakes and that four had been specifically discussed. She remarked that the errors were "unusual" and that the Claimant was normally accurate in her work. She also noted the Claimant's reference to her workload and the discussion which had taken place on that subject, in which she had offered some advice on dealing with the competing demands of her job.

Overloading – complaints 11 and 12

46 The nearest the claim form comes to this allegation is the reference in the particulars of claim, para 6.6 to "low staffing". It seems that there was a gap in the team in January and part of February 2016, until a new recruit, Mr John-Paul Crummie, arrived. We accept that, with numbers depleted, team members including the Claimant may have felt a degree of added pressure. We do not accept that she was ever instructed to work late. We do accept that on some occasions she chose to do so.

The error log – complaint 8

47 In February 2016 Ms Renshaw started to compile a log of errors made by the Claimant in the performance of duties. The document shown to us recorded 19 mistakes between 15 January and 3 March. A much shorter list noted 4 errors by Mr Pudney between 8 March and 1 April 2016. These lists were not exhaustive: at least one error was omitted from each.

48 The Claimant's case on the error log was not entirely consistent. In part she seemed to complain that Ms Renshaw's criticisms were petty or otherwise unfair; in part she relied on her mistakes as tending to point to a decline in her mental health.

Shouting – complaint 4

49 This complaint arises out of a meeting between the Claimant and Ms Renshaw on 4 March 2016. It followed a tense exchange of emails initiated by Ms Renshaw. She was concerned that the Claimant had intervened in a matter (to do with hedging) on which Mr Crummie was being trained and had sent an email which appeared to undermine him. We accept Ms Renshaw's contemporary note of the meeting as capturing the gist of what was said. She recalled that she told the Claimant that she was sure that she had not intended to undermine Mr Crummie but that her action had had that effect. The Claimant responded that Ms Renshaw was jumping to conclusions which were unwarranted. Ms Renshaw mentioned in evidence that she had apologised to the Claimant for sending her an email (as opposed to simply speaking to her) but that in hindsight she doubted if the apology had been appropriate. Her note ended by expressing her view that her relationship with the Claimant had completely broken down.

50 We find that this was an uncomfortable encounter on both sides. We do not accept that Ms Renshaw shouted at the Claimant.

The informal performance improvement plan ('PIP') – complaint 7

51 It is common ground that, at a meeting on 16 March 2016 attended by the Claimant, Mr Hughes and Ms Renshaw, the Claimant was placed on an informal PIP. This action was taken after consultation with HR. It was pointed out that some aspects of her performance were very good and that the purpose of the PIP was to assist her to improve in those areas in which she was working at a level below that required. Three particular matters were identified: accuracy, productivity and team focus. An 'action plan' document was handed to her, summarising the improvements required, advising that there would be weekly meetings to gauge progress culminating in a final review in April, and warning that failure to achieve the required improvements might make it necessary to "review" her contract of employment.

52 The first and, as it turned out, only review meeting took place on 24 March 2016. Ms Renshaw was away and the meeting was conducted by Mr Hughes only. It seems that there was some discussion of the things that the Claimant was doing well and of the areas in which improvement continued to be required. The Claimant complained that her relationship with Ms Renshaw was making her ill and said that she wished to move to another role. Later that day she issued a grievance. She was off sick with effect from the following day and never returned to work.

53 There was nothing unique about the treatment applied to the Claimant. Ms Renshaw told us without challenge that she had placed two white male employees on informal PIPs.

The "exaggeration" allegation - complaint 10

54 EJ Goodman's interpretation of this part of the Claimant's case is noted above. It does not correspond wholly with the pleading in the particulars of claim para 11.11 c, which seems to accuse Mr Hughes and Mr Chessum (perhaps on 6 April, perhaps on 23 March) of unfairly questioning her mental health as a device to "protect and justify" Ms Renshaw's alleged comments about the loss of her father. We are bound to say that, having got to the end of the case, we are quite unclear about this complaint. It was not put to any of the witnesses called on behalf of the Respondents. Nor did it feature in the Claimant's closing submissions. No material admission was made. In the circumstances, we cannot find that any objectionable comment concerning the Claimant's health was made, by Mr Hughes or Mr Chessum, on the dates mentioned or on any other date.

Failure to investigate the discrimination allegation – complaint 13

55 As we have stated, the Claimant issued a grievance 24 March 2016. It included references to a number of the events on which she bases claims in these proceedings. It did not refer to discrimination but did mention the concepts of a detriment and detrimental treatment.

56 The grievance was assigned to Ms Chan. She invited the Claimant to a meeting at which it was explored. That took place on 6 April 2016. Thereafter, she conducted an investigation involving interviews of Mr Kennedy, Ms Renshaw, Mrs Vernon, Mr Hughes, Mr Chessum and Ms Renata Mehmi of HR.

57 On 3 May 2016, Ms Chan wrote to the Claimant to inform her that the grievance had not been upheld. She found that the Claimant had received adequate training. She rejected allegations of insensitive treatment by senior management, pointing out the support which had been offered to help her to deal with the grief resulting from the loss of her father. She concluded that placing the Claimant on a PIP had been an appropriate step to take in the circumstances. And she judged that, while Ms Renshaw may have had a "direct" and "matter-of-fact" management style, the evidence did not substantiate the suggestion that she had singled her out for adverse treatment.

58 The Claimant appealed against Ms Chan's decision, taking numerous points and raising allegations of unlawful discrimination. In a letter of 8 August, Mr Field upheld the appeal to a significant extent. He made a number of criticisms of Ms Renshaw, although he also found that the Claimant had contributed to the breakdown in the relationship between the two. He was also critical of Ms Chan's investigation, judging that it could have been more thorough. On the other hand, he found no substance in the Claimant's complaints of bullying and discrimination. He recommended the removal of the 'Under Performance' rating, review of the bonus award, revocation of the PIP, institution of (unspecified) support mechanisms for staff, and mediation to repair the relationship between the Claimant and Ms Renshaw, pending which, it was suggested, the Clamant should report to a new line manager. The Claimant made no allegation before us of discrimination against Mr Field and raised no material challenge to the part which he played in the story.

Insisting on mediation/redeployment meetings – complaints 14 & 15

59 In the report of 30 August 2016 (to which we have referred above), the OH practitioner, Dr Sajid Khan, included these remarks:

> **It is worth noting that the degree of embitterment is so strong that [the Claimant] cannot see herself returning to work, particularly within the same environment and with the same colleagues/management.**
>
> **…**
>
> **On one level one could argue that her impairment is not a medical one … But, at the same time, if you were to offer her the options of mediation and/or returning to work (which you have done) then she will continue to refuse those options and will not see herself being able to cope either now or in the longer term.**
>
> **Ultimately then, if you are looking at a practical way of bringing her back to work you may need to explore having her work in a different team or even a different location.**

60 By a letter of 14 September Mr Hughes invited the Claimant to a meeting on 30 September to discuss the OH report and her employment. The letter included this:

> **Our preference is that you return to your current role of Fund Manager's Assistant and we are very much prepared to engage in the mediation process and to offer appropriate support for your return to the office and to your team. However, the Occupational Health report clearly indicates that you may not be prepared to engage in mediation or to return to your current role and team. The report also suggests that you may be interested in working in a different team or even a different location. We are of course willing to explore this option and remind you that, as an L&G employee, you are free to apply for any vacancies within the company. We can register you on the redeployment site on your behalf and we will need to provide your personal email address to the resourcing team to give you access to the redeployment site externally. Please confirm if you wish me to proceed with this in advance of the meeting. In the meantime, I enclose our current vacancies list for your information.**

61 The meeting was postponed at the Claimant's request and accordingly, on 30 September, a fresh letter was sent to her inviting her to a meeting on 14 October. Much of the content of the letter of 14 September was repeated. In addition, she was advised that she had a right to be accompanied at the meeting and that a note-taker would be present.

62 Mr Alphonso sent an email to the Claimant on 13 October asking her to confirm that she would be attending the meeting scheduled for the following day. The Claimant's reply included this:

> **Based on Dr Khan's findings and recommendations, are you giving me another role within the firm and asking me to come [to] meet my new manager tomorrow … because it is easily possible to redeploy me into another role within a different … business unit. Therefore this matter can then be resolved amicably otherwise what is the benefit of coming to the meeting? It is a complete waste of your, mine and everyone's involved precious time.**

63 Despite Mr Alphonso's reply, in which he was at pains to explain that any question of redeployment would need to be discussed, as would the availability (or not) of suitable vacancies, the Claimant did not attend the meeting on 14 October.

64 By 14 October the Claimant had taken to returning letters (at least two) sent to her by the Respondents. In a hostile email to Mr Alphonso of 17 October, she appeared to hold the Respondents responsible for failing to consider her for (unspecified) vacancies, despite the undisputed fact that she had not expressed interest in any. She also insisted that any "discussion" be by email.

65 On 18 October Mr Alphonso invited the Claimant to a further meeting to discuss the OH report and her wish for redeployment, to be held on 24 October. He pointed out that no suitable alternative role had been identified, but that she was at liberty to apply for any vacancy. He asked her to confirm her attendance or, if she did not wish to attend, to submit written representations. He also pointed out that, if she did not attend or make representations in writing, the company would proceed on the information available and that one possible outcome was dismissal.

66 On 21 October the Claimant sent a further hostile email to Mr Alphonso, complaining that her human rights were being breached and that she was being subjected to discrimination. Her message included this:

> **I will only come in if you are going to employ me in a new role. Please send me details of that role by email, and arrange a time for me to be introduced to my new manager.**

Mr Alphonso replied the same day, explaining that her email would be made available to the chairman of the meeting on 24 October. He added:

> **As I have confirmed previously, we are not able to place you in a role without you first expressing your interest in applying for it. Hence our request that you consider the current vacancy list …**

Dismissal and appeal against dismissal

The meeting went ahead on 24 October. It was chaired by Mrs Vernon (a witness before us). The Claimant did not attend or submit written representations. In a letter of the same date she set out her reasons. Echoing the remarks of Mr Hughes in his letter of 14 September about the Respondents' preference for her to return to her current role and her unwillingness to do so, she continued:

> **We have not to date been able to identify any suitable alternative employment … and we do not expect any new suitable alternative employment to become available in the near future. For these purposes, we deem 'suitable alternative employment' to be a role which is equivalent to your current role in respect of skills, aptitudes and experience, tasks to be performed, status, place of work, pay, hours and responsibility. We have, however, sent you details of redeployment opportunities (which is alternative employment which may not be 'suitable alternative employment' as above which you may, and have been encouraged to, express your interest in. … A vacancy list was attached to the email which was sent to you on 14th September. You were also given access to our internal vacancy website on 30th September 2016. We have not received any applications or expressions of interest …**
>
> **I have considered if there are any alternatives we should consider and invited you to confirm the same. Given that neither we nor you have been able to identify any such alternatives, I have concluded that there are none and it is unlikely that this position will change in the near future.**
>
> **In view of the above, my decision is to dismiss you from your employment for 'some other substantial reason', being your refusal to engage in mediation and return to your substantive role and team in circumstances where we have been unable to identify any alternatives to your dismissal. Your dismissal is with one month's notice in accordance with your contract …**

67 In a document dated 28 October the Claimant appealed against her dismissal, claiming that she had been dismissed for 'whistle-blowing' and raising wide allegations of discrimination, including the following:

> **It is indeed alarming how the firm ignores their … [OH] Advisor's recommendations and findings … plus failed to investigate and reply as to why 1) managers make offensive, harassing and unwelcoming comments 2) block me from getting a fair bonus 3) create and falsify career document (sic) called "the error log" 4) create the "error log behind my back 5) and then further block me from applying for jobs within the firm by placing me on an unattainable PIP.**
>
> **Is this firm's policy to create false career documents behind employees' backs and then block them from career progression – a strategy to discourage, discriminate, get them sick and then snatch away their livelihood? All because the management**

> **of the team does not like the color of employees' skin, religion, gender, language, national or social origin etc?**

She also made it clear that she would not attend any appeal hearing and requested communication by email only.

68 The appeal was assigned to Ms Spiteri (a witness before us). She read the key documents and held interviews with Ms Renshaw, Mr Hughes, Mrs Vernon and Mr Alphonso.

69 By a letter of 6 December 2016 Ms Spiteri dismissed the appeal. She arranged the Claimant's complaints under four headings: discrimination and management conduct in the workplace, disregard of OH recommendations, racism against employees and prevention of career progression/denial of proper remuneration. She found no substance in any of the grounds of appeal and set out detailed reasons for rejecting them all. As for the dismissal itself, she found that the reason was that the Claimant had refused to return to her role or team and it had not been possible to find alternative employment for her. The allegation of victimisation on 'whistle-blowing' grounds was rejected.

Secondary Findings and Conclusions

Unfair dismissal

70 The unfair dismissal claim is misconceived. We have set out the applicable provisions above. The protection under the 1996 Act, s104 attaches to persons who have asserted a relevant statutory right. The list of relevant statutory rights does not include those contained in the 2010 Act. Accordingly, the complaint of unfair dismissal fails and is dismissed.

Disability

71 We are satisfied that the Claimant was not at any material time disabled. The contemporary evidence (from the GP and OH practitioner), which we have reviewed above, is all the other way. Against that the Claimant relies on her own evidence, which seeks to make good her pleaded case (from which we have quoted above), and the GP's letter of 20 March 2017. We reject her evidence, which we regard as tactical and greatly exaggerated. It cannot be reconciled with the case which she advanced in the internal proceedings to the effect that her performance at work was entirely satisfactory, or with her conspicuous ability to manage the detail of both stages of the grievance and dismissal procedure. As for the GP's letter, it is, we regret to say, an unreliable document which appears to have been penned in a misguided attempt to help the Claimant in this litigation. It is in open conflict with the GP's earlier evidence and, as already noted, with the Claimant's own oral evidence before us to the effect that her condition had improved since about the end of 2016.

72 Based on our assessment of the evidence, we are clear that the Claimant's case falls (from her point of view) on the wrong side of the line drawn by Underhill

P (as he then was) in *J-v-DLA Piper UK* [2010] ICR 1052 EAT, where he observed:[2]

> **The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para. 33 (3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events".** [5] **We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para. 40 (2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived.**

In short, there was, in our judgment, no substantial adverse effect on the Claimant's ability to undertake normal day-to-day activities and there was no impairment. And even if we had taken a different view on the substantial adverse effect point, we would have held that any effect was not long-term. We would have found that it did not last for 12 months and that it was never "likely" to last for at least 12 months. The evidence, overwhelmingly, was that she was experiencing a stressful time at work and that the natural symptoms flowing from that state of affairs could be expected to resolve themselves in a short period of time.

73 Had we seen the issue of disability differently, the complaints of discrimination arising from disability and failure to make reasonable adjustments would nonetheless have failed on the ground that the Respondents were not aware, and could not reasonably have been expected to be aware, that the Claimant had a disability or that any disability put her at any particular disadvantage. On our primary findings there was nothing to put them on notice that she had a disability or any condition which put her at a material disadvantage. And the want of knowledge also makes the direct disability discrimination claim untenable. The 'because of' formulation under the 2010 Act, s13 requires an inquiry into the mental processes of the decision-maker whose act (or omission) is

[2] Para 42. See also to similar effect *Herry-v-Dudley Metropolitan Council & another* UKEAT/0100/16 EAT, at para 56 (HHJ Richardson).

under challenge. An employer cannot discriminate against an employee because of her disability if he does not know (or at least believe) that she has it.

Refusal of time off/insensitive remarks – complaints 1, 2 and 9

74 These claims fail on our primary findings. The Claimant was given the time off which she requested. She was given more time off than she was entitled to. The days over Diwali could not be allowed under the compassionate leave policy and so the rules were bent (one could say broken) in her favour and the absence was recorded as sick leave in circumstances where she was not sick. We struggle to understand her sense of grievance.

75 We have found that, as was accepted, Ms Renshaw made a clumsy comment about "mental health". She was attempting to differentiate between physiological and psychological problems but her choice of language was unfortunate and gave offence. The other remark (that it would have been better if the Claimant had not been aware of the Diwali dates in 2015) was unobjectionable. We have found that a third alleged comment was not made.

76 In our judgment the single ill-judged remark, obviously not intended to hurt or offend and immediately retracted and apologised for, falls well short of conduct amounting to harassment under the 2010 Act, s26. It plainly did not, we find, have a purpose or effect capable of satisfying the strong language of the section. It caused the Claimant a minor upset and no more. And since there was no disability, it was not 'related to' the alleged protected characteristic of disability. Nor was it related to any other characteristic.

Low mark on appraisal – complaint 6

77 There is nothing in this claim. We are clear that Mr Chessum had a good reason to assess the Claimant's discharge of 'New Business' tasks as 'Under Performance'. She had indeed struggled in that area. She has no ground for complaint. There was no detriment and no conduct capable of constituting harassment. Nor was Mr Chessum's assessment influenced to any extent by any protected characteristic of hers.

Bonus – complaint 5

78 The bonus award may have been disappointing to the Claimant but it was, we find, satisfactorily explained. There was evidence before us of a concern that her output was on the low side. The adjustment, taking her 2.6% (less than £1,300) below the bottom of the indicative bracket, appears proportionate. If, as we find, there was a proper operation of the bonus scheme, no detriment was suffered. In any event, we are satisfied that any detriment was nothing to do with the Claimant's race, sex or alleged disability. The comparator relied upon (Carl Pudney) did receive a much larger bonus than her, but that is obviously explained by the fact that his performance was rated much higher than hers. The requirement for a 'like for like' comparison is not met. There is no basis for any theory that a comparator without the Claimant's protected characteristics would have been treated more favourably than her.

Criticism on 28 January 2016 – complaint 3

79 We find no force in this claim. The Claimant had made a series of errors and Ms Renshaw, her line manager, spoke to her about then. She was not unfair or rude or oppressive. There was nothing capable of amounting to harassment and there was no detriment. The incident was nothing to do with any protected characteristic.

Overloading – complaints 11 and 12

80 These claims are defeated by our primary findings. In almost all walks of life, work pressures are not constant: they increase and abate from time to time. The Claimant and her colleagues may have experienced a degree of added pressure in January and part of February 2016. If so, it was not excessive. The staff were not 'overloaded'. And there was no difference between the treatment of the Claimant and that applied to her peers. No detriment is shown, nor anything capable of amounting to harassment. Any increase in workload was wholly unrelated to any protected characteristic.

The error log – complaint 8

81 There is no ground for complaint here. Ms Renshaw noted an increase in errors on the Claimant's part and made a record of them. That was an appropriate step to take in order to monitor and address an apparent deterioration in her performance. There was no detriment and nothing which could have constituted harassment. The treatment was not connected in any way to any protected characteristic.

Shouting – complaint 4

82 There was, as we have found, no shouting. That disposes of this complaint, but even if one treats it as wider, there is nothing in it. It is apparent that the relationship between the Claimant and Ms Renshaw had become very difficult by 4 March 2016. That was the consequence of Ms Renshaw's wish to deal with the deficiencies in the Claimant's performance and the latter's resistance to her attempts to do so. These circumstances typically make for awkward exchanges, but the fact that a line management relationship has become uncomfortable does not entitle of itself entitle either party to complain of detrimental treatment or harassment. Here Ms Renshaw did not subject the Claimant to unfair or oppressive treatment. She acted in good faith in raising a legitimate concern bearing upon the interests of a third party (Mr Crummie).

The informal PIP – complaint 7

83 Here again, the claim is without merit. The PIP was justified, given the decline in the Claimant's performance. It was designed to assist her to improve. It was not a disciplinary measure (although it could have ultimately led to disciplinary action). There was no detriment in placing her on the PIP, and that step was not capable of amounting to harassment. Nor was it connected in any way with any relevant protected characteristic.

The "exaggeration" allegation – complaint 10

84 As already noted, we struggle to understand this claim and in any event no case on it was put to any witness. The complaint (whatever it is) is not made out and we reject it.

Failure to investigate the discrimination allegation – complaint 13

85 On our primary findings, this claim fails. The discrimination allegation was adequately examined by Ms Chan. She rejected it. We think she was right to do so. It was then considered afresh on appeal, by Mr Field. Although he upheld some aspects of the appeal, he agreed with Ms Chan that the charge of discrimination was unfounded. Despite this, the Claimant makes no complaint of discrimination against him. We are satisfied that there was no failure to investigate at either stage and she received appropriate outcomes in relation to discrimination at both stages. There was no detriment and no treatment capable of constituting harassment. And the Respondents' action had no connection with any protected characteristic.

Insisting on mediation/redeployment meetings – complaints 14 and 15

86 We do not understand these complaints. The Respondents were faced with an awkward problem. They needed to take appropriate action to give effect to Mr Field's recommendations. And, according to the OH report, the Claimant might not be willing to engage in mediation or to return to her current role and team. They attempted to set up meetings at which the possible options might be explored. They cannot be faulted for doing so. They did not 'insist' on anything. They merely made courteous, constructive suggestions of ways to move matters forward. Unfortunately, she did not engage with them. There was no detriment and no treatment that could have amounted to harassment.[3] And again, there is no evidence of any link between the treatment complained of and any protected characteristic.

Dismissal and appeal against dismissal

87 We treat the complaint broadly as a claim for race and/or sex discrimination based on the dismissal process (the first-instance decision and the appeal).

88 We find no merit in these claims. It seems to us that the actions of Mrs Vernon and Ms Spiteri were rational and reasonable. By failing to engage and refusing to meet, the Claimant left Mrs Vernon with very little choice. And on appeal Ms Spiteri dealt in detail with the points of challenge raised and reached a conclusion which was eminently open to her. The Claimant would naturally say that she suffered a disadvantage by losing her job, but we doubt that she can fairly claim a legitimate sense of grievance. The dismissal was properly effected, as was the dismissal of the appeal. There is no room for any allegation of

[3] It seemed to be suggested that it was unfair to invite the Claimant to a meeting when she was signed off sick. If so, that was not a good point. She did not say at the time that she was unfit to attend a meeting and there was no medical evidence to that effect. Her position at the time was simply that a meeting would be a waste of time.

harassment. If there was a theoretically actionable detriment, she was not subjected to it 'because of' any protected characteristic. The outcome was not influenced in any way by her race and/or sex.

Time

89 We have found that there was no unlawful treatment at all under the 2010 Act. Accordingly, there was no [unlawful] 'conduct extending over a period' (see s123(3)(a)). It follows that all claims based on events which occurred more than three months plus the Early Conciliation period before 30 November 2016 (the date of presentation of the claim form) are out ot time unless the Tribunal considered it 'just and equitable' to substitute a more generous time limit. There is no good reason to do that. The Claimant has not demonstrated any ground and the exercise would be pointless in any event since all claims have failed on their merits. By our reckoning, the necessary result is that all of her case falls outside the Tribunal's jurisdiction on time grounds except for complaints 13, 14 and 15 and the claim based on the dismissal process, including the appeal.

Outcome

90 For the reasons stated, the Claimant's claims fail and the proceedings are dismissed.

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EMPLOYMENT JUDGE SNELSON
24 JULY 2017