



EMPLOYMENT TRIBUNALS

Claimant

Respondent(s)

Mrs M Ward

AND AXA Investment Managers Limited

Heard at: London Central

On: 15 & 16 November 2017

Before: Employment Judge Mr A Spencer (sitting alone)

Representation

For the Claimant: Mr J Crozier (Counsel)

For the Respondent: Mr J Laddie QC (Leading Counsel)

RESERVED JUDGMENT

The Judgment of the tribunal is:

1. The Claimant was a disabled person within section 6 of the Equality Act 2010 at all times material to these claims (namely between February 2014 and 18 May 2017); and
2. The Claimant has permission to amend her claim form in Case Number 2206556/2016 in order to pursue the following principal additional claims/allegations:
 - (a) A perceived discrimination claim; and
 - (b) A disability discrimination claim (on grounds of actual disability) pursuant to sections 13, 15 and/or 19 of the Equality Act 2010 relating to her bonus for the performance year 2014; and
 - (c) A disability discrimination claim (on grounds of actual disability) pursuant to sections 15 and 19 of the Equality Act 2010 relating to her bonus for the performance year 2015; and
 - (d) A disability discrimination claim (on grounds of actual disability) pursuant to sections 13, 15 and/or 19 of the Equality Act 2010 by not promoting the Claimant to the role of Head of Research and Strategy in or around June 2016 and appointing Greg Mansell instead.

3. **Allegations numbered 47 and 48 raised in case number 2200992/2017 are struck out on the grounds that they have no real prospect of success. For the avoidance of doubt those allegations are:**
 - (a) **that there was a failure to deal correctly with an 8% interest payment on back pay in connection with payments under the Respondent's PHI scheme (Grounds of Complaint, paragraphs 33(xv), 38, 39 and 40); and**
 - (b) **that there was a failure to provide a certificate of interest in relation to back pay (Grounds of Complaint, paragraphs 33(xvi), 38 and 41)**

4. **The following issues regarding time have not been determined and will need to be determined at the full merits hearing:**
 - (a) **Have the Claimant's discrimination claims in Case Number 2200992/2017 been brought in time?**
 - (b) **Alternatively, has the Claimant proved that there was a continuing act extending over the entirety of the relevant period?**
 - (c) **If not, would it be just and equitable to extend time?**

REASONS

Introduction

1. The Claimant is employed by the Respondent as Deputy Head of Research. She is currently on long-term sickness absence which began shortly after the Respondent confirmed to the Claimant that she was facing potential disciplinary action in March 2015.
2. The Claimant has brought three tribunal claims against the Respondent:
 - 2.1 Claim 1 (Case Number 2206556/2016) was presented to the tribunal on 8 August 2016 ("Claim 1"); and
 - 2.2 Claim 2 (Case Number 2200992/2017) was presented on 18 May 2017 ("Claim 2"); and
 - 2.3 Claim 3 was presented on 8 November 2017 ("Claim 3")
3. Claims 1 and 2 were consolidated by order of Regional Employment Judge Potter dated 24 May 2017. Claim 3 was presented after that order was made.
4. Regional Employment Judge Potter also directed that there should be a preliminary hearing to determine a number of preliminary issues in relation to Claims 1 and 2.

5. The Claimant is currently extremely unwell. This was apparent throughout the hearing. The Claimant found the process of giving evidence extremely challenging and distressing. A number of adjustments were made to achieve a fair hearing. The Claimant recently underwent knee surgery and was provided with a chair with arms for her to sit in and a separate chair upon which she could elevate her leg during the course of her evidence. A screen was brought into the tribunal room to reduce the contact that the Claimant had with the Respondent's witness. The Claimant's anxiety and stress levels were increased by certain events and certain people associated with the Respondent. The screen was introduced to reduce that anxiety to facilitate the giving of the Claimant's evidence.
6. Mr Laddie conducted his cross-examination as sensitively as possible in the circumstances. It was robust enough to serve his client's interests despite being moderated to take into account the Claimant's state of health.
7. At the end of the hearing I strongly recommended to the parties that they address their minds to the adjustments which might be made to manage the much greater rigours of a 10 day full merits hearing. My own observation was that the Claimant's cross examination proceeded better when she was fresh. She appeared to become tired and less focused as time progressed and more prone to anxiety and stress. The parties and the tribunal may wish to consider whether it is feasible to break down the Claimant's cross examination into smaller parts at the final hearing.

Documents

8. I took into account the contents of an agreed set of tribunal bundles comprising five lever arch files. The amount of documentation was excessive for a two-day preliminary hearing. I read the documents that I was directed to by counsel and the documents to which I was taken during the course of evidence.
9. I was provided with witness statements for the four witnesses, skeleton arguments from both counsel and an agreed list of issues.
10. The Respondent's counsel provided a bundle of case authorities at the conclusion of the hearing which was supplemented by two additional case authorities provided by the Claimant's counsel.

Witnesses

11. For the Claimant, I heard evidence from the Claimant herself, her husband Timothy Ward and Ewa Wolinska, a family friend of the Claimant. For the Respondent, I heard evidence from Louise McMahon, their Head of Employee Relations and HR Operations.
12. Each witness confirmed the contents of their witness statement(s) under oath or affirmation. I had the benefit of seeing the evidence of each witness tested under cross-examination and the opportunity to put questions to the witnesses myself.

Issues

13. The preliminary issues to be determined were established by the case management order of Regional Employment Judge Potter dated 24 May 2017.

The parties have refined the issues since then. The issues to be determined are as set out in the parties agreed list of issues. Those issues are repeated in the "Discussion/Conclusions" section below.

Applicable Law

14. Taking the law relating to the various preliminary issues in turn:

Disability

15. The statutory test to be applied to determine whether a person is a disabled person requires the tribunal to consider whether that person has a disability at the material time.

16. Section 6 Equality Act 2010 provides that:

(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 effect on P's ability to carry out normal day-to-day activities.

17. Guidance upon the essential elements of this statutory test is provided in Schedule 1 of the Equality Act 2010 and the Statutory Guidance 1.

18. At the date of or during the period of any discrimination, the Claimant must have had either a physical or mental impairment or impairments. An **impairment** may include mental health conditions as well as mental illness, such as depression.

19. The Tribunal must consider whether any impairment adversely affects or affected the claimant's **ability to carry out normal day to day activities**. Relevant day to day activities are not necessarily work activities but may be. Although the list is not exhaustive, the following are included: -

19.1 Mobility

19.2 Manual dexterity

19.3 Physical co-ordination

19.4 Continence

19.5 Ability to lift, carry or otherwise move everyday objects

19.6 Speech, hearing or eyesight

19.7 Memory or ability to concentrate, learn or understand

19.8 Perception of the risk of physical danger

20. The adverse effect on day to day activities must be both **substantial** and **long term**. In this regard:

20.1 A "**substantial adverse effect**" is an effect which is "more than minor or trivial" (section 212(1) Equality Act 2010); and

- 20.2 An effect is **long term** if it has or is likely (i.e. “could well happen”): Para.C3, Guidance) to last for at least 12 months (Paragraph 2(1); Schedule 1, Equality Act 2010);
21. If an impairment ceases to have a substantial adverse effect, it is to be treated as continuing where it is likely to (or “could well”) recur (Paragraph 2(2); Schedule 1, Equality Act 2010);
22. In considering the effect on day-to-day activities, regard should be had to the time taken and the manner in which activities are carried out (Paragraphs B2-3, Guidance), the cumulative effect of an impairment on day-to-day activities as a whole (Paragraphs B4-5, Guidance), and coping strategies developed to avoid or reduce the impact of the impairment (Paragraphs B7-9, Guidance).
23. In assessing whether an impairment has the required substantial adverse effect the so called “corrective measures doctrine” applies. This requires the tribunal to ignore the effect of measures being taken to treat or correct the impairment. The focus should be whether the impairment would likely have a substantial adverse effect in the absence of such treatment (Paragraph 5(1); Schedule 1, Equality Act 2010; Paragraphs. B12-14, Guidance). For example, in a case concerning a mental health condition the tribunal must ignore the effects of counselling and medication.
24. The following non-exhaustive factors are listed in the Appendix to the Guidance as being “reasonable to regard as having a substantial adverse effect”:
- 24.1 Difficulty in getting dressed, for example, because of... low mood;
- 24.2 Difficulty entering or staying in environments that the person perceives as strange or frightening;
- 24.3 Persistent general low motivation or loss of interest in everyday activities;
- 24.4 Frequent confused behaviour, intrusive thoughts...;
- 24.5 Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder;
- 24.6 Persistent distractibility or difficulty concentrating;
25. The Tribunal’s focus should be on what a person cannot do (or has difficulty doing) rather than what he/she can do.
26. It is often helpful, particularly in cases concerning mental health, to begin by addressing the second limb of section 6 Equality Act 2010 by considering whether a claimant has suffered adverse effects on day-to-day activities which are substantial and long term. The impairment required to address the first limb is likely to be drawn by common-sense inference once the adverse effect is established: *J v DLA Piper* [2010] ICR 1052 at [38],[40]. Questions of nomenclature may distract, rather than aid, establishing the relevant impairment [Paragraphs.A6, A8, Guidance].

Amendment Applications

27. The approach to determining an application for amendment is set out in the Judgment of Mummery J in Selkent Bus Co Ltd v Moore [1996] ICR 836. Those principles are helpfully summarised in the Presidential Guidance – General Case Management issued by the President of the Employment Tribunals (England & Wales) 2014.
28. With regard to substantial amendments regard must be had to all the circumstances, in particular to any injustice or hardship which would result from the amendment or a refusal to make it.
29. The Tribunal, in deciding whether to grant an application to amend must carry out a careful balancing exercise of all of the relevant factors, having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment.
30. Relevant factors include: -
 - 30.1 The nature of the amendment to be made – applications can vary from the correction of clerical and typing errors to the addition of facts, the addition or substitution of labels for facts already described and the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal must decide whether the amendment applied for is a minor matter or a substantial alteration, describing a new complaint.
 - 30.2 Time limits – if a new complaint or cause of action is intended by way of amendment, the Tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended.
 - 30.3 The timing and manner of the application – An application can be made at any time. However, allowing an application is an exercise of a discretion and delay in making the application and the reasons for the timing of the application are relevant factors in the exercise of that discretion. A party will need to show why the application was not made earlier and why it is being made at that time.

Time Limits

31. There is a time limit under the Equality Act 2010 within which a Claimant must present their claim to the Tribunal. A claim must be lodged within the period of 3 months starting with the date of the act to which the complaint relates, subject to extension for early conciliation (section 123(1) Equality Act 2010).
32. Time runs from the act or omission complained of.
33. However, section 123(3)(a) Equality Act 2010 extends time where the discriminatory act concerned is part of a series of acts extending over a period. In such cases the time limit must be taken to run from the end of that period (i.e. time runs from the date of the last act in the series of acts).
34. Determination of whether acts extend over a period is a matter to be determined at a final hearing when the Tribunal has all the relevant documentary and witness evidence available to it. At this stage (i.e. when considering section 123(3)(a) at a preliminary hearing) the Tribunal is to determine only whether the Claimant has

established a *prima facie* case that there was a series of continuing acts (Lyfar v Brighton & Sussex University Hospitals Trust [2006] EWCA Civ 1548).

35. A series of acts can be identified by a range of factors not limited to the policies or practices of the Respondent, and extends to situations where the Respondent is responsible for an ongoing situation or a continuing state of discriminatory affairs (Hendricks v Commissioner of Police of the Metropolis [2003] ICR 530 at [51]-[52]). However, it is necessary for the Claimant to show that the incidents relied on are so linked to each other to provide evidence of continuing discriminatory state of affairs. Such an ongoing state of discriminatory affairs might, for example, be established by the involvement of the same persons as decision makers.
36. If a complaint is out of time, the Tribunal has a discretion under section 123(1)(b) Equality Act 2010 to extend time where the Tribunal considers it "just and equitable" to do so.
37. It is for a Claimant to satisfy the Tribunal that its discretion should be exercised in his/her favour. The exercise of the discretion in favour of a Claimant should be the exception rather than the rule.
38. The discretion is wide. It is often helpful to consider the factors set out in section 33(3) of the Limitation Act 1980 which are:
 - 38.1 the length of, and the reasons for, the delay on the part of the Claimant;
 - 38.2 the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by either party is or is likely to be less cogent than if the action had been brought within the time allowed
 - 38.3 the conduct of the Respondent after the cause of action arose, including the extent (if any) to which he/she responded to requests reasonably made by the Claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant to the Claimant's cause of action against the Respondent;
 - 38.4 the duration of any disability of the Claimant arising after the date of the accrual of the cause of action;
 - 38.5 the extent to which the Claimant acted promptly and reasonably once he/she knew whether or not the act or omission of the Respondent, to which the claim was attributable, might be capable at that time of giving rise to an action;
 - 38.6 the steps, if any, taken by the Claimant to obtain medical, legal or other expert advice and the nature of any such advice he/she may have received.
39. These are not however the only factors that the Tribunal may consider relevant. The Tribunal is entitled to take into account anything it considers to be relevant.

Strike Out & Deposit Orders

40. The Tribunal's power to either strike out a complaint or to make a deposit order and the tests to be applied by the Tribunal when determining such applications are set out in Rule 37 (Strike Out) and Rule 39 (Deposit Orders) of the

Employment Tribunals Rules of Procedure 2013. The relevant parts of each rule are set out below:

“Striking out

37.(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;*
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;*
- (d) that it has not been actively pursued;*
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).”*

41. Discrimination claims and the resolution of the legal issues arising in such cases are often highly “fact sensitive” and tribunals should be slow to strike them out on the basis that they should, save in the most clear cut of cases be determined after hearing all the available evidence (Anyanwu –v- South Bank Students’ Union [2001] IRLR 305). However, that is not an absolute rule and a tribunal may strike out a discrimination claim provided the necessary test under rule 37 is met. An example of this is the case of ABN Amro –v- Hogben UKEAT/0266/09.
42. In applying that test I must assess the merits of the claim. However, it is not appropriate to conduct a “mini trial” of the claim (Ezias v North Glamorgan NHS Trust [2007] IRLR 603).
43. I must also take into account the evidence before me and the evidence that might reasonably be available before the tribunal at a full merits hearing. However, there must be a realistic prospect of that evidence becoming available. It is not appropriate to simply allow a hopeless case to proceed to trial in the hope that “something may turn up” or might come out in cross examination.
44. Whilst the threshold for strike out under Rule 37 is a high one particularly in a discrimination case the threshold for a deposit order under Rule 39 is lower and provides the tribunal with greater leeway to make a deposit order where a claim or argument is perceived to be weak but cannot necessarily be said to have no reasonable prospect of success. Rule 39 states:

Deposit orders

39.(1) Where the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not

exceeding £1,000 as a condition of continuing to advance that allegation or argument.

45. The approach to strike out applications in the context of discrimination claims established in Anyanwu –v- South Bank Students’ Union also applies to applications for deposit orders. Where there are underlying disputes of fact, in a discrimination case a tribunal should be slow to make a deposit order.

Findings of fact

46. Having heard the evidence, my findings of fact are as follows:
47. The Claimant is well educated with an academic background in law. She graduated with a law degree and achieved a Master's degree in International Law. The Claimant has not qualified or practised as a lawyer. She works in commercial property. Her role for the Respondent involves property research.
48. This Claimant has Polish parents and a brother with mental health issues. Her parents refused to acknowledge those problems. The Claimant described the Polish approach to mental health problems as to see them as a weakness. The Claimant worked in an environment where, as she described it, depression was “the D word” and “a dirty word”. In the circumstances, the Claimant was reluctant to admit to herself and others that she had mental health problems.
49. The Claimant commenced employment with the Respondent as a multi-investment manager on 16 February 2009. She worked in the real estate research team. She is currently deputy head of the team. Before her sickness absence commenced she reported to her manager and the head of the team, Alan Patterson.

2011/2012

50. The Claimant went on maternity leave in 2011. She suffered from post-natal depression after her son’s birth in September 2011. In March 2012 she was assessed by her GP as “*moderately depressed,*” with particularly high scores on a patient questionnaire for “*no interest or pleasure, tiredness and poor concentration*” She was referred for counselling privately. The Claimant’s evidence of this period is consistent with the contemporaneous medical evidence. She spent frequent periods crying in a dark room; avoiding contact with others and did not leave the house for the first two months after the birth. She struggled for motivation – and was only motivated by her son’s needs. She was unable to carry out household tasks including cooking, cleaning, etc. She also struggled to sleep because of anxiety, and was often exhausted;
51. The Claimant dialled in to work calls from October 2011 and became more involved at work before returning to work in January 2012. Despite returning to work, the Claimant was still unwell. She felt like she was “on a train” and had lost control. She increasingly withdrew from social engagements and physical activity and lacked motivation. Mr Ward confirmed that the Claimant had a tendency to isolate herself, be confused, lacking in motivation, and to be tearful and tired.
52. Although the Claimant visited her GP in May and August 2012 there is no further reference in her GP records to stress or mental health problems until an entry in October 2012 (see below).

53. In summer 2012 Ms Wolinska noticed a significant change to the Claimant's demeanour. She was a family friend and had known the Claimant for many years, albeit seeing her only infrequently when the Claimant visited her parents. Ms Wolinska came to visit the UK in June 2012 and stayed with the Claimant and her family until July 2014. Ms Wolinska was surprised by the Claimant's changed demeanour. Previously, she had seen the Claimant as person who enjoyed life and was very energetic and open. Ms Wolinska thought the Claimant was ill. From the beginning of her visit to the UK she said that the Claimant had changed completely and was not the person she had known before. She referred to it being difficult to communicate with the Claimant at times. The Claimant would come home from work late and was tired. When Ms Wolinska tried to talk to the Claimant about her son at times she seemed not to understand what Ms Wolinska was saying to her. She described it as if the Claimant was standing in front of her looking at her as if she was behind glass and was not hearing her. A few weeks after arriving in June 2012 she recommended that the Claimant saw a doctor for a check-up. Ms Wolinska's perception is consistent with the Claimant's evidence.
54. The Claimant recalled that what she described as the "black cloud" lifted a little in summer 2012, but her anxiety remained. She recounted being frequently tearful and lacking her former resilience throughout the latter part of 2012.
55. The Claimant eventually saw her GP and an entry in the GP records in October 2012 refers to a diagnosis of "*stress at work*", with complaints including "*long hours. very macho environment weakness frowned upon.... hair loss, feels gen[erally] run down.*" The Claimant's GP recommended time off work and counselling, and also discussed anti-depressants which the Claimant declined in favour of trying counselling first.
56. The Claimant began sessions with a counsellor and psychotherapist, Ros Redshaw in November 2012. In an email sent by the Claimant to Ms Redshaw at the time she described having "*struggled to keep my head above water, combined with some mild post-natal depression, I have been finding it harder and harder to cope... I have noticed myself being quite down, physically and mentally run down, not having any energy to do anything, quite tearful and find it hard to think clearly*".
57. In November 2012, the Claimant had an anxiety/stress attack when the right-hand side of her body went numb. She saw a neurologist. The Claimant felt low and had no interest in the activities she used to enjoy. The Claimant's sessions with her counsellor were described by Mr Ward as providing temporary respite.
58. In late 2012, the Claimant was examined by a neurologist, Dr Rose, following tingling and numbness down her right side. She had complained to her GP of feeling "*tired and run down*". Dr Rose attributed these symptoms, in the absence of a neurological explanation, as possibly stress-related. Upon further investigation, no neurological explanation was discovered.

2013

59. On 30 January 2013 the Claimant collapsed at work. She had been "tipped over the edge" according to her GP's records.

60. In March 2013 the Claimant was diagnosed by her GP as suffering from “*chronic or recurrent depression and anxiety*.” Her scores on assessment were: GAD7¹ – 19 indicating “severe anxiety”; and PHQ9 - 17 indicating “moderately severe depression.” The Claimant’s GP records describe her condition as “*stressful for last few years but inc[reased] stress last few months, presenting with psychosomatic problems like chest pain, eating poorly, only gets weekends to herself...*”. The Claimant was advised to take time off work.
61. A further entry on 22 March 2013 refers once again to “*stress at work*” and indicates that the Claimant took a few days off work which helped and that she was “*seeing counsellor to prevent*”.
62. The Claimant’s evidence was that matters calmed again in April/May 2013, but her symptoms worsened again in June 2013. She continued to withdraw from social engagement and had physical symptoms, including palpitations and scratching of her head and scalp. The Claimant continued to feel exhausted between July and November 2013. In the evenings of work days she frequently struggled to cook and wash herself. She also experienced anxiety attacks.
63. In December 2013, The Claimant’s cardiologist, Dr MacCarthy, records that the Claimant “*has not felt right since the birth of her child....over the last year she has remained fatigued with episodes of light headedness, ‘woozy feeling’, and a pounding head when she exercises*”.

2014

64. Despite her health problems the Claimant continued to function at work. She was clearly regarded by the Respondent as a very capable individual. She had performed very well in her job and by 2014 she was commanding a substantial salary of £110,000 per annum. She also enjoyed a substantial annual bonus. For example, she received a bonus of £75,000 for 2014. However, it appears that the resources required to maintain this performance at work took their toll on the Claimant’s health.
65. An entry in the Claimant’s GP records for 27 January 2014 refers once again to stress-related problems. The Claimant was said to be very worried and upset, tearful and to feel unable to go to work. The Claimant was consequently signed off work for about three weeks.
66. In mid-2014 the Claimant broke down in front of the Respondent’s Chief Investment Officer. She was referred to the Respondent’s Occupational Health. In her evidence the Claimant described at this time becoming increasingly anxious and isolated, with further loss of motivation and feelings of guilt, frequently feeling tearful/angry – and running away from home on one occasion when matters became too overwhelming to cope with. She struggled with cleaning, cooking, taking care of herself and personal hygiene.
67. On 12 May 2014, the Claimant saw Dr Ernstzen for an occupational health assessment. She was considered to be experiencing symptoms relating to anxiety and depression in recent months. She was distressed at times during the consultation and was considered unfit to work. Dr Ernstzen’s report refers to “*in recent months she has felt overwhelmed, tearful and feeling that she cannot*

¹ Generalised Anxiety Disorder Assessment. Scores between 15-21 represent “severe anxiety”

cope. She describes this as running on empty” and “she is referred to as feeling very anxious by work and feeling that she “could not switch off”.

68. The Claimant sent an email to Dr Ernstzen on 14 May 2014. She said she was shocked at the diagnosis and after further serious thought wanted to relate her feedback. She confirmed that she believed that she was experiencing symptoms of anxiety and she was feeling overwhelmed by the situation at work and was feeling tired coping with the workload and stresses of the job. With regard to depression she stated *“however, I strongly believe and I am certain that I’m not clinically depressed. I know this as I experienced postnatal depression immediately post birth that lasted six months. I feel very very differently now”*. I do not place significant weight on the Claimant’s email. The Claimant was very keen to downplay the suggestion that she had a significant mental health problem. She did not want the Respondent to know she had depression. She was worried about her job. The Claimant’s email does not reflect the severity of her condition at the time.
69. The Claimant saw a consultant psychiatrist, Dr Brenner for the first time in June 2014. He described the Claimant as *“heading to burnout”* and referred her to Sue Camm, a Clinical Psychologist. The Claimant also experienced recurrence of chest tightness which her cardiologist, Dr Gall, attributed to work stresses.
70. I accept the Claimant’s evidence that between Mid 2014 and March 2015 she struggled to clean, cook and take care of herself. She became increasingly indecisive, placing increasing reliance on her PA and husband, and would frequently lose everyday items and needed detailed notes for meetings and presentations.
71. The Claimant began to see Sue Camm for Cognitive Behavioural Therapy in July 2014. This helped the Claimant to develop coping mechanisms to enable her to function better at home and at work.
72. In late 2014, the Claimant felt that her work environment became more and more toxic and she began to hide in the toilets at work to avoid colleagues.
73. The Claimant also recounts events in late 2013 and early 2014 where she was found crying/shaking/curled up/tearful, and was unable to cook or wash herself: she felt numb and had anxiety attacks; she was forgetful and making mistakes (including losing her engagement ring). Mr Ward supported this account.

2015

74. Problems developed with the Claimant's team. This led to the team members who were managed by the Claimant and Mr Patterson raising grievances and complaining of bullying. The Respondent commissioned independent consultants to investigate the matter. They reported in February 2015 following which the Respondent decided to instigate disciplinary action against the Claimant and Mr Patterson.
75. The Claimant was informed of the potential disciplinary action at a meeting on 3 March 2015. This appears to have been a tipping point with regard to the Claimant's health. Following the meeting her condition deteriorated significantly. Her GP notes record *“sleeping/vomiting/headaches/feels cannot focus/crying” as well as “panic attacks, shaking, nausea, dry retching. Unable to focus or concentrate in order to make a care for herself.”* The Claimant is diagnosed as

suffering with “*anxiety states*”. The Claimant was signed off work, and has yet to return. The Respondent accepts that the Claimant was disabled from May 2015. Dr Brenner’s diagnosis in May 2015 was of an acute adjustment disorder with depressive symptoms.

76. By 10 March 2015 the Claimant had engaged Kingsley Napley solicitors who are recognised employment law specialists. Both she and Mr Patterson instructed Kingsley Napley to conduct a coordinated strategy to respond to the disciplinary allegations. Kingsley Napley were acting for the Claimant as their client although in practice most of the actions that they took were taken on behalf of both the Claimant and Mr Patterson together as a concerted strategy to defend the interests of both clients.
77. Following advice from Kingsley Napley the Claimant and Mr Paterson adopted a strategy in which attack was plainly considered to be the best form of defence.
78. Alan Patterson was very much the driving force with regard to instructing Kingsley Napley. I accept that the Claimant very much took the back seat given her evident health issues.
79. As part of that strategy the Claimant submitted an extensive grievance to the Respondent on 22 June 2015. It is a comprehensive and coherent document running to 46 pages. This was prepared by the Claimant with assistance from Alan Patterson. Allegations of sex discrimination are set out in section 7 of the grievance. This is said to set out a non-exhaustive list of examples of ways in which the Claimant had been treated less favourably on grounds of her sex. It was alleged that the motivation behind her team's complaints which led to the disciplinary process was the discriminatory attitude towards the Claimant as a senior female managing a team consisting of eight or more men who refused to accept her authority as female. It is notable that the Claimant was not asserting at that stage that discrimination had taken place around her return from maternity leave as she now alleges in Claim 2.
80. On 30 June 2015 Kingsley Napley sent an open letter to the Respondent raising a number of potential claims on behalf of the Claimant. They included breach of contract, a claim for damages for personal injuries and a complaint of sex discrimination.
81. The Claimant incurred substantial legal costs with Kingsley Napley as the dispute with the Respondent developed. The mounting costs were of significant concern to the Claimant and her husband. The Claimant received little or no pay for most of this period. This led to the Claimant ceasing to instruct Kingsley Napley after which the Claimant's husband took on the primary role of pursuing the claim against the Respondent.
82. The medical reports from the Claimant's consultant psychiatrist Dr Brenner give some insight into the Claimant's state of health in the period in which the Respondent accepts that she was disabled. This is relevant to the question of whether time should be extended on the basis that it is just and equitable to do so. For example:
 - 82.1 In a letter/report from Dr Brenner dated 15 September 2015 he refers to the Claimant's anxiety and depression score placing her in the “*significantly anxious depressed range*”. She said to be tearful and to find

it difficult to sleep. She said to have had suicidal thoughts and becomes upset if she has to deal with emails or letters from her workplace; and

- 82.2 In a letter/report dated 7 October 2015 Dr Brenner refers to the Claimant spending a lot of time lying on her bed. She is said to find it extremely difficult to cope, her mood is low with poor concentration and energy. She is tearful and her sleep and appetite disturbed. She is said to have lost a significant amount of weight and have had thoughts of self-harm. She is said to lack motivation and her libido is reduced. She feels foggy in her mind; and
- 82.3 Dr Brenner's letter dated 3 December 2015 refers to the Claimant's mood remaining low and the Claimant lacking energy and concentration. She is said to be tearful over small things. Her appetite is said to fluctuate and she is not sleeping well.
- 82.4 Dr Brenner's letter dated 4 December 2015 refers to the Claimant's situation gradually deteriorating stating "*her sleep is getting worse. She wakes multiple times and she has nightmares, night sweats, palpitations and early morning wakening*" and "*she is isolating herself. She is more aggressive and particularly towards her husband. She is scared to go out. She is tearful with poor concentration and energy. Her appetite is poor, she lost weight and her mood is low*"

2016

83. The Claimant referred her complaints to ACAS for early conciliation on 14 June 2016. ACAS issued the certificate to conclude the early conciliation period on 14 July 2016.
84. The Claimant's husband, acting in conjunction with the Claimant, prepared her claim form for Claim 1 on her behalf. Claim 1 was presented to the tribunal on 8 August 2016. The complaints are focused. The complaints that are still pursued are of disability discrimination and focus on the following key matters:
- 84.1 the amount of bonus paid to the Claimant for the year 2015. Mention is also made of the Claimant's bonus in 2014. However, the claim form expressly refers to the fact that the claim in relation to the 2014 bonus was not pursued as the Claimant understood that complaint to be out of time; and
- 84.2 a complaint regarding the promotion of Greg Mansell to the role of Head of Research in June 2016 following the termination of Alan Patterson's employment. The assertion was that the Claimant had been promised that promotion and that it was unlawful disability discrimination for the Respondent not to hold open the Claimant's role for her during her absence and instead to appoint Mr Mansell to the role on a permanent basis.
85. The claim form for Claim 1 is well presented. It clearly identifies the factual allegations and identifies them as allegations of disability discrimination. It does not go on to place legal labels on the specific types of discrimination alleged with reference to the sections of the Equality Act 2010. However, it is a coherent and impressive document which is well above the standard achieved by most litigants in person.

86. The Respondent presented a Response to Claim 1. The allegations of discrimination were denied in their entirety.

2017

87. The litigation resulting from Claim 1 did not proceed quickly. An initial preliminary hearing was postponed due to the Claimant's severe ill health. The first operative preliminary hearing took place on 24 May 2017.

88. The Claimant instructed her current solicitors Didlaw in February 2017. The Claimant's evidence was that it was only when she sat down with her new solicitor that questions were asked about the background and the details about the historic discrimination started to come out. This led to an application being submitted by Didlaw on 15 May 2017 to seek to amend Claim 1. The grounds for the application are set out in a letter of the same date. The proposed amendments seek to introduce: –

88.1 a perceived discrimination claim (on the same facts); and

88.2 A disability discrimination claim (on grounds of actual disability) pursuant to sections 13, 15 and/or 19 of the Equality Act 2010 relating to her bonus for the performance year 2014; and

88.3 A disability discrimination claim (on grounds of actual disability) pursuant to sections 15 and 19 of the Equality Act 2010 relating to her bonus for the performance year 2015; and

88.4 A disability discrimination claim (on grounds of actual disability) pursuant to sections 13, 15 and/or 19 of the Equality Act 2010 by not promoting the Claimant to the role of Head of Research and Strategy in or around June 2016 and appointing Greg Mansell instead.

89. The Respondent's grounds for objection to the amendment application are set out in a letter from the Respondent's solicitors Simmons & Simmons to the employment tribunal dated 18 May 2017.

90. Didlaw presented Claim 2 to the tribunal on 18 May 2017. Claim 2 is a very substantial claim. It raises over 40 factual allegations, the majority of which occurred before the presentation of Claim 1. The factual allegations range between 12 July 2011 and May 2017. The parties have helpfully prepared an agreed table setting out the allegations and the legal basis on which each incident is said to amount to unlawful discrimination. The allegations relate to a significant number of employees. The Respondent has identified 21 potential witnesses that they might need to call to give evidence to deal with the allegations in Claims 1 and 2. Most of this number relate to Claim 2. However, a closer analysis of the allegations shows that the vast majority of the allegations relate to the conduct of Alan Patterson, Denis Lopez and Louise McMahon.

91. Claims 1 and 2 were consolidated at the first effective preliminary hearing before Regional Employment Judge Potter on 24 May 2017. She directed that today's preliminary hearing take place and identified the issues to be determined. She also directed that the case should be listed for a 10-day full merits hearing in June 2018.

92. The Respondent filed a Response to Claim 2 . The Respondent did not have difficulty investigating and preparing a Response to the allegations raised in Claim 2 despite the age and volume of those allegations. This is evident from the Grounds of Resistance which are particularly comprehensive. They run to 34 pages and 155 numbered paragraphs and represent a very comprehensive response to the significant number of allegations raised in Claim 2.
93. The Respondent confirmed by letter to the tribunal dated 2 August 2017 that having considered the medical evidence the Respondent accepts that from May 2015 the Claimant was disabled within the meaning of that term under the Equality Act 2010. However, the Respondent disputes that the Claimant was disabled at any point prior to this.
94. The Respondent's application to strike out part of the claims and to seek deposit orders are set out in a letter to the tribunal from Simmons & Simmons dated 19 September 2017. However, that application was revised and the revised application is set out in Simmons & Simmons letter dated 17 October 2017.
95. In a letter from Simmons & Simmons to Didlaw dated 19 September 2017 Simmons & Simmons asserted that it would no longer be possible to conduct a fair hearing in relation to some of the older aspects of Claim 2. However, when asked what steps the Respondent had taken to contact the relevant witnesses and whether the witnesses had indicated their availability to give evidence. Simmons & Simmons responded on 20 October 2017 to confirm that the Respondent had yet to take steps to contact the witnesses concerned.
96. A psychiatric report was jointly commissioned by the parties from Dr Geoff Isaacs. Dr Isaac's report is dated 29 September 2017. Dr Isaacs undertook a review of the substantial amount of documentation provided to him. He also interviewed the Claimant at length.
97. The Claimant's solicitors contacted Alan Patterson by email in November 2017. He responded to confirm that he will cooperate with the requirements of any witness order and will attend tribunal to testify if required. He also confirmed that he had not been contacted by the Respondent to be a witness to help them with their case.
98. Mrs McMahon was cross examined about her recollection of meetings with the Claimant. She had a clear recollection of the meetings.
99. The Claimant presented her claim form for Claim 3 to the tribunal on 8 November 2017. That claim relates to alleged harassment contrary to section 26 Equality Act 2010 because of race and/or sex. The Claimant says that on 12 September 2017 she received copies of email correspondence from the Respondent following a request made under the Data Protection Act 1998. She alleges that the content of the emails contain unwanted and derogatory comments about her of a racist and sexist nature made by her work colleagues.
100. The Claimant's financial situation is relevant in the context of an application for a deposit order. No evidence was adduced by the Claimant regarding her financial circumstances. She did not assert that her means were limited. There is evidence in the tribunal bundle to show that the Claimant and her husband own their own home and I understand that the Claimant is currently in receipt of PHI payments equivalent to approximately two thirds of her normal salary.

Medical Evidence: Dr Isaacs Report

101. Dr Isaacs splits the time period into two parts:

101.1 The first being from 1 October 2013 to 3 March 2015; and

101.2 The second being from 3 March 2015 onwards.

102. His opinion as to the Claimant's state of health in the two periods are:

From March 2015 onwards

103. The Claimant was very unwell from March 2015 when the allegations of bullying and harassment were first disclosed to her. He describes this at paragraph 49 of his report as the "tipping point" and concludes "*From that point, Mrs Ward is very clear that her functioning had disappeared completely and that there was a serious adverse effect on her ability to carry out her day to day activities. She recalls that she was unable to carry out even simple tasks like shopping, cooking or looking after her child properly.*"

104. At paragraph 58 of his report Dr Isaacs states "*in the period from 3 March 2015 to 30 April 2015, Mrs Ward's symptoms became much more severe and she was diagnosed as having an acute adjustment disorder which is usually coded in the ICD – 10 under an adjustment disorder F43.2 (Appendix A) and thus Mrs Ward had a more severe impairment from 3 March to 30 April 2015*".

105. This is echoed at Paragraph 61 where Dr Isaacs states "*..... Mrs Ward became completely overwhelmed by her symptoms from 3 March 2015 and was unable to carry out most normal day-to-day activities. She was unable to shop, clean, care for herself properly or look after her family. She had difficulties communicating and spent a lot of that time, crying and retching*"

106. The Respondent accepts that the Claimant was disabled for most of this period.

From 1 October 2013 to 3 March 2015

107. Dr Isaacs' opinion is that the Claimant had a mental impairment in this period. In fact, Dr Isaacs expresses the opinion that the Claimant had a mental impairment as early as March 2012. At paragraph 54 of his report he refers to the fact that the Claimant "*... began to develop some evidence of a mood disorder is at least as early as March 2012. The symptoms of the mood disorder included both anxiety related symptoms and some low mood, they became more evident by October 2012 and there were neurological symptoms that might or might not have been related to stress in November 2012*".

108. He also refers at paragraph 55 to Mrs Ward having counselling / psychotherapy sessions between December 2012 and April 2013 which he says were helpful.

109. With regard to the period from 1 October 2013 to March 2015 Dr Isaacs states that in this time period the Claimant "*did have symptoms of a mood disorder that was probably best described as a mixed mood disorder of fluctuating intensity, that was not present all the time. They were*

described as work-related are mostly anxiety type symptoms with some depressive elements, not necessarily meeting the formal threshold of a depressive illness. These symptoms nevertheless, constitute a mental impairment".

110. He also states at Paragraph 59 that *"the mental impairment probably began in at least 2012 but had a fluctuating course"*.
111. However, despite concluding that the Claimant had a mental impairment in this earlier period Dr Isaacs' opinion is that the effect upon the Claimant's day to day activities in this earlier period was limited and that the effect was attributable more to the Claimant's workload than her impairment. For example, at paragraph 39 of his report Dr Isaacs states *"Mrs Ward describes the period of time, from the middle of 2012 until 3 March 2015, extremely stressful,..... but Mrs Ward was very clear that she continued to function at work, apart from short absences. She was working up to 14 hours a day on occasion, certainly 5 days a week and frequently working at weekends with no serious adverse effect on her day-to-day activities. There were certainly problems at home, and she was doing less in terms of housework shopping, playing with her son and getting on with her husband, this was mainly due to the fact that she was working excessive hours rather than significant symptoms. Mrs Ward feels that she was tired throughout the period of time in question, in particular from 1 October 2013 until 3 March 2015, she had frequent episodes of anxiety related symptoms, but does not see herself, nor did she claim at interview, that there was any serious adverse effect on her day-to-day activities"*.
112. Dr Isaacs maintained this view when questions were put to him by the Claimant's representative after he had provided his initial report stating *"I believe that I make it quite clear in my report the Mrs Ward is "doing less in terms of housework, shopping, playing with her son in getting on with her husband", this was mainly due to the fact that she was working excessive hours rather than significant symptoms". "In other words Mrs Ward was working long hours, but also taking her work time and was choosing to prioritise her work over other functioning in the house. Had she wanted to boil an egg, she would have been able to do so but, in terms of the time that she was prepared to dedicate the boiling an egg, she chose she chose to focus on her work, rather than on household chores or interacting with her husband and son"*
113. Paragraph 48 of Dr Isaacs reports states *"Mrs Ward described the period January 2015 to 3 March 2015 as one in which she felt extremely stressed, had clear symptoms of anxiety with chest tightness, uncomfortable body feelings in general and was irritable and on edge, but at the same time she continued to function well at work"*
114. At paragraph 60 of his report Dr Isaacs states *"however, Mrs Ward functioned in her own estimation, reasonably well at work throughout the period 1 October 2013 to 3 March 2015. She did not claim at interview, and there is no evidence documented to suggest that there was any serious adverse effect on her ability to carry out normal day-to-day activities during that first time period of the "relevant time"*.
115. It is notable that these views approach matters from the perspective of what the Claimant could do rather than the perspective of what she could not do or what she struggled to do and so they must be approached with some caution.

116. Of course, the impact of treatment received by the Claimant must be discounted when applying the test of disability. In this regard Dr Isaacs's views are unclear. For example:
- 116.1 He refers to the Claimant having counselling Sue Camm. He refers to the effect this had upon the Claimant as follows: "*it is difficult to be clear whether or not Mrs Ward would have continued to cope without a serious adverse effect on her ability to carry out normal day-to-day activities without the therapy sessions that she was having with Sue Camm, between July 2014 and December 2014. I am therefore unable to conclude whether Mrs Ward's ability to carry out her normal day-to-day activities would have been adversely affected if she had not been receiving treatment, i.e. therapy from Sue Camm*".
- 116.2 However, at Paragraph 66 Dr Isaacs states "*However, given that Mrs Ward described her stress is increasing towards the end of 2014, i.e. from December, it is likely that Mrs Ward was suffering from a more serious mental impairment that could or would have caused a serious adverse effect on her ability to carry out normal day-to-day activities were it not for the psychotherapy that was ramped up in December 2014*"; and
- 116.3 Didlaw also asked Dr Isaacs whether he had considered the impact on the Claimant's ability to function but for the treatment that she had received including counselling. Dr Isaacs stated "*it is extremely difficult to be clear, if one discounts of the treatment provided by Sue Camm from July 2014 that there was a substantial adverse effect on Mrs Ward's ability to carry out normal day-to-day activities. Mrs Ward on her own account of events, feels that without the counselling that she would have found it difficult to cope and that could be interpreted as suggesting that there would have been a substantial effect on Mrs Ward's ability to carry out normal day to day activities, but there is no documentation to support this*"; and
- 116.5 Dr Isaacs also concluded "*in terms of the first impairments, i.e. before 3 March 2015, I have stated on several occasions that it did not appear to have a substantial adverse impact on Mrs Ward's ability to carry out normal day-to-day activities, albeit it may well have been, certainly from July 2014, the impact of counselling that enabled her to function*"

117. The medical evidence is somewhat inconclusive on the issue. On balance, I accept the Claimant's evidence that the treatment she received did have a significant effect on her ability to function and without that treatment the impact of the Claimant's impairment on her ability to undertake day to day activities would have been significantly greater.

Discussion/Conclusions

118. The issues for determination are quoted below in bold type from the parties' agreed list of issues. I have retained the paragraph numbering used in the parties document for consistency of reference despite slightly altering the order in which I have determined the issues.

Disability

119. The two issues for determination are:

1. ***Is or was the Claimant a disabled person within section 6 Equality Act 2010 at any material time (i.e. between February 2014 and 18 May 2017)?***

2. ***If so when did the Claimant become a disabled person?***

120. The first element of the section 6 definition requires the Claimant have an impairment. In this regard:

120.1 The Claimant suffered from post-natal depression after her son's birth in September 2011 (paragraph 50 above); and

120.2 The Claimant's GP referred to her as suffering from "stress at work" in late 2012 (paragraph 55 above); and

120.3 The Claimant was diagnosed as having severe anxiety and moderately severe depression in March 2013 (paragraph 60 above); and

120.4 Dr Ernstzen refers to the Claimant having symptoms of anxiety and depression in the months leading up to May 2014 (paragraph 67 above); and

120.5 Dr Isaacs refers to the claimant having symptoms of mixed mood disorder since at least 2012 (paragraph 107 above)

121. This is not the only relevant evidence but serves to show the existence of an impairment throughout the relevant period. In the circumstances, whilst the labels placed on that impairment might vary, I have no doubt that the Claimant had a mental impairment from late 2011/early 2012 onwards and that mental impairment has continued to the present day.

122. I must also be satisfied that the impairment has had the necessary substantial adverse effect on the Claimant's day to day activities. In assessing this I must discount the effect of treatment received by the Claimant which includes the counselling from Ros Redshaw and the counselling and CBT from Sue Camm.

123. I accept the Claimant's evidence that it was this treatment that enabled her to continue to function in her work life and outside work and were it not for that treatment the effect of her impairment on her day to day activities would have been significantly worse.

124. I am satisfied that even with the treatment the effect of the Claimant's impairment upon her day to day activities was substantial. For example:

124.1 In late 2011 the claimant was avoiding contact with others, not leaving her house and was unable to carry out household tasks. Further, her sleep was significantly disturbed due to anxiety (paragraph 50 above); and

124.2 In early 2012 the Claimant lacked motivation, withdrew from physical activity, tended to isolate herself, be confused, tearful and tired (paragraph 51 above); and

- 124.3 Ms Wolinska noticed a significant change in the Claimant's personality when she came to the UK in mid-2012 (paragraph 53 above); and
- 124.4 In March 2013 the Claimant's GP records refer to her having recently experienced psychosomatic problems such as chest pain and her eating poorly (paragraph 60 above). Further, those symptoms worsened in mid-2103 with the Claimant experiencing physical symptoms such as palpitations, scratching her head and scalp together with withdrawal from social engagements anxiety attacks and difficulty undertaking household tasks (paragraph 61 above); and
- 124.5 The Claimant was suffering similar effects by mid-2014 including feelings of being overwhelmed, frequently being tearful and feelings that she could not cope.
125. The treatment began part way through the period referred to above. Notwithstanding the treatment the effect on the Claimant's day to day activities was substantial. They are substantial adverse effects even though the Claimants' problems were being alleviated to some extent through treatment. I have no doubt that the effect on the Claimant's' day to day activities would have been more significant were it not for that treatment.
126. I accept that the nature of the Claimant's impairment is such that her state of health fluctuated. There were times when she functioned better and there might well have been times when the impairment did not have an effect that crossed the line into being a substantial adverse effect. However, I am satisfied that the nature of the Claimant's condition was that at such times it was very likely that the substantial adverse effects would reoccur.
127. It is also clear that the effects have met the definition of being "long term" for the purposes of section 6.
128. In conclusion I find that the Claimant has met the section 6 definition and should be considered to be a disabled person for the purposes of the Equality Act 2010 for the entirety of the relevant period (i.e. from February 2014 to May 2017).

Amendment Application (Claim 1 – 15th May 2017)

129. The issues for determination are:
- 3. Should the Claimant be permitted to amend her claim form for Claim 1 to pursue the following principal additional claims/allegations:**
- (a) **A perceived discrimination claim; and**
- (b) **A disability discrimination claim (on grounds of actual disability) pursuant to sections 13, 15 and/or 19 of the Equality Act 2010 relating to her bonus for the performance year 2014; and**
- (c) **A disability discrimination claim (on grounds of actual disability) pursuant to sections 15 and 19 of the**

Equality Act 2010 relating to her bonus for the performance year 2015; and

(d) A disability discrimination claim (on grounds of actual disability) pursuant to sections 13, 15 and/or 19 of the Equality Act 2010 by not promoting the Claimant to the role of Head of Research and Strategy in or around June 2016 and appointing Greg Mansell instead.

130. Taking account of the factors identified earlier my conclusions are as follows:
131. With regard to the nature of the amendments I conclude that the proposed amendment at paragraphs (a), (c) and (d) above are essentially relabelling exercises. In each case the underlying factual complaints have already been made in the original claim form and are substantially unchanged by the proposed amendment. In each case, the Claimant is merely seeking to clarify the claim by placing a legal label upon it. I do not accept that these amendments are of the nature of significant new complaints. However, the same cannot be said for the proposed amendment at paragraph (b) above. That seeks to introduce a new factual complaint in relation to the Claimant's 2014 bonus. That complaint was not raised in the original claim form.
132. Despite the relative sophistication of the claim form the claim was issued by the Claimant as a litigant in person. I do not consider it to be a contentious amendment to allow more precise legal labels to be placed on the existing factual complaints. Those existing factual complaints were brought in time. The balance of prejudice in respect of the amendments at paragraphs (a), (c) and (d) clearly lies in favour of the Claimant. The amendments are not significant, they seek to clarify and label existing factual complaints. They do not seek to introduce significant new factual complaints and there can be no real prejudice to the Respondent in allowing these amendments.
133. The position is different with regard to the amendment at paragraph (b) above. That amendment does seek to introduce a new factual complaint dating back to the Claimant's 2014 bonus, Whilst the complaint is virtually the same as the complaint in relation to the 2015 bonus the proposed amendment is significant as it seeks to introduce an new factual allegation and cause of action.
134. Furthermore, that new cause of action is potentially significantly out of time. I understand that the Claim relates to a bonus that was payable in early 2015. The amendment application was made on 15 May 2017 and therefore the claim is very significantly out of time (subject to the application of section 123(3)(a) of the Equality Act 2010).
135. The Claimant has also delayed making the application until very late in the day.
136. Other relevant factors are:
- 136.1 Although the allegation is a new factual allegation it is virtually identical to the Claimant's existing claim in relation to the 2015 bonus (which the Respondent will have to deal with in any event). In that respect the addition of this new cause of action will be much less prejudicial to the

Respondent than a factual allegation of an entirely different character;
and

- 136.2 The reason for delay on the part of the Claimant is simple. She had the claim in mind when Claim 1 was originally presented. That is clear from the reference to the 2014 bonus in the original claim form. However, the Claimant mistakenly thought that the claim was out of time due to her ignorance of section 123(3)(a) Equality Act 2010 and her ignorance of the fact that it could be argued to be part of a continuing series of events which potentially brought the claim within time.
- 136.3 I am not persuaded that the passage of time will create a significant prejudice to the Respondent in dealing with this claim. They will have to deal with the claim in relation to the 2015 bonus in any event. I understand that the decision makers were Alan Patterson and Denis Lopez both of whom have left the Respondent's employment. Mr Patterson is still available to give evidence. The Respondent has not persuaded me that Mr Lopez is not available. In any event one would expect the Respondent to have well documented records of bonus decisions and I am not persuaded that there is any significant prejudice to the Respondent in having to meet this claim now.
- 136.4 Mr Laddie's submissions about the apparent weakness of the claim at paragraph 38 of his skeleton argument have some force. However, it would be wrong to determine the claim summarily at this stage and whilst the claim does not appear to be particularly strong based on the material available at present I am not persuaded that this is a significant factor in favour of disallowing the amendment.
- 136.5 The Claimant's state of health is also a significant factor. It is clear that the Claimant has been extremely unwell since Claim 1 was presented and I accept that it is only the involvement of her new solicitors that facilitated the application to be made.
137. Considering all of these factors I find that the balance of prejudice lies in favour of the Claimant and the amendment is allowed.
138. Normally, when making such a decision on an application to amend which is, on its face, out of time I would also need to consider whether to exercise the discretion under section 123(1)(b) Equality Act 2010 as to whether it is just and equitable to extend time. However, the parties respective Counsel both agree that I cannot determine this in the Claimant's favour at this time given that the question of whether the claim is out of time will depend on the findings at the final hearing on other matters. It is only once those findings are made that the tribunal can apply section 123(3)(a) and consider whether the claim in relation to the 2014 bonus is part of a continuing series of acts and whether the claim is in fact in time. In the circumstances, whilst allowing the amendment application I make no finding at this stage as to whether the claim in relation to the 2014 bonus is in time or whether it is just and equitable to extend time. That is a matter which will need to be determined by the tribunal at the final hearing.

Strike Out/Deposit Order

139. I deal with these issues in a different order to the order set out in the parties list of issues. I should deal with the strike out applications before the out

of time issues as if claims are struck out it will have a knock-on impact on the determination of whether the Claimant can argue that the surviving claims are in time as part of a series of continuing acts.

140. As both the strike out and deposit order applications involve an assessment the merits of the claims it is convenient to deal with them both together although I remind myself that the tests to be applied differ. As the threshold for a obtaining strike out is higher than the threshold for obtaining a deposit order it follows that if I consider that a particular claim or allegation has more than little reasonable prospect of success it will survive both the threshold for strike out and a deposit order.

141. The claims that are the subject of the strike out and deposit order applications and my conclusions in relation to each claim are set out below (allegation numbers relate to the numbered allegations in the parties' agreed table of allegations and paragraph numbers refer to the corresponding paragraphs of either Claim 1 or 2 as applicable):

(1) Allegation Number 43 (Claim 2): that the Claimant received no bonus in respect of the 2016 Performance year (Grounds of Claim, paragraph 33(v), 38-41)

142. This allegation is one amongst 21 examples of behaviour on the part of the Respondent cited in support of the Claimant's "global" allegation that she was treated less favourably after her absence on sick leave because of her sickness absence and/or disability. Consequently, it is dangerous to seek to separate out one allegation as having no reasonable prospect of success or little reasonable prospect of success when the success or failure of the particular allegation is intertwined with the other allegations. The more allegations the Claimant succeeds with the greater the prospect of the tribunal drawing an inference that an individual allegation is made out.

143. Further, I understand that the Claimant will state in evidence that the Respondent operates an unwritten policy whereby absence is not counted towards bonus calculation (a fact which the Respondent contests) and that this policy was not applied to her.

144. The Respondent asserts that the bonus was not paid to the Claimant as she was absent for the entire bonus year. Thus, it is likely that the non payment of the bonus will be found to be unfavourable treatment arising from the Claimant's disability and the real issue will be whether the Respondent can justify that treatment. There is considerable force in Mr Laddie's assertion that no tribunal reasonably directing itself could find that an employer is obliged to make a positive award of a bonus to an employee who has been absent from work for the entirety of the performance period. However, that is matter that the Respondent will need to prove on the evidence. It is not a matter I am willing to assume the Respondent will be able to make out. It is a matter which should be determined after hearing all the available evidence.

145. There are plainly significant issues of fact to be determined here and in the circumstances I am not persuaded that the tests for strike out or a deposit order are met. No strike out or deposit order is made in respect of this allegation.

(2) Allegation Number 44 (Claim 2): that the Claimant did not receive any compensation statement or letter re her (non-existent) bonus award (Grounds of Claim, 33(iii), 38-41)

146. Again, this allegation is one of the 21 examples of behaviour on the part of the Respondent cited in support of the Claimant's "global" allegation that she was treated less favourably after her absence on sick leave because of her sickness absence and/or disability. I repeat paragraph 142 above.

147. The Respondent asks what would be the point of sending such a letter when there was no bonus to be awarded. I am not persuaded by that argument. It was open to the Respondent to send a letter confirming that no award was being made and confirming the reasons for their decision. I understand that they did not do so. Further, the Claimant's allegation is that this is merely one example of the way in which the Respondent treated her differently due to her absence and/or disability.

148. I do not consider it appropriate to seek to "sever off" this allegation and consider its merits in isolation when it is merely one allegation of many cited in support of the same "global" allegation that the Claimant was treated less favourably after her absence on sick leave because of her sickness absence and/or disability. I conclude that the Claimant has more than little reasonable prospect of success in proving that "global" allegation and that it is not appropriate to make a strike out or deposit order in respect of this allegation.

(3) Allegation Number 45 (Claim 2): that it was "inferred" via the bonus process that the Claimant would never return to work (Grounds of Claim 33(xvii), 38, 39 and 40)

149. Again, this allegation is one of the 21 examples of behaviour on the part of the Respondent cited in support of the Claimant's "global" allegation that she was treated less favourably after her absence on sick leave because of her sickness absence and/or disability. I repeat paragraph 142 above.

150. If this allegation were made in isolation as a freestanding and separate allegation of discrimination it is difficult to see how it could succeed. It is difficult to see how one could draw the necessary inference. However, it is not an isolated allegation. I refer to the preceding paragraph. In my view the allegation is so intertwined with the other allegations in support of the Claimant's "global" allegation that it is not appropriate to "sever off" the allegation for the reasons set out above. It is not appropriate to make a strike out or deposit order in respect of this allegation.

(4) Allegation Number 46 (Claim 2): that irreversible damage was caused to the Claimant's reputation by communicating to the outside world including recruitment consultants [that the Claimant was no longer employed by the Respondent] (Grounds of Claim, 33(xxi), 38, 39 and 41)

151. Again, this allegation is one of the 21 examples of behaviour on the part of the Respondent cited in support of the Claimant's "global" allegation that she was treated less favourably after her absence on sick leave because of her sickness absence and/or disability. I repeat paragraph 142 above.

152. This is clearly a fact sensitive allegation. I understand that the Claimant's evidence will be that she was informed by a recruitment consultant that the Respondent had communicated that the Claimant was no longer employed by the Respondent. I must assume at this stage that such evidence will be adduced at a final hearing and on this basis the Claimant must have more than little reasonable prospect of success in establishing this fact.

153. There will of course be evidential issues as to whether the reason for this treatment related to the Claimant's disability. However, the allegation is one that should properly be dealt with at a final hearing having heard all the evidence. It is not appropriate to make a strike out or deposit order in respect of this allegation.

(5) **Allegation Number 47 (Claim 2): that there was a failure to deal correctly with an 8% interest payment on back pay in connection with payments under the Respondent's PHI scheme (Grounds of Complaint, 33(xv), 38, 39 and 40)**

154. The Claimant asserts that the Respondent failed to deal properly with issues relating to back pay under the PHI scheme and that the motivation for this was discriminatory / harassing.

155. I have seen the evidence of Louise McMahon on this issue. It is dealt with in her witness statement. It is accepted that there was a delay on the part of the Respondent in dealing with this. However, her evidence will be that this had nothing to do with the Claimant's absence or disability and was due to the fact that this was a novel situation for the Respondent. Her evidence will be that the Respondent had never had to administer a PHI payment made in circumstances where the claim had initially been refused and where interest was subsequently paid following a reversal of the original decision. Her evidence will be that the Respondent had not been through such a situation before and it was not until they obtained legal advice as to how to deal with the matter that it was dealt with.

156. I am in a different position with regard to this allegation. I have seen the Respondent's witness evidence relating to the allegation. I am therefore much better placed to gauge the merits of this allegation. I must consider what prospect there is of the Claimant adducing evidence at a final hearing which supports her contention that the Respondent's behaviour in this regard was an act of unlawful disability discrimination. There is no suggestion that the Claimant will be able to adduce such evidence. This strikes me as a good example of the type of case where the success of the claim on this point will depend on "something turning up" or some admission being made by the Respondent's witnesses on cross examination. It might be said that the claim could succeed even in the absence of such direct evidence as the tribunal might be willing to draw the necessary inference in the event that that the Claimant's other allegations were to succeed. However, that too appears to be the most remote of possibilities in a case in which the Respondent has advanced a perfectly sensible explanation for their behaviour and the Claimant has not identified any possible evidence to the contrary. In the circumstances I conclude that this allegation stands no real prospect of success and will be struck out.

(6) Allegation Number 48 (Claim 2): that there was a failure to provide a certificate of interest in relation to back pay (Grounds of Complaint, 33(xvi), 38 and 41)

157. I repeat paragraphs 154 to 156 above. This claim is also struck out for the same reasons.

(7) Allegation Number 22 (Claim 2): the Claimant's claim that the commissioning of a report into her team without her knowledge amounted to direct disability discrimination and harassment related to her disability (Grounds of Claim paragraphs 30, 38 and 39)

158. This appears to be an ambitious allegation for the Claimant to make at first glance. To succeed she will need to adduce sufficient evidence for the tribunal to conclude that the reasons for these actions related to the Claimant's disability and not (as the Respondent will say) because members of the Claimant's team raised complaints regarding the behaviour of the Claimant and Mr Patterson.

159. However, it is not a claim which should be struck out. The success or failure of the claim will depend on an evaluation of evidence that has yet to be produced regarding the complaints made by the Claimant's team and the Respondent's motives for commissioning the report.

160. Whilst this appears to be a relatively weak allegation it is one that should be determined having heard the evidence and should not be struck out.

161. I also considered whether to make a deposit order. On balance, I conclude that no deposit order is appropriate for the same reasons. The motivations of the decision maker are a matter for trial. This issue is so fact sensitive and so dependent on evidence that I have not yet seen that it cannot be said to have little reasonable prospect of success.

(8) Allegation Number 29 (Claim 2): the claim in relation to the absence of direct contact between her and the Respondent, when the Claimant's solicitors, Kingsley Napley, had required on a number of occasions that all contact be through them (Grounds of Complaint paragraph 33(i), 39 and 40)

162. Again, this allegation is one of the 21 examples of behaviour on the part of the Respondent cited in support of the Claimant's "global" allegation that she was treated less favourably after her absence on sick leave because of her sickness absence and/or disability. I repeat paragraph 142 above.

163. It is a matter which requires detailed examination of the contact between the parties, an assessment of the motivations of the decision maker and the impact the behaviour had upon the Claimant. These are all highly fact sensitive matters and I cannot at this stage, say with confidence that the claim stands little reasonable prospect of success. I will not strike out the claim or make a deposit order in relation to it.

(9) Allegation Number 36 (Claim 2): the Claimant's claim that the Respondent's alleged failure to communicate a change of her line management on two occasions amounted to direct disability and/or harassment related to her disability (Grounds of Complaint paragraphs 33(xix), 38 and 41)

164. I repeat my conclusions in paragraphs 162 and 163 above.

(10) Allegation Number 38 (Claim 2): the Claimant's claim that the failure to provide her with a compensation letter in relation to her 2015 bonus amounted to direct discrimination and/or harassment related to her disability (Grounds of Complaint paragraphs 33(ii), 38 and 41)

165. The position here appears to be little different to Allegation 44 and I repeat my conclusions at paragraphs 146 and 148 above.

(11) Allegation Number 40 (Claim 1): the Claimant's claim that she should have been promoted to the role of Head of research or Strategy on an unknown date and in circumstances in which she had not attended work since 9 March 2015 and remains unfit to return to work

166. The Claimant's evidence at trial (which I understand to be disputed by the Respondent) will be that she was offered the role of Head of Research / Strategy in early 2015 and that during her prolonged period of sickness absence the Respondent instead promoted Greg Mansell to that role on a permanent basis. The Respondent's decision not to promote the Claimant to the role is said to be unfavourable/ less favourable treatment on the grounds of disability and also to amount to harassment on the same grounds.

167. Essentially, the Respondent appears to accept that the Claimant was not promoted to the role but says that the reason for this was because of her prolonged absence and the fact that by the relevant date it was very unlikely that the Claimant would ever return to work. In essence the key issue at trial will be justification.

168. There is force in Mr Laddie's submission that the Respondent is likely to be able to show justification for filling the role when the Claimant was on such a prolonged absence. Whether that argument is quite so strong in relation to the decision to *permanently* fill the role is less clear cut and should properly be investigated at trial. Again, this is a matter which should properly be determined at trial when all the relevant evidence will be available.

Time

169. The Respondent contends that the vast majority of Claim 2 is out of time.

170. The issues for determination are:

5. ***Have the Claimant's discrimination claims in Claim 2 been brought in time?***
6. ***Alternatively, has the Claimant proved that there was (or is a prima facie case of) a continuing act extending over the entirety of the period?***
7. ***If not, would it be just and equitable to extend time?***

171. When considering whether the complaints are capable of constituting a series of continuing acts and the out of time issues I must first establish which complaints are still "live" as I should ignore any claims that are no longer relevant when considering whether the complaints are potentially part of a series of continuing acts. I take into account the fact that the claims relating to allegations 47 and 48 have been struck out.

172. Both parties' counsel agree that I cannot determine at this stage whether there is a series of continuing acts for the purposes of section 123(3)(a) Equality Act 2010 as that is a matter for the tribunal to determine at a full merits hearing after hearing all the appropriate evidence and making findings as to the various allegations said to be a part of that set of continuing acts.

173. Both parties' counsel also agree that in the circumstances I cannot make a positive decision in the Claimant's favour as to whether it is just and equitable to extend time pursuant to section 123(1) Equality Act 2010 as that should be determined after the tribunal has made findings in relation to continuing acts. It is submitted that it is open to me to determine the issue *against* the Claimant (i.e. to conclude that it would not be just and equitable to extend time in any event). However, having considered the point it appears to me that the issue of time is a matter that ought properly to be dealt with by the full tribunal at the full merits hearing once a decision has been made as to continuing acts. Until that decision is made the tribunal cannot determine whether the claims are out of time and, if so, how far out of time they are. These appear to me to be important factors that need to be taken into account when deciding whether it is just and equitable to extend time (i.e. one needs to know how generous an extension of time is required before one can consider whether it is just and equitable to grant it). Thus, the preliminary issues on time will need to be determined by the full tribunal at the full merits hearing.

174. However, at this stage I must consider whether the Claimant has demonstrated a *prima facie* case that the events relied upon are capable of amounting to a continuing series of acts for the purposes of section 123(3)(a) Equality Act 2010.

175. Claim 2 includes a very substantial number of complaints. The character of those complaints varies as do the identities of the individuals who are said to be the perpetrators. The complaints can however be broken down as follows:

175.1 There are discrete allegations of maternity and pregnancy discrimination extending between July 2011 and January 2012. Alan Patterson is said to be to perpetrator in every case; and

- 175.2 There are 17 allegations of sex discrimination said to have occurred between January 2012 and March 2015. Some relate to the Claimant's return to work following maternity leave. Others relate to the way in which the Claimant was treated by her line manager Alan Patterson and others relate to the behaviour of the Claimant's team towards her; and
- 182.3 The remainder are allegations of various forms of disability discrimination said to have occurred between February 2014 and May 2017.
176. It is also of note that the Claimant has presented Claim 3 in which she seeks to rely on further allegations of sex discrimination. It is not clear from the Claim Form in relation to Claim 3 when those events are said to have occurred. However, the Claimant's counsel asserts that the relevant date is 12 September 2017 as that is when the Claimant discovered the alleged harassment. He submits that the cause of action for a claim for harassment under section 26 Equality Act 2010 is not complete until the effect required by section 26(1)(b) Equality Act 2010 occurs.
177. Whilst the final determination of this issue is a matter for the full tribunal to determine at the final hearing having heard all the evidence I take the view that the Claimant has demonstrated a *prima facie* case that the acts are capable of constituting a series of linked events for the purposes of section 123(3)(a) Equality Act 2010. In particular:
- 177.1 The earlier allegations of sex discrimination that might otherwise be out of time are potentially "saved" by the allegations in Claim 3. Further, there are sufficient commonalities between the allegations to be capable of supporting an argument that there was an underlying and continuing state of affairs whereby the Respondent tolerated or condoned sex discrimination; and
- 177.2 The allegations of disability discrimination largely focus on how the Claimant was treated after her illness became apparent and how her absence was managed by the Respondent. Again, there is at least a *prima facie* case that the allegations are capable of demonstrating a particular approach to the treatment of disabled employees.
178. In the circumstances I reject the Respondent's contention that the claims should be struck out on the basis that the Claimant has failed to demonstrate a *prima facie* case that the acts are capable of constituting a series of linked events for the purposes of section 123(3)(a) Equality Act 2010.

Employment Judge A Spencer on 21 December 2017