



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms J Douglas-Nelson

v

**The Hillingdon Hospitals NHS
Foundation Trust**

Heard at: Watford

On: 30 & 31 January &
1 February 2018

Before: Employment Judge R Lewis
Members: Mr I Bone and Ms S Johnstone

Appearances

For the Claimant: Miss N Joffe, Counsel
For the Respondent: Mrs S Ramadan, Solicitor

RESERVED JUDGMENT

The claimant's claims of disability discrimination, howsoever formulated, fail and are dismissed.

REASONS

Case management

1. By a claim presented on 10 October 2016 by solicitors who continued to represent her, the claimant complained of disability discrimination. The respondent denied that the claimant met the section 6 definition of disability, and asserted that the claimant had been dismissed due to failure to meet the requirements of her probationary period.
2. The case was the subject of telephone preliminary hearings on 20 December 2016 (Employment Judge Manley) and 9 March 2017 (Employment Judge Bedeau). By letter dated 21 June 2017, the respondent conceded "the claimant is, and was at the relevant time, disabled within the meaning of the Equality Act 2010 by reason of sarcoidosis." A preliminary hearing which had been scheduled to deal with the issue of disability was

accordingly vacated and notice of the present hearing sent on 7 October 2017.

3. At the start of this hearing, there was an agreed bundle of about 350 pages. Witness statements had been exchanged. The claimant was the only witness on her own behalf. The respondent's only witness was Ms Obibugo Maduako-Ezeanyika, at the time employed by the respondent as Head of Workforce Planning and Organisational Development, and therefore the claimant's line manager.
4. We record a number of matters of case management which arose during the hearing. The tribunal made a number of adjustments to enable the claimant to participate fairly in the proceedings, included adjusting times, taking breaks, and adjusting the lighting in the tribunal room. Disclosure of relevant documentation was given overnight after the first day of the hearing. It was agreed, in light of time constraints and other matters, that this stage of the hearing would deal with liability only. In reserving judgment at the end of the third day of hearing, the tribunal provisionally listed a remedy hearing, which is now cancelled.
5. The parties exchanged written closing submissions which were of great assistance, and in light of matters raised about the limitation defence, Miss Joffe was granted permission to recall the claimant for brief additional evidence on extension of time.

Preparation issues

6. We preface our findings with general observation. In this, as in many cases, we heard evidence about a wide range of matters. Some of the evidence was given in some depth. Where we make no finding about a matter of which we heard, or make a finding but not to the depth to which the parties went, that should not be taken as oversight or omission, but as a reflection of the extent to which the point was of assistance to us. That observation is commonplace in the work of the tribunal.
7. It is also commonplace that tribunals are asked to consider bundles of documents which are sometimes disproportionate or unwieldy, but which may nevertheless appear incomplete because of the absence of complete office documentation or email trails. We consider it our responsibility to proceed on the basis of the material which has been placed before us, and not by speculating about the material which might be before us and is not. We are cautious of applications for disclosure during a hearing. We bear in mind that it is the task of the tribunal to adjudicate on the dispute between the parties, and that any observation about case preparation or presentation should be strictly limited to that which is necessary to explain to the parties how the tribunal has reached its conclusions. It is useful to bear in mind that the tribunal has no insight into the preparation process.
8. Within those general observations, we decided this case within the framework of a number of issues which relate to disclosure and evidence.

9. From the respondent's side, the tribunal noted the absence from the bundle of its policies on probation, and of template correspondence with probationers; of an equal opportunities policy; of guidance on disability monitoring and annual reporting; on handover, or on induction of new employees. We noted a fleeting reference in the sickness policy to the management of long term sickness and to disability issues (78); we were not referred to it in evidence, and it was not clear on reading that it applied to the claimant as a probationer.
10. It was Ms Maduako-Ezeanyika's evidence, which we accept, that she had regular one to one meetings with the claimant after she took up employment on about 29 June 2015. There was no note or record from the respondent of any such meeting before that of 30 November 2015. We note that although emails suggested that the claimant's objectives were defined at a one to one on or about 12 August 2015, they were not set out in writing until 27 November 2015. Ms Maduako-Ezeanyika gave evidence that much of her decision to dismiss was based upon documents written by the claimant which Ms Maduako-Ezeanyika printed on or after 31 March 2016 and considered inadequate; none of those documents was in the bundle. There was little or no evidence of HR support from management in the events with which we were concerned. There was no evidence of Ms Maduako-Ezeanyika's potentially relevant views on the wider issues of disability, although in her last answer to the tribunal she said that she considered herself to meet the section 6 definition, and had been the beneficiary of reasonable adjustments (she was not asked to give any more detail about this).
11. On the claimant's side, the witness statement from which we worked was in part factually inaccurate, inconsistent and incomplete. There was one line in the statement about remedy, and we split the hearing in part because we could not envisage a fair hearing on remedy in the absence of remedy evidence or disclosure. Ms Maduako-Ezeanyika's evidence had been that the claimant made notes at their one to one meetings, but they had not been disclosed. We had from the claimant's side no medical evidence which advised the tribunal about sarcoidosis, and no report which specifically addressed the question of sarcoidosis and the claimant's work.
12. We understood that none of these matters could be laid at the door of either representative who appeared before us. We set them out because we consider them material to the challenges faced by the tribunal in this case.

Limitation

13. A general limitation issue was pleaded in the response. It was common ground that the claimant was given notice on 9 May 2016, which expired on 31 July, and that latter date was therefore the effective date of termination. Day A was 15 August and Day B was 15 September. The claim was presented on 10 October 2016. We accept that events which took place on or before 16 May 2016, were on their face out of time.

14. Ms Ramadan's submission was that all the matters of which the claimant complained, including her dismissal, took place on or before 16 May, and that the tribunal should therefore find the entire claim out of time. She submitted further that decisions made in the course of the claimant's management were discrete matters, and not continuing acts. When recalled, the claimant's brief evidence was that she consulted a regional officer of Unison at or around the time of dismissal, and proceeded thereafter in accordance with advice that time ran from 31 July 2016, and that the entire claim was in time if that were the case.
15. Our finding is simple. This was a discrimination claim which in its entirety was based on management events which passed between the claimant and Ms Maduako-Ezeanyika. We find that the entire sequence, from the claimant taking up appointment until her dismissal, constituted a continuing act. If our approach had been otherwise, we would have found the earlier events to constitute relevant background. We do not accept that where dismissal is given with long notice, time to complain of discriminatory dismissal runs from the date of notice, as opposed to the effective date of termination. That would mean that a claimant who claimed both unfair dismissal and discrimination in dismissal might have two different time limits arising out of one and the same dismissal. Furthermore, we do not accept that Mrs Ramadan's is a proper interpretation of section 123(1) of the Equality Act 2010 which describes the time limit as "the period of three months starting with the date of the acts to which the complaint relates." The act was termination of the claimant's employment. It was decided on 9 May, and was effected on 31 July 2016. If we were wrong about that, we would have concluded that it was just and equitable to extend time to enable the claimant to proceed on that basis.

Setting the scene

16. In our fact find, we depart from strict chronology where we consider it helpful to do so. The respondent is an NHS Hospital with about 4000 employees. We were concerned with the claimant's appointment as Learning, Development and Organisational Manager, reporting to Ms Maduako-Ezeanyika. Ms Maduako-Ezeanyika summarised the role and function; "I was responsible for overseeing the Strategic and Operational Workforce and Organisational Development functions, which sat within the Human Resources Directorate." She reported to the Director of People.
17. The team where the claimant worked was regularly short staffed, had considerable recruitment and retention difficulties, and worked under pressure, which we understood to be in part generated by the need to balance strategic matters (such as drafting new policies) with routine tasks (which within the respondent were called "the day job"). Ms Maduako-Ezeanyika gave striking evidence, which we accept, that during the period with which we were concerned, there were days when she arrived at her desk at 6.00am, and remained sometimes until 10.00pm. Clearly that

indicates structural issues which go beyond the remit of this tribunal. It may also explain the absence of notes of meetings.

18. The claimant was born in 1967. Her job application indicated an impressive record in both public and private sectors in the general field of Learning and Development. Ms Maduako-Ezeanyika interviewed her and thought her an impressive candidate. In a notable phrase in evidence, she said that she felt like “the cat who got the cream” when she was able to appoint the claimant.
19. When completing her application form, the claimant wrote, “I do not wish to disclose whether or not I have a disability.” (135).
20. On being appointed, she completed a document called NHS Employment Health Check, which was marked as confidential to Occupational Health, stating, “This means that the medical details you put on the form will not be disclosed to anyone else without your explicit consent” (135a). This document was disclosed by the claimant overnight after the first day of the hearing. In the medical history section (135b) the claimant mentioned orthopaedic matters, and in the context of chronic carpal tunnel and tenosynovitis, she wrote, in answer to the question, “Do you need any specific aids or adaptations,” “Perhaps support (for wrists) and light reflection (sarcoidosis) and supportive chair for back.” (135b).
21. Mr Siraj of Occupational Health telephoned the claimant on 12 May 2015 in response to this. He made a two-page note, focusing on carpal tunnel, and his second page contained the following:

“Is right hand dominant. Also, has sarcoidosis – but says normal office chair usually supportive. Advised re. wrist support” (135h).
22. Before taking up appointment, the claimant filled in an Employee Appointment form, with information such as emergency contact details. The form asked, “Do you have a disability?” The claimant did not tick either the yes or no boxes. She wrote something in the line beneath them, which she then erased and which was illegible (145).
23. The claimant took up post on 29 June. She was appointed to Band 8, a senior managerial post. We noted that her contract of employment (58) stated, “Your employment is subject to a six months’ probationary period and may be terminated, with notice, if any aspect of your attitude, ability or aptitude proves to be unsatisfactory. Where there are concerns in your probationary period the line manager will discuss these with the post holder and People Development.” (62).
24. The claimant worked in an open plan office. Ms Maduako-Ezeanyika’s desk was adjacent to hers, and there was ample opportunity for informal interaction. Ms Maduako-Ezeanyika facilitated a two week overlap between the claimant and her predecessor, Ms Kent, who had been in post several months on an agency basis, and who was, in Ms Maduako-Ezeanyika’s estimation, extremely effective and competent. The purpose of the

handover was, as is obvious, to ensure that Ms Kent had the fullest possible opportunity of briefing the claimant on the post to which she had been appointed.

The period before 30 November 2015

25. The period between the claimant's appointment and 30 November 2015 was relatively uneventful. The claimant agreed in evidence that she had no disability related absences before 1 February 2016. She was absent for the entire calendar month of September on pre-arranged leave.
26. We accept that during that period there were numerous interactions between the claimant and Ms Maduako-Ezeanyika. Some were no more than routine or casual, in the nature of colleagues in the same team working at adjacent desks. We accept that there were in the same period one to one meetings, and we accept Ms Maduako-Ezeanyika's evidence that they were clearly distinguishable from routine interaction, because they were held in a separate closed room which had to be booked. They were undocumented.
27. We make the following general findings about the period up to 30 November 2015:
 - 27.1 Although the claimant had public sector experience (with the London Borough of Brent) she had never before worked in the NHS, and there were aspects of NHS process and procedures which were unfamiliar to her, and with which she struggled;
 - 27.2 She raised an issue of homeworking. Ms Maduako-Ezeanyika was in principle supportive of homeworking, both on grounds of effectiveness and in light of the equality implications for family and childcare issues.
 - 27.3 Within the respondent, home working was offered subject to disciplines, which included reporting back to line management. The claimant was a senior mature employee, who was uncomfortable with the concept of reporting back to her line manager on how she had spent the working day at home;
 - 27.4 Within a matter of weeks of starting, the claimant raised an issue with Ms Maduako-Ezeanyika about her pay. In evidence, the claimant asserted that she had not realised the hidden costs in taking up her appointment, including travel, parking and childcare, and asked for a pay rise which would recognise this. For her part, Ms Maduako-Ezeanyika was taken aback that a newly appointed senior colleague should ask for a pay rise within weeks of starting, and was troubled by the question of appropriate process. We accept that this issue gave rise to tension between the two, and resentment on the part of the claimant.

- 27.5 We accept that the claimant gave Ms Maduako-Ezeanyika reason to believe that she was resistant to the degree and nature of line management which Ms Maduako-Ezeanyika regarded as appropriate to the relationship between the two and in accordance with the respondent's working culture. We are unable to find (nor was it suggested to us) that this was a mere personality clash, although that may have been an element. We find that the respondent was a more structured and hierarchical organisation than the claimant expected, and that Ms Maduako-Ezeanyika had expectations that the claimant would understand these matters and readily accept that they were part of her new working environment.
- 27.6 We accept that the one to one meetings were not all harmonious. Ms Maduako-Ezeanyika described them in evidence as at times heated, but was unable to give a specific instance of a heated dispute. She commented that during the meetings the claimant's body language was generally poor, and in evidence demonstrated the claimant sitting in slouched posture, not facing Ms Maduako-Ezeanyika directly, and with her body half turned away from her, so that Ms Maduako-Ezeanyika was addressing the claimant's shoulder and the claimant was looking at her over her shoulder. While we accept that that happened on occasion, we do so on the basis of oral evidence, and with considerable misgivings that such discourtesy was not noted or dealt with by Ms Maduako-Ezeanyika at the time.

Communication about health

28. A great deal of time was taken in evidence with a recurrent dispute between the claimant and Ms Maduako-Ezeanyika about what the claimant said about her health in this period. The claimant asserted that from her earliest days in employment she told Ms Maduako-Ezeanyika that she suffered from sarcoidosis, spoke about it, and said that two relatives had died from it. Her evidence on the last point was that she had made the comment almost with levity, stating that the two relatives who had died were thought of as very fit, and so it was fortunate that she, the claimant, was unfit, and less at risk. Ms Maduako-Ezeanyika's evidence was that sarcoidosis had never been mentioned to her by the claimant; that she did not know what it was, and that the first she knew of it was on 3 February 2016 (286) when the claimant mentioned it in a text.
29. This dispute was emotive for both protagonists. It was of considerably less assistance to us than appeared to the parties, because the common ground was that the claimant had no absence which she considered disability related before 1 February 2016, and that no later than 3 February 2016 Ms Maduako-Ezeanyika as line manager had been told of sarcoidosis as a presenting cause. (The issue of whether information given in confidence by the claimant to the respondent's Occupational Health function constituted knowledge for the purposes of the Equality Act was accordingly one which we did not need to decide and do not).

30. We understood the claimant to rely on the point as evidential background to indicate Ms Maduako-Ezeanyika's indifference or even hostility to the claimant's health issues and concerns, coupled with her failure to identify the existence of the disability and take any appropriate steps in consequence.
31. In considering the conflict of evidence on this point, we are troubled by the obvious difficulty: two senior professionals in the HR field had participated in a series of meetings of which neither could produce a word of documented record. As with many cases in the tribunal, a one line email written at the time could have avoided a great deal of later dispute.
32. We prefer Ms Maduako-Ezeanyika's evidence and we find that the claimant did not inform her after recruitment that she had sarcoidosis, and we reject her evidence that she mentioned it frequently. We do so for the following reasons. Both the claimant and Ms Maduako-Ezeanyika were delighted by the claimant's appointment. Neither had any reason to foresee that the appointment would not succeed, or end up in a tribunal.
33. Ms Maduako-Ezeanyika wanted the claimant to succeed and remain in post. It was wholly in Ms Maduako-Ezeanyika's interests that there be a competent successor to Ms Kent. She had no interest in suppressing or disregarding information which might assist or support the claimant, such as a health matter. We accept secondly that in general terms, there was no evidence that Ms Maduako-Ezeanyika was in any way hostile or impatient about disability or health issues amongst staff; she commented on a number of times in evidence that on the contrary she worked in a hospital. Thirdly, the remark cited by the claimant seems to us so unusual and striking (that she had a disability which had proved fatal to two close relatives) that we do not accept that Ms Maduako-Ezeanyika would not have made some form of response. Fourthly, we accept that the term sarcoidosis was unknown to Ms Maduako-Ezeanyika at the time, and in our judgment, she would at the very least have asked what it was and what it entailed. We could also see no need for the claimant to refer repeatedly to sarcoidosis in her first days in post. She had told Occupational Health that the only practical consequence was a good quality chair, which she told us in evidence was not an issue. She said that she had been diagnosed with the condition many years previously, and that it was under control for the first six or seven months of her employment.
34. It follows that if it is suggested that in the period before 30 November 2015 any aspect of Ms Maduako-Ezeanyika's management of the claimant was the result of an adverse response to her disability, we reject such evidence.
35. One specific matter which did arise in the period before 30 November was that on 12 August Ms Maduako-Ezeanyika arranged to meet the claimant to discuss objectives (150). An undocumented meeting took place. The claimant was then away for the calendar month of September. The objectives were not sent to the claimant in draft until 27 November (159).

The language of the email of 27 November is amicable and relaxed. It is suggestive of going through the motions to complete the six months' review and then set the objectives, and we find that it is a small indication that by that date the possibility of the claimant failing probation, or leaving the Trust early, was not in Ms Maduako-Ezeanyika's contemplation. On the previous day, the claimant had a hospital appointment at which she was told that she had a severe vitamin D deficiency and was prescribed appropriate medication (149).

The medical background

36. As stated, we heard a great deal about the claimant's sarcoidosis, but without the benefit of any professional independent evidence. The claimant's witness statement contained the following about it:

"Sarcoidosis is a rare multi systemic inflammatory disease that effects immunities. It causes a person's immune system to overact when fighting an infection (or imaginary infection). This then creates inflammation which then damages the person's own body tissue. The classic feature of sarcoidosis is a formation of granulomas. These are microscopic clumps of inflammatory cells that group together. When too many of them form in a body organ they can interfere with how that organ functions on a day to day basis. Sarcoidosis can affect any body organ or system with very little warning. There is no cure, symptoms are determined by which part of the body it effects. Sarcoidosis can be serious and in some cases can be life threatening.... Sarcoidosis primarily affects my glands and eyes". (WS11, 12 & 13).

37. We intend no disrespect to the claimant in stating that while the above evidence may be accurate, it sets out no more than the claimant's understanding of what she has been advised or read, and does not constitute medical or expert evidence. We accept it on that basis.
38. The claimant's general evidence was that she attended work feeling generally unwell on many occasions, often feeling fatigued, breathless or having such like generalised symptoms. We make no finding that that was the case and make no finding that any such event related to disability. We proceed on the basis of the claimant's own evidence, which was there was no disability related absence before 1 February 2016, accepting as a matter of common sense that the health episode on that day was not an instantaneous event, but may have built up over a few days before.
39. It will be recalled that the claimant joined on 29 June 2015 and was subject to six months' probation, due to end therefore around 29 December 2015. The respondent had a cycle for annual review, which was the twelve months ending 31 March. As the claimant had joined mid-year, she had no objectives from the previous year, and Ms Maduako-Ezeanyika completed her 2015 review form in August 2015, setting out objectives to be completed by 31 March 2016 (139). That was three months after probation which was due to be completed, and we accept Ms Maduako-Ezeanyika's evidence,

which was that she gave the March date in the expectation that the claimant would be confirmed in post, and that by setting objectives to the end of the review year, she would put the claimant on the same footing as colleagues for the following year.

Work issues

40. We heard relatively little specific evidence from Ms Maduako-Ezeanyika or the claimant about their actual work. While we understood them to be busy, and their team under resourced, it was not clear to us how each functionally spent a week, or what the boundary was between their work and that of HR Business Partners. We did understand that part of their role involved the strategic overview of the Trust's policies and procedures. We note that when policies were issued, they were numbered and dated, with a statement of when the next version was due. The cover sheets of the Trust's managing sickness absence policy (74-76) were a powerful indication of the thoughtfulness with which such policies were updated and promulgated, and also of the extent of stake holding, in the sense of the large number of individuals and interest groups to be consulted during that process. The document also indicates the seniority of those involved in the process.
41. In autumn 2015, Ms Maduako-Ezeanyika's team was under pressure to provide updates of a number of policies. Both witnesses before us were at pains to stress that this was not a functionally complex task, and any complexity arose from organisational needs to consult widely. It was stressed to us also that the task was not drafting policies from scratch, but the revision of existing policies.
42. The extent of involvement in policy drafting rendered the task high profile within the Trust, in the sense that a large number of consultees and stakeholders were aware of what was being done and the timetables for it. We noted email checks in October from the People Development team about progress and deadlines for revised policies (151-157). On 9 November, the claimant was reminded of the two further policies which were required to be updated by her team, which were staff induction and statutory and mandatory training (156). The claimant's response was to ask for time until the following March or April to complete the tasks because of staffing issues. She was told in reply of the complex process involved in changing the completion dates (155-156).
43. When we consider how matters stood at 30 November 2015, we find as follows.
44. The claimant had been in post for about five months. Ms Maduako-Ezeanyika's expectation was that the claimant was on course to complete her probation within another two months. There had been some tensions about pay and settling in, but nothing excessive or untoward. There had been an amicable meeting about objectives in August, and while Ms Maduako-Ezeanyika can be criticised for not having put the objectives in

writing for over three months, the delay is also an indication that she was not aware of any imminent critical issue emerging. The claimant, we find, had not spoken about sarcoidosis to Ms Maduako-Ezeanyika, and there had been no material health issues. The claimant had been alerted recently to the issues of support work that needed to be completed, and she was upset to have been diagnosed with severe vitamin D deficiency. The team remained under staffed and under considerable pressure.

Events from 30 November

45. In that setting, a regular one to one took place on 30 November 2015. Ms Maduako-Ezeanyika's witness statement contained a lengthy account of the meeting, concluding with the sentence, "After the meeting, I was so concerned about her behaviour and reaction towards me that I decided to make a detailed note of what had occurred." It was the first occasion on which Ms Maduako-Ezeanyika made a note of a one to one meeting with the claimant (160-1). She said that she wrote it up on screen immediately after the meeting had ended and saved it, for her personal record, and not to be shared or agreed with the claimant. The language of the file note is emotive and subjective. It says much more about the claimant's attitude and language than about functional employment tasks.
46. We find that the meeting on 30 November had at its heart questions raised by Ms Maduako-Ezeanyika about the backlog of tasks described above. It was common ground that the claimant's reply included the phrase, "My head is full," but that does not assist us either way. We find that Ms Maduako-Ezeanyika pressed the claimant to complete the tasks within deadline, something which Ms Maduako-Ezeanyika believed to be achievable and important. We do not think that she imposed on the claimant an unachievable deadline.
47. We accept that in reply the claimant spoke about her discontent with work, which arose out of a number of factors, including travel, pay and demands of seniority in an under staffed team. We accept that the discussion led also into the issue of homeworking, and the claimant's surprise and discontent with being expected to account to Ms Maduako-Ezeanyika during working days at home. We do not agree that the claimant spoke at any length or in any detail about her health. We could see no reason for Ms Maduako-Ezeanyika to omit any health reference from the note which she wrote at the time. We also record that however however emotional her file note, Ms Maduako-Ezeanyika undertook to speak to the Director of People as soon as possible about the claimant's pay, and did so the same afternoon. That was a creditable indication of a manager who did not let her feelings interfere with her professional duty. The Director of People confirmed that there would be no question of a pay rise in the circumstances.
48. We consider the meeting notes made by Ms Maduako-Ezeanyika in the period from 30 November onwards to be generally accurate, so far as they go. We accept that they accurately reflect the factual events at a meeting (e.g. issues raised by either side and Ms Maduako-Ezeanyika's genuine

perception of the subjective matters such as the claimant's body language). They were not intended to be complete transcripts, and we do not criticise them for incompleteness. Our finding is that any omission was honest, and we make no finding that Ms Maduako-Ezeanyika intended or attempted to mislead by her selection of material. We add that the notes from 30 November to 11 December (after which Ms Maduako-Ezeanyika went on leave until January) were more emotive and subjective than those which followed.

49. The most significant practical point in the 30 November note was a discussion about completion of policies. We recall that three days before Ms Maduako-Ezeanyika had emailed the claimant the belated objectives from August (159), and that there had been recent emails about deadlines. We accept that although defensive, the claimant said that she would complete the work by February.
50. The claimant worked at home on 1st December, and there was an exchange about arrangements for homeworking the following day (161-163) which, while properly expressed on both sides, indicated some underlying tension about the claimant providing a delivery of outputs of the homeworking day. The claimant had been in post for five months, and this was a matter which on any view should have been ironed out long before.
51. We accept that the next meeting between the two on 2 December remained cool. Ms Maduako-Ezeanyika took the opportunity to feed back that the Director of People had declined any pay increment. We accept that in that meeting the claimant raised and Ms Maduako-Ezeanyika properly recorded health issues. We accept the accuracy of the note, which seemed to us significant; "I explained that although she had informed me she had problems with her eyes, she had never informed me that this was impeding her ability to do the job. She added that she had problems with her vitamin levels however, I explained that I had only been aware of this that morning when she announced this as she came into work." (164). We note that the claimant having raised a health issue, Ms Maduako-Ezeanyika recorded it, contrary to the general drift of the claimant's case that Ms Maduako-Ezeanyika did not record her health concerns. We note also the immediate linkage of the issue of health with impact on work and at work.
52. There were significant meetings on 9 December and 11 December. At the former Ms Maduako-Ezeanyika told the claimant that her probation was to be extended, and at the latter Ms Maduako-Ezeanyika gave the claimant a letter confirming the extension to 28 February 2016 (168, 171, 173). The reason that there were two meetings was that the claimant became in Ms Maduako-Ezeanyika's words, "tearful and so distraught" that she thought it better to adjourn the first meeting. While the documents should be read in full, we find from them the following headline points:
 - 52.1. Ms Maduako-Ezeanyika opened the first meeting with reference to the positive attributes and achievements which the claimant had demonstrated;

- 52.2. In that setting, she identified shortcomings, both in the claimant's functional performance, and in a range of issues and qualities which she summarised as "attitude and unwillingness to accept my role as her manager";
- 52.3 Issues were raised about pay, the pressure on the team of being under staffed and the quality of induction, as well as personal issues;
- 52.4 Ms Maduako-Ezeanyika recorded references made by the claimant to the vitamin D deficiency, anaemia, and the claimant's husband's disability (we were given no details save that we were told that he has restricted mobility). The claimant also referred to lethargy and potential memory loss.
- 52.5 In both meetings, Ms Maduako-Ezeanyika recorded that information about the claimant's health had come to her recently. On both occasions she recorded that the claimant volunteered that her husband had a disability. Those are the only references to disability in the notes.
- 52.6 We accept the accuracy of the note of 11 December in stating, "We discussed her health issues – namely her being anaemic and having a vitamin deficiency and what support I could provide her as her manager. I also inquired whether they were potentially conditions that could impact her work. Julie said 'no' explaining that she had only been diagnosed with the latter as she was lethargic and that one of the symptoms of the condition was memory loss. I therefore suggested [Occupational Health referral] which she agreed" (171).
53. The extension letter set out five specific matters which had led to the extension of probation. Only the first related to carrying out a functional task, and the rest were behavioural or attitudinal matters which Ms Maduako-Ezeanyika agreed subsequently the claimant had addressed by the end of the extended probation period. That left as the one, live matter the first issue: "Failure to review and update learning and development and associated policies within deadlines." (173). The specific action plan which followed, as a restatement of the letter, was set out at page 175.
54. Ms Maduako-Ezeanyika was then away for a period over Christmas 2015. She emailed the claimant on 6 January with feedback from Occupational Health (188) whose advice was "Unless your health is affecting your performance, a management referral is not appropriate in your case. They suggest however that if you would like one to one advice from the service, you may self refer..... If however, in future you feel that your health is affecting your performance, please do let me know so I can make a management referral and put in place appropriate support/adaptations." (188). The claimant did not self refer and did not request any management referral.

55. Matters may have benefitted from the period of separation over Ms Maduako-Ezeanyika's absence on leave and the Christmas closure. There was a clearly constructive meeting on 5 January 2016 (186/189) at which Ms Maduako-Ezeanyika stressed the claimant's positive contributions in her absence. The same day she emailed the claimant to record that they had agreed that the policies and annual report were to be completed by 19 February. Ms Maduako-Ezeanyika's email recorded that the agreement was that these would be completed "in addition to your day job" and that they were stated to be "objectives connected to extension of your probation period." (186).
56. Ms Maduako-Ezeanyika's file note of 11 January was a striking document (191). It was the only meeting note which recorded a start and finish time of a meeting (though in evidence Ms Maduako-Ezeanyika thought that the meeting had been two hours and not the three recorded). It broke down the discussion into specific issues, and omitted any subjective assessment by Ms Maduako-Ezeanyika. It presents as an entirely professional dialogue between senior colleagues meeting on the basis of respect and trust. In over one and a half pages, only two lines referred to the matters before us:

"Annual training report: The claimant confirmed that she was progressing the annual report that she was required to do as part of her objectives. OME asked her to let her know what support she required if needed." (191).
57. It is a strikingly different document from many of its predecessors. Its importance is not whether at that stage the claimant was seen to have achieved perfection in every aspect of her work, but whether the two individuals demonstrated the ability to work together, as plainly they did.
58. The claimant was off sick for the five working days starting Monday 1 February 2016. She self-certificated.
59. The bundle contained texts exchanged between the claimant and Ms Maduako-Ezeanyika during the week of absence (284-289). They are to the credit of both. Their language was entirely professional and friendly, with the claimant expressing concern about work to be done that week, and Ms Maduako-Ezeanyika expressing support in both the personal and professional senses. It was in that context that the claimant's text of 3 February should be read (286): "Sorry I am not any better, I have seen a Doctor as I was having chest pains and discovered I have a chest infection. I have medication and have been told I need to rest for a few days to get this under control and hopefully not trigger my sarcoidosis. So sorry I would much prefer to be at work." Minutes later Ms Maduako-Ezeanyika replied: "That's fine Julie you need to get your rest and recover fully before coming back to work. Is there anything I need to pick up this end?"
60. Ms Maduako-Ezeanyika's evidence was that that was the first she had heard of the word sarcoidosis, and gave it no further thought, did not undertake any research or enquiry into it, and left matters in the hands of

the claimant to give her the information the claimant thought she needed. Ms Joffe cross-examined to the effect that her failure to enquire as to the meaning of the term, or to ask the claimant what it meant, was an indication that she must have already have known that the claimant had sarcoidosis. She submitted in turn that that was an indication that the claimant had been telling her about her sarcoidosis since the previous July.

61. We do not accept Ms Joffe's interpretation and accept Ms Maduako-Ezeanyika's evidence. In the context of several pages of friendly text traffic, we are wary about placing the weight which Ms Joffe asks us to on Ms Maduako-Ezeanyika's failure to enquire about one medical word. On the contrary, the text traffic shows her focusing on supporting the claimant in her absence, and dealing with any specific work issues which followed as a consequence. We read no more into it than that. The respondent through Ms Ramadan rightly conceded that for statutory purposes, it had knowledge of the claimant's disability from the morning of 3 February 2016.
62. Departing from chronology, we briefly set out material medical position after that.
63. The claimant was at work for the seven working days between Monday 8 February and Tuesday 16 February inclusive. On 17 February, she began a sickness absence, from which she did not return. A series of Med 3s in the bundle began on 23 February and ran until conclusion of the notice period on 31 July 2016. Some referred to a chest condition or pneumonia. Only one, dated 31 May 2016 and lasting to 31 July, and therefore starting after notice had been given, named the diagnosis of sarcoidosis (265).
64. The claimant was admitted to hospital on 23 February and discharged on 1 March. The discharge summary (215) gave the reason for admission as "Community Acquired Pneumonia," identified glandular sarcoidosis as a relevant co-morbidity, recording that that was being managed at Barts Hospital. The diagnosis included the words "Exacerbation of Airwaves" (216) which Ms Joffe submitted referred to sarcoidosis.
65. On 21 April, the claimant was assessed by Dr Cooney, Consultant Occupational Health Physician, who reported to Ms Maduako-Ezeanyika (242): "The reason for her appointment with me today is related to her absence from work since 17 February 2016 with the following: pneumonia, pulmonary sarcoidosis. As you know she was admitted to hospital with respiratory symptoms and was diagnosed with pneumonia and pulmonary sarcoidosis. I have a copy of the discharge summary regarding this." (In fact the discharge summary refers twice to glandular sarcoidosis, and does not use the phrase pulmonary sarcoidosis, but this tribunal is unable to comment further on that point). Dr Cooney wrote that the claimant was unlikely at that time to have a successful return to work and would be reviewed again on 9 June.

The position on 8 February 2016

66. Returning to the chronology, it is perhaps useful to review the position as it stood at the claimant's return to work on 8 February. Our finding is that the claimant had by that stage been in post seven months, and was due to have her probationary review in three weeks. Her team remained under pressure and under staffed. The specific tasks which she had been asked to undertake with a view to completing probation remained in her hands: there was no evidence of Ms Maduako-Ezeanyika having intervened in these tasks after 11 January. Although there had been tensions between the claimant and Ms Maduako-Ezeanyika, it appeared from the note of 11 January that they had established a respectful foundation on which to go further. The claimant remained upset about her pay, and stressed about the staffing of the team. We find that the claimant had mentioned health issues in a general sense, and specific concerns about eyesight and vitamin D. She had been offered the facility of self-referral to Occupational Health, but had not taken it up because she did not identify her health as affecting her work before the absence starting 1 February. She had, by a text on 3 February, identified sarcoidosis as an issue. Her line manager made no inquiry about the meaning or implications of that term, and the claimant did not volunteer any.
67. In accordance with the respondent's procedures, it was Ms Maduako-Ezeanyika's duty to carry out a return to work meeting within 48 hours of the claimant's return on 8 February. She did not do so. We attach little weight to this point, and certainly do not take it as evidence of any underlying attitude to the claimant's health or disability. On 9 February Ms Maduako-Ezeanyika emailed the claimant to ask to arrange a meeting "to review your progress." The two met on Thursday 11 February and the note of meeting was contained in an email sent by Ms Maduako-Ezeanyika to the claimant the same afternoon (207).
68. The email presents as professional and amicable. It contained constructive guidance about how the claimant should approach the task of report writing in particular. It contained constructive information about the approach to policy writing. It twice referred to how the claimant should write about matters where the information on which she might wish to base her text was unavailable or incomplete, and counselled the claimant firmly to "keep it simple and work with the information you have available;" but to flag up where information was not available or where there were anomalies. Ms Maduako-Ezeanyika also attached material from colleagues which might assist.
69. There is nothing in the email which suggests that either the claimant or Ms Maduako-Ezeanyika had any inkling that what the claimant was being asked to do could not be achieved by the end of February. It is perhaps surprising that some of the guidance and information was put on paper to the claimant so late in her probationary period. There was no indication from the claimant that the target was unattainable. She worked at home the following Monday, 15 February, and when she was about to sign off

reported to Ms Maduako-Ezeanyika, "I have spent the afternoon reviewing and updating the induction policy and have made good head way now, have a draft version that still requires a little more updating and amendments based on input, query/information I have requested." (211).

70. The claimant's sickness absences began on 17 February. We note that on 26 February and from hospital the claimant sent a lengthy email about work matters (214), a matter much to her credit. On 11 March Ms Maduako-Ezeanyika wrote to her about an Occupational Health assessment on her return, her letter concluding: "As your period of sickness absence has impacted your extended probation period, which ended on 28 February 2016, I shall on your return to work confirm a new probation date. Wishing you a quick recovery!" (218).
71. Mr Siraj, the respondent's Occupational Health Manager, interviewed the claimant by telephone on 24 March and 13 April (227, 236, 135i and 135j). Mr Siraj reported that the claimant remained unwell, and, as stated she was referred to Dr Cooney, for an appointment in person on 21 April.
72. Meanwhile, there was occasional text traffic between Ms Maduako-Ezeanyika and the claimant. The demands and pressures on Ms Maduako-Ezeanyika were increased by the claimant's absence. On 31 March she texted the claimant "Apologies for contacting you again. I wonder whether you can tell me where you saved the policies you were working on as it's now really high on the agenda and Terry has asked for the latest draft." The claimant replied to say where the documents were saved in their latest versions. She referred to the drafts in part as "as almost finished." (302).
73. Having received this information, Ms Maduako-Ezeanyika found the saved documents, and read them. This was dealt with sketchily in her witness statement, and more compellingly in oral evidence. The Judge's note of the material part of her evidence in cross-examination reads as follows:
- "I was disappointed in March when I found she had made no head way in Induction policy. I had to work on it myself.
I did not change plan....
She told me she had nearly completed the work, was nearing the end. [Her dismissal] was fair, there was no likelihood of completing it.
I estimated a week for her predecessor to complete: both pieces of work within one to three weeks....
The claimant was not competent to complete and carry out the work."
74. In reply to questions from the non-legal members, Ms Maduako-Ezeanyika stated that her reading of these two items had changed her mind about the claimant's confirmation in post at the end of probation. The Judge's note reads,
- "Q: What changed your mind?
"The two pieces of work.
I came to the view that she was not competent to do this work..."

In the end, I completed the policies.

I was covering, I renegotiated the deadline, it took me 2 weeks to complete.”

75. We find that on or after 31 March, Ms Maduako-Ezeanyika had sight for the first time of the claimant’s drafts as they stood on 16 February 2016, her last day before sick leave. We find that she looked at them with the expectation that they would be both nearly complete and to the standard which she expected. We accept her evidence that she found them incomplete and below standard. The latter is the more significant point, which she stressed in her oral evidence. We accept that a determinative matter in her mind then became the fact that the work which the claimant had done was, in Ms Maduako-Ezeanyika’s opinion, not of acceptable standard. When she formed that view, she formed the logically consequential view that there was a performance issue, which was not the amount of time afforded to the claimant to carry out the work, but the claimant’s ability to do so.
76. It will be recalled that on 21 April Dr Cooney wrote to Ms Maduako-Ezeanyika and that her letter identified sarcoidosis as a condition. It also indicated an absence of many more weeks. Ms Joffe put to Ms Maduako-Ezeanyika that that was “the last straw” which led to termination of the claimant’s employment. Ms Maduako-Ezeanyika in evidence denied this, and stated that if in effect there was a last straw, it was her reading of the claimant’s written work. We accept that evidence. In our judgment, Ms Joffe’s approach makes the mistake of taking chronology for causation. The importance of Dr Cooney’s letter was, we find, in suggesting a long further absence. We find that it was that which led to the arrangements for the next meeting.
77. After received Dr Cooney’s report, Ms Maduako-Ezeanyika asked Mr Siraj whether the claimant was fit to attend a meeting, and was advised that she was. A probation review meeting was therefore arranged. At the claimant’s choice it took place at her home, and was attended by Ms Maduako-Ezeanyika accompanied by an HR Partner, Ms Mistry. This was the first occasion on which there was evidence of the involvement of a member of the HR function in these events. There was a note of the meeting (256-258) written by Ms Mistry.
78. We accept that there was a discussion of the history of the working arrangements between the two, of more general issues relating to the claimant’s employment, and of the material which Ms Maduako-Ezeanyika had downloaded on or after 31 March. Ms Mistry’s note records that, “She had recently looked at the work JD had done on the policy and saved on the drive and that it was in no way ready. Ms Maduako-Ezeanyika added that despite numerous meetings and discussions on the issue she had not seen any draft that the two objectives JD had been asked to deliver.” (257). The claimant replied with reference to clarity, pressure, and with no more than a passing reference to health. The meeting concluded on the basis that Ms Maduako-Ezeanyika would consider matters.

79. While we were concerned throughout this hearing not to be drawn into arguments based on unfair dismissal, we sympathise with Ms Joffe's wish to cross-examine Ms Maduako-Ezeanyika on the lack of fair process which accompanied this meeting. We agree in principle that those criticisms were well made. We appreciate also the potential difficulty in putting professional criticism at a meeting to an employee who is on long term sickness, and who is being interviewed in her own home. We accept that Ms Maduako-Ezeanyika indicated her concern with the quality of the work which she had found saved on the drive. It would have been a great deal more fair, even in the context of a probationary review, had she produced to the claimant the copies of what she had found on the drive, and identified specific illustrations of her concerns, so that that process was recorded in Ms Mistry's note, and in the bundle before us.
80. After considering the matter after the meeting, Ms Maduako-Ezeanyika wrote to the claimant to dismiss her, giving her notice to expire on 31 July (252-6). She identified the reason for dismissal as "you failed to deliver on objectives that had been set and agreed with you to agree deadlines", which should be read in conjunction with the assertion shortly above: "despite this level of support you were unable to demonstrate the expected standards and performance for the role." (254).
81. As a dismissed probationer, the claimant had no right of appeal. She instead instituted a grievance (309) on 9 August 2016. We were referred to a letter of 14 August 2016 from Ms Rachel Stanfield, Deputy Director of People, rejecting the grievance (314) and one dated 29 November 2016 from Terry Roberts, Director of People, rejecting the grievance appeal (321). Although we were taken to one matter in the grievance notes and outcome, we did not in the event find that that assisted us.

Discussion

82. This claim was brought exclusively under the provisions of section 6 of the Equality Act 2010. The protected characteristic under which this claim proceeded was disability. Section 15 provides that "A discriminates against B if A treats B unfavourably because of something arising in consequence of B's disability". The provision is disapplied, "If A shows that A did not know, and could not reasonably have been expected to know, that B had the disability". It was common ground that the respondent had the requisite knowledge by 3 February 2016 at the latest. The duty to make reasonable adjustments arises and is set out under sections 20, 21 and 22 and Schedule 8 of the Act, and it would be disproportionate to set out those lengthy provisions here. The critical obligation in this case was set out in section 20(3): "Where a provision criterion or practice of [the respondent] 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."
83. The focus of this case was the decision to terminate the claimant's probationary employment. The sole decision maker was Ms Maduako-

Ezeanyika, acting as line manager and on her own knowledge and assessment, without need for a procedure which would have required her to prepare a report to be considered by any other colleague or manager.

84. At the heart of Ms Joffe's submission was a simple proposition. The claimant had been given deadlines within which to complete tasks. She was within a short period of completing the tasks, when she became absent from work due to disability related illness. Disability related absence was the reason she had not completed the tasks within the timetable set, and was therefore the operative reason for her dismissal. Ms Joffe submitted, in short, that the claimant had been dismissed for something arising from her disability. She also brought a claim of a failure to make reasonable adjustment. If the claimant had been given a little more time, and indeed had had the time originally envisaged which had been cut off (17 to 28 February) she would have completed the tasks. Ms Joffe relied on an evidential background, which was that the claimant had been alerting Ms Maduako-Ezeanyika to disability issues for a long time, had been met with at best indifference and at worst hostility, and that Dr Cooney's letter, putting a consultant's name to the diagnosis of sarcoidosis, and setting out a long recovery period, was indeed the last straw.
85. Ms Maduako-Ezeanyika's evidence, which we accept was a great deal more compelling in person than in her witness statement, was that when she saw the material written on 31 March she formed the view that time, absence, health, clarity of instruction or work load were not the reasons for delay in completing the claimant's tasks, but that the work which the claimant had completed fell short of the standard expected of her seniority, experience, and the time and resource available to her. Given the amount of time which the claimant had had to produce these pieces, it was clear to her that time was not the issue, and that allowing the claimant more time would not have achieved work to the expected standard. (We fully appreciate that at the time of dismissal, the period of the claimant's sickness absence was unknown, and it certainly could not be known that she would be signed off to 31 July).
86. We must approach this conflict with care, particularly because we accept that in common with most litigation, this case was put to us on an artificially binary footing: the claimant's case was that the quality of the work was not an issue at all and the respondent's was that illness was no consideration whatsoever. Neither of those is the test in law, and Ms Joffe was right to remind us in submission that if we were to find that the reason for dismissal were to a material degree both standard of work and disability related, (or caused by absence arising from disability), the claim of discrimination is made out.
87. In considering the conflict of evidence, we must take great care to set aside any question or consideration arising out of our assessment of case preparation. We must give both witnesses full allowance for the artificiality and strain of giving evidence in an artificial setting. We must, when considering the contents of the bundle, apply a realistic workplace standard,

bearing in mind the frequency in litigation with which cross-examination proceeds on unrealistic standards and expectations. We must avoid the trap of considering a discrimination case as one of reasonableness in the section 98(4) sense.

88. We prefer Ms Maduako-Ezeanyika's evidence and we find that the claimant was dismissed due to her assessment of the poor quality of her work, and not because of her absence or any other reason related to health or disability. We now give our reasons for so finding.
89. We do not accept the underlying premise of the claimant's case, which was that throughout her employment her health was a recurrent issue which provoked negative responses. There was no independent indication of the fundamental premise that Ms Maduako-Ezeanyika responded inappropriately to information about the claimant's health, whenever it was given. Such correspondence as there was specifically about health, and during the claimant's absences, was measured, appropriate and on occasions supportive. In particular, when the claimant was absent during her extended probation, Ms Maduako-Ezeanyika volunteered the proposal of dealing with extended probation issues.
90. We accept that Ms Maduako-Ezeanyika had no interest in the claimant failing her probation or not remaining in post. One logical core of the claimant's case was that from an early stage Ms Maduako-Ezeanyika became hostile or indifferent towards her as a result of health based information. Not only was there no evidence to support that, it was contrary to the logic of the setting. It was common ground that this team was under resourced, difficult to recruit to, and short of staff. The resource costs of the claimant's predecessor (paid for several months at agency rates) and the resource cost of the recruitment exercise were significant. It was completely in Ms Maduako-Ezeanyika's interests for the claimant to prove her appointment a success.
91. Furthermore, the time issue was, we think, something of a red herring in this sense. By March, the work was already long overdue. We accept that Ms Maduako-Ezeanyika completed it, although she did not tell us precisely when. It would in our judgment have been irrational to dismiss the claimant in retaliation for working slowly, but entirely rational to dismiss her if the work that she had done within her time was not of the required standard.
92. For avoidance of doubt, we do not find that the period of absence between 1 to 5 February inclusive and from 17 February onwards was the reason or any part of the reason for dismissal, and accordingly any claim under section 15 must fail. Although it is not necessary for us to make any decision on the other aspect of defence, we find that by 3 February, the respondent had knowledge of the disability for the purposes of section 15. It is not necessary for us to find if the defence of justification would have been made out, and we do not make any finding on that point. That said, we accept that the aim of producing work to the acceptable work standard within organisational goals and timeframes was in fact the operative aim,

and was a legitimate aim. We would have struggled to find that analysed through the spectrum of the Equality Act, Ms Maduako-Ezeanyika had conducted a balancing exercise on proportionality, giving consideration to how to achieve the aim with the least discriminatory impact available.

93. The claim for reasonable adjustments seemed to us secondary to the section 15 claims. It was primarily an alternative formulation of the assertion that the claimant should have been given more time to complete the tasks available to her. However, the starting point was the assertion of a PCP to the effect that the respondent required completion of pieces of work within deadlines. The difficulty with that assertion was that it rested entirely on the claimant's experience. The claimant's experience was that Ms Maduako-Ezeanyika on our finding had shown commendable flexibility in extending deadlines when appropriate, and on our finding had not dismissed the claimant for failing to meet a deadline. We do not therefore find on the evidence before us that the existence of the pleaded PCP has been made out. If we were wrong about that, we add that we do not find that it has been shown that the claimant suffered disadvantage, for two reasons; first that there was flexibility in the deadline, secondly that the deadline was not the reason for dismissal. Thirdly, accepting as we do that the time factor was not the material reason for dismissal, we do not find that the adjustment proposed, which was essentially extension of time, would have reduced any disadvantage to the claimant. The disadvantage which the claimant experienced was caused by the quality of her work, not the time which it took her.
94. It follows that all the claimant's claims fail and are dismissed.

Employment Judge R Lewis

Date: ... 26th February 2018.....

Sent to the parties on:

.....
For the Tribunal Office