



# EMPLOYMENT TRIBUNALS

## Claimant

Ms J De Ledesma

v

## Respondents

(1) Ms E Curtis  
(2) Mr M Queenan  
(3) Interserve Construction  
Limited

**Heard at:** Watford

**On:** 14 to 18 August 2018

**Before:** Employment Judge Manley  
Mrs A E Brown  
Ms S Hamill

## Appearances:

**For the Claimant:** In person (with Mr Williams assisting on the first day)  
**For the Respondent:** Mr A Roberts, counsel

**JUDGMENT** having been sent to the parties on 18 August 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Introduction and issues

1. This disability discrimination case is brought by the claimant against her former employers (the third respondent) and two former line managers who are the first and second respondents. In November 2016, a preliminary hearing set out the issues to be determined at this hearing. They were recorded as follows:

### *“The complaints*

2. *By a claim form presented on 24 August 2016, the claimant brought complaints of disability discrimination. The respondent defended the claims. In essence they arise out of the claimant’s breast cancer and what she says was the resulting depression and the respondent’s reaction to her condition. She remains employed by the respondent.*

**The issues**

3. *I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows. These issues define **authoritatively** what the case is about: they show the parties what their evidence should cover, they will help the tribunal decide what evidence is relevant and they will govern the matters to be covered by the tribunal's decision.*

**4. Disability**

4.1 *Does the claimant have a physical or mental impairment, namely breast cancer and/or depression? The respondent does not dispute that the claimant has breast cancer or that it is a disability. The respondent does not admit and puts the claimant to proof of the fact of her depression and that it amounts to a disability. The claimant says that the depression was a side effect of the drug Letrozole.*

4.2 *If so, does the depression, if proved, have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?*

4.3 *If so, is that effect long term? In particular, when did it start (The claimant says November 2015 to December 2015) and:*

4.3.1 *has the impairment lasted for at least 12 months?*

4.3.2 *is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?*

*N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the Definition of Disability (2011) paragraph C4.*

4.4 *Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?*

**5 Section 26: Harassment on grounds of disability.**

5.1 *Did the respondent engage in unwanted conduct as follows:*

5.1.1 *Emma Curtis at a meeting on or about 8 April 2016 made denigrating and belittling comments of the claimant in front of the team. The three comments identified are:*

5.1.2 *In relation to a question about whether clients had raised queries or questions, Emma Curtis said, "why do you always have to make things more complicated?"*

5.1.3 *In relation to a question about whether the client or company was to select the brick to be used on a project, Emma Curtis said, "I've told you a gazillion and one times."*

5.1.4 *The claimant was insistent that they should go through the agenda for clients because the claimant was concerned that there might be some 'unexploded bombs'. At which Emma Curtis stood over the claimant with the agenda and ran her finger down each item, asking in relation to each item, "is this an unexploded bomb?" in an aggressive and intimidating way.*

5.2 *Was the conduct related to the claimant's protected characteristic?*

5.3 *Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

5.4 *If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

5.5 *In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

**6 Section 13: Direct discrimination on grounds of disability.**

6.1 *Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:*

6.1.1 *Mr Queenan, on or before October 2015, required the claimant to be in the office and to work core hours when others were allowed to work flexibly;*

6.1.2 *Mr Queenan in September 2015 and again in April 2016 took away work from the claimant because of her disability and because of the perception that she was a risk to the project and was 'scary' to the company;*

6.1.3 *Mr Queenan from January 2016 only gave the claimant 'housekeeping chores' (minor tasks on projects rather than her own projects);*

6.1.4 *Mr Queenan between September and October 2016 treated the claimant in an aggressive and hostile way when the claimant asked him to allow her to work from home;*

6.1.5 *Mr Queenan cut off the claimant's access to e-mail and the intranet on 18 April 2016;*

6.1.6 *Miss Curtis on 8 April 2016 she said that the company could not trust the claimant with a project and she was 'scary' because of her disability if she sued the company.*

6.2 *Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following comparators (Tammie Aziz and 'Rob', both of whom were on a comparable level to the claimant, were not disabled, were allowed to work flexibly and were not treated as was the claimant as set out above) and/or hypothetical comparators.*

6.3 *If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?*

6.4 *If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?*

**7 Section 15: Discrimination arising from disability**

7.1 *The "something arising in consequence of the claimant's disability" alleged is*

7.1.1 *Tiredness/ the need for the claimant to leave early;*

7.1.2 *Increased absences.*

7.2 *No comparator is needed.*

7.3 *Does the claimant prove that the respondent treated the claimant as set out under para 6.1 above?*

7.4 *Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?*

7.5 *Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent will provide full further information about whether or not and if so, how it proposes to run this defence in its amended response as ordered below.*

7.6 *Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability, namely depression? The respondent accepts that it knew that the claimant had cancer.*

**8 Reasonable adjustments: section 20 and section 21**

8.1 *Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely*

8.1.1 *requiring the claimant to work the core hours of 8.30am to 5.00pm at the office and not at home as requested?*

- 8.1.2 *Not allowing even occasional home working?*
- 8.2 *Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who did not have the claimant's disability in that:*
- 8.2.1 *The claimant had difficulty with the time taken and the stress of commuting to the office;*
- 8.2.2 *The claimant was immuno-suppressed and therefore travelling on public transport exposed her to the risk of infection.*
- 8.3 *Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:*
- 8.3.1 *Allowing the claimant to do some work from home when she felt the need to do so.*
- 8.3.2 *Being flexible about the claimant's core hours (e.g. allowing her to travel in when trains are less busy).*
- 8.4 *Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above? The respondent says that it knew that the claimant had breast cancer but did not know of any other disability or any of the disadvantages on which she now relies.*

## **9 Time**

- 9.1 *The claim form was presented on 24 August 2016. Day A was 6 July 2016. Day B was 3 August 2016. Accordingly any act or omission which took place before 7 April 2016 is potentially out of time, so that the tribunal may not have jurisdiction.*
- 9.2 *Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?*
- 9.3 *Was any complaint presented within such other period as the employment Tribunal considers just and equitable?"*

## **The Hearing**

- 10 The hearing was listed for six days, although we completed it within five days with the assistance of the parties. There were several preliminary procedural matters and things did not always progress smoothly at the hearing. The claimant found some of the procedures at the hearing rather difficult and sometimes became upset.
- 11 From looking at the tribunal file before the hearing, the Employment Judge

had seen that the claimant had asked in February 2017 for a variation to the list of issues which is set out above between paragraphs 3-9. That application had been refused by Regional Employment Judge Byrne by letter to the claimant in March.

- 12 At the beginning of this hearing, the claimant expressed further concern about the list of issues. She also referred to part of Ms Curtis' witness statement. Having listened to her, we understood that she was making an application to amend her claim to include a claim of victimisation under Equality Act 2010. This seemed to be based on what Ms Curtis said at paragraph 28; namely that she had been told by a colleague that the claimant had brought employment tribunal proceedings against a previous employer. The claimant informed us that that was incorrect; there had been no such tribunal proceedings, but there had been some sort of settlement agreement which she asked us to look at. She believed that it was right that she should be allowed to bring a complaint of victimisation. We considered that application to amend and we did not allow it. In our view, that was an entirely new matter with a new head of claim and, on the information provided by the claimant, it was unlikely to succeed in any event as she was unable to articulate a protected act or detriment.
- 13 The hearing then continued in the usual way. There were two bundles of documents as it had not been possible to agree a joint bundle. After the employment tribunal had read the witness statements and the essential documents, the claimant began to be cross-examined. She stated to us that she was concerned that she had not told us everything and there was more evidence we needed to hear.
- 14 The process of the hearing was explained to her several times, including the need, for example, for relevant evidence. At the end of her cross-examination, she was invited to provide other evidence if it was not contained either in her witness statement or what she had said during cross-examination. She made reference to the bundle of documents she had prepared and was told that she could take us to any documents she felt were relevant. We did indeed look at notes she had made of a meeting of 8 April and, at the end of the hearing during submissions, she asked us to look at other documents including text messages and we did so.
- 15 On the second day of the hearing, Mr Queenan was the first witness for the respondent and the claimant began to cross-examine him. She did sometimes find it rather difficult to focus on the relevant evidence. We accept, of course, that it can be hard for litigants in person to carry out this rather technical part of the hearing. The claimant became upset particularly when the Employment Judge tried to guide her towards relevant matters. It became necessary for us to break from hearing the evidence for there to be discussions about how matters should progress. It then became clear to the tribunal that the claimant was attempting to make another application to amend the list of issues to add some acts of harassment. She suggested there were six or seven incidents and was allowed time to formulate what she was asking the Employment Tribunal to do.
- 16 After clarification, four incidents were relied upon. They were based on parts of a letter apparently drafted by the claimant's former solicitors which

had been attached to the claim form. The four matters related to paragraphs 7, 13, 5 and 18 of that document which is at pages 13-17 of the respondent's bundle.

- 17 The respondent objected to the tribunal hearing such an application, arguing that attempts to amend the list of issues had been rejected already and that we had no power to consider this again. It was argued that the summary from the preliminary hearing had "authoritatively" set out the issues and this was a repeat application by the claimant. The respondent said that, if the amendments were allowed, it would not be possible to finish the case in time. There would be significant prejudice to the respondent.
- 18 After careful consideration, we refused to allow two amendments to proceed. These related to paragraphs 7 and 13; one related to an alleged failure to refer the claimant to occupational health and the other to a payslip for half pay. These were matters not dealt in witness statements, we did not have the specifics and they seemed highly unlikely to meet the test of harassment. There would be a significant danger of the hearing not being concluded.
- 19 We did, however, allow the other two matters to proceed as amendments. These related to paragraphs 3 and 18. We took the view these requested amendments could be dealt with by the witnesses who were present, that it could not be said that they were hopeless claims and this document had accompanied the claim form. The Employment Judge gave oral judgment.
- 20 The list of issues was therefore amended to include two alleged acts of harassment as follows:

*5.1.5 In September 2015 the claimant found that work was taken away from her. Mr Queenan repeatedly criticised her for "not being quick enough".*

*5.1.6 On around 17 December 2015 the claimant broke down and started crying in the bathroom at work. Ms Curtis saw her and accused her of "making a fuss".*

- 21 The claimant then proceeded with cross-examination of Mr Queenan, Ms Curtis and Ms Moreton, who was the Human Resource witness for the respondents. The claimant seemed much more able to ask for and accept guidance and the hearing proceeded.

## **Facts**

- 22 We find the following relevant facts. The claimant commenced employment on 18 May 2015 with the third respondent, who we will refer to from now on as "Interserve". She was employed as a Senior Design Manager. Her line manager was another Senior Design Manager, Mr Queenan, who was involved in her recruitment. Interserve carries out construction based activities in the private and the public sectors. We heard about several school building projects in London which the claimant was involved with whilst working for Interserve. Ms Curtis was there initially as a freelance consultant. She was employed as an Associate Director with the third

respondent from December 15 and from that point she was Mr Queenan's line manager.

- 23 On 15 June 2015, the claimant informed Mr Queenan that she had been diagnosed with breast cancer. She was initially placed on medication called Letrozole which had some side effects. The tribunal has seen text messages and email exchanges from this point through to November between the claimant and Mr Queenan. We have read those in the respondent's bundle and those in the claimant's bundle. They are not particularly remarkable. On the whole, they display a friendly attitude both from the claimant and from Mr Queenan. For example, on 1 July 2015 the claimant wrote in a text message - "*On my way....will be late*" to which Mr Queenan replied ". OK, no worries". A further example is a text message on 28 August when the claimant wrote - "*Had a bad night, can I work from home today please*" and Mr Queenan replied - "*OK if you get it covered*". Again, in September the claimant wrote - "*Sry..bad night staying home. Call you a bit later*" and Mr Queenan replied "*OK let me know in the morning again whether you are in or not*".
- 24 The claimant also needed to take some sick leave and sometimes arrived late (as evidenced by text messages) or she needed to leave early, often for medical appointments. The claimant has not shown any documents where Mr Queenan is other than accommodating when she said she would work from home, would be late or leave early.
- 25 The claimant was the main Senior Design Manager on a school project which was known as CWC2 and she also began to be involved in Kingston Academy (known as TKA) around July. She was on sick leave between 8 and 27 July. Mr Queenan agreed to copy the claimant into TKA to get her up to speed and during this time the claimant discussed and sometimes emailed Mr Queenan about her medical treatment.
- 26 The claimant told Mr Queenan about the effects of her treatment including stress and fatigue. By the end of 28 August he decided to reduce her workload and to reallocate TKA and he communicated this to the claimant. Mr Queenan explained why he did this in his witness statement at paragraph 17. He said that the decision arose from conversations he had had with the claimant where she had told him about the side effects of her treatment, including the fatigue and stress and although she told him she wanted to keep busy, he became concerned for her wellbeing. When he told her about removing her from TKA she said that she was disappointed, but that she understood. She told the tribunal that she understood that he was concerned about her welfare.
- 27 The claimant has alleged that Mr Queenan said around this time or a little later - "*you're not quick enough*" and this is one of the amended acts of harassment. This did not appear in her witness statement and we are not clear about when it is alleged to have been said, although the claimant may have believed it was September. We did hear some evidence about a specific piece of work where it was thought that the claimant was somewhat slower than Mr Queenan thought was reasonable. The claimant does not agree and thinks the time taken was reasonable. In any event, we accept that Mr Queenan did not mention any concerns he had about her speed in



relation to that or any other matter. The tribunal has insufficient evidence to find that Mr Queenan said that she was not quick enough. It is denied by him and the claimant's recollection of it is vague and inconsistent.

- 28 Throughout this period, namely August to November, the claimant was working normally although she was occasionally late and there was some working from home again as evidenced by text messages.
- 29 On 12 October, there was a discussion between the claimant and Mr Queenan. The claimant sent an email on 13 October which begins:-

*"Mark  
Thanks for listening yesterday.  
I'm feeling the side effects from the new pills and the cold today and would appreciate taking it a bit easy this morning".*

- 30 We have seen no documented reply to that email. Later that month the claimant had to undergo surgery and commenced a period of sickness absence returning on 16 November.
- 31 Interserve wrote to the claimant regarding her sick pay entitlement and the claimant queried this. There were also discussions about whether she should be taking sick days or holiday, the details of which we do not need to go into at this stage.
- 32 There was then an email from the claimant sent to Mr Queenan early in the morning on 20 November. It starts as follows;

*"Mark  
As you know my wages have been stopped because of the sick pay and I'm now unable to cover my bills next month.  
As I will need to sort this out today, try and get some financial help from a charity or government, I need to have a series of personal conversations which would be easier in private.  
I would like to stay home to deal with it please. If you have any objection I will of course come in immediately".*

Mr Queenan replied to this and said;

*"Jo  
You will need to book this as annual leave really if you need time off to address this".*

The claimant replied;

*"OK. I will come to the office but will be a bit late now".*

Mr Queenan wrote:

*"It sounds like you need to address your issue if it is that extreme, so I will suggest you take the day as holiday, but if you decide to come to the office I'm unclear how you will be able to deal with the issue. Completely your decision".*

To which the claimant replied;

*"I had understood that it would be OK to work from home sometimes. I would of course cover the work from CWC but as ICT have stopped my wages I need to talk to HR and sort out why they can't use my holiday allowance.*

*If I don't have any holiday left and I have to look for help for the bills next month. I don't really have any other options left".*

33 Mr Queenan replied in some detail as follows;

*"Jo*

*You didn't claim your holiday so nobody including the company can just take it. You claimed it all as sick leave. I myself spoke to you about this twice and I sent you an email as well as the company sent you a letter.*

*As far as I'm aware you have some holiday left. We discussed working from Uxbridge but up until the other day I do not recall agreement of working from home. On your return you said that you no longer had issues travelling which is why this was agreed in the first place. You confirmed you could get to and leave work on time.*

*Given the position you explain the time you require to address these things and I would suggest you take a day's holiday. Working from home I cannot see how you will be doing a lot from everything you've explained.*

*Given you only made me aware this morning I think it reasonable that if you require the time that I'm willing to forego the company notice period for a requesting a day off.*

*Let me know what you wish me to do".*

The claimant replied to that answering that she was dealing with it with HR. As we understand the position, the claimant may well have attended work that day.

34 In any event, this exchange led to a meeting being arranged on 23 November with the claimant, Mr Queenan and Ms Curtis. The claimant was accompanied at that meeting. It was recorded that the claimant said *"she felt Interserve were managing the sickness situation by the book with no flexibility to the rules"*. It is also recorded that Mr Queenan noted that the claimant *"had taken advantage of flexible working arrangements through working from home and reduced hours none of which has been recorded as sick leave."* The claimant acknowledged that comment but said she felt it had been difficult to request flexible time given the nature of her illness.

35 Matters were discussed further. It was agreed that there would be a referral to Occupational Health and that Mr Queenan would conduct weekly meetings with the claimant. As far as those meetings are concerned Mr Queenan agrees that they did not take place weekly, but assessed that he did have those discussions with her about every ten days. The claimant

disagrees and points out that there are no notes showing whether those meetings took place. The tribunal accepts that there were discussions but they may not have amounted to formal meetings.

36 Around this time, there was a quiet period for the CWC2 project. Interserve and the claimant were awaiting client instructions and its approval to proceed. In the meantime, some work was allocated to the claimant including BREEAM and Elsley Primary School which we will come to.

37 The claimant was referred to Occupational Health. The claimant saw the referral and signed it on 1 December. The additional information reads as follows;

*“Adjustments to working patterns and hours are currently by agreement on an ad hoc basis as requested by Joanna and agreed by her line manager Mark Queenan e.g. reduced hours and working from home”*

38 On 9 December, Occupational Health produced a report. This stated that what had been put in practice were sensible adjustments.

39 On 17 December, an incident with Ms Curtis occurred. This is one of the amendments above (at 5.1.6). It is largely agreed what happened on this day. The claimant was upset and was discussing various health matters with a colleague in the bathroom at work. Ms Curtis' line manager told Ms Curtis that he had heard that the claimant was *“making a fuss”* and that she should go and sort it out. Ms Curtis told us that she went to the bathroom, found the claimant and the colleague and asked to talk to the claimant repeating the phrase that her line manager had used, namely the *“making a fuss”* comment. The claimant was reluctant to meet and said that she was going for a coffee with the colleague. Ms Curtis was fairly insistent and a discussion followed with the claimant, the colleague and Ms Curtis over common concerns and various health matters. At the end of that discussion, Ms Curtis offered for the claimant to finish work that day which was a day or two early before the Christmas break. This is an unremarkable incident. The claimant stated in cross-examination that Ms Curtis was *“trying very hard to look and be supportive;”* was *“trying to help”* and that the claimant *“was grateful to her - it was a helpful conversation”*.

40 As indicated the work the claimant was doing during December and January was limited because of the lack of work connected to her main project CWC2. It seems the client on that project was waiting for information or approval from the Education Funding Agency.

41 The claimant was asked to carry out a BREEAM exercise which she now complains was work suitable for less qualified people. The tribunal accepts that both Mr Queenan and Ms Curtis as well as more junior people had carried out some of that and similar work and it was necessary work. This is not in the tribunal's view something that could be referred to as the claimant did as *“housekeeping chores”*.

42 On 8 January, there was an informal welfare meeting. It was attended by the claimant, Ms Curtis and Mr Queenan with Ms Moreton from HR in attendance. Unfortunately, no notes were taken of that meeting and there

was a further unfortunate delay before a letter was sent to the claimant outlining what the respondents said was discussed. That letter was dated 16 February, but she did not receive it until 8 March. After setting out what the claimant had told the respondents about her radiotherapy treatment and the medication, the letter states:

*“We discussed the possibility of you being able to work from the Uxbridge office on occasion, however you stated that your commute to work was fine and sometimes restful so this would not be of assistance.*

*You advised that you need to be kept busy and that you had been prescribed with an anti-depressant, but these have not been effective. You do feel however that there are a number of people in the office that you feel that you are able to talk to and who will advise you if your mood dips within the office”.*

- 43 After a reference to possible treatment which might be arranged through Occupational Health the letter says:

*“It was agreed that whilst this treatment continues you will remain in control of the project CWC2, but will assist the team by using a priority list each day so that it is easy to see which tasks need completing”.*

- 44 The claimant takes issue with that letter now, but we were not clear about what aspect she disagreed with and there is no indication that she took issue with it at the time with Interserve.

- 45 There are other examples around this period of the claimant being allowed to take holiday at short notice and working from home. For instance, on 15 March she emailed Mr Queenan to say she was suffering from fatigue. She also telephoned HR and asked to work from home. An agreement was reached that from 16 March there would be specific days when the claimant would work from home.

- 46 There was then a meeting on 8 April. This was to be an internal meeting handing over the CWC2 project. This was in preparation for the client meeting later. The claimant now raises various allegations about Ms Curtis’s behaviour during the course of this meeting. In particular, she said that she had made denigrating and belittling comments. The respondents allege that the claimant appeared unprepared; she had not brought with her drawings, which it was what a Design Manager would be expected to do, but she was asked to go and bring them and it seemed that she did so.

- 47 The comments are those set out between issues 5.2 to 5.4. It is alleged that Ms Curtis said *“Why do you always have to make things more complicated?”*; *“I’ve told you a gazillion and one times”* and asked, a number of times *“Is this an unexploded bomb?”*. The claimant did not make notes of that meeting and those in the bundle which we have seen make no reference to any of the comments attributed to Ms Curtis. On any account, this would appear to have been a slightly difficult meeting. A witness statement taken from another attendee at that meeting during a later grievance investigation did not support what the claimant now says happened, but he does appear to have accepted that there was what he

called an “atmosphere”.

- 48 We do not find Ms Curtis made the first two comments attributed to her. She denies having made them and the claimant’s evidence on it has been rather vague. Her memory is sometimes unclear and she has sometimes displayed, in this tribunal, an inability to listen carefully and to recollect accurately things said to her. We cannot find that those comments were made.
- 49 As for the “*unexploded bombs*” comments, Ms Curtis accepts that she repeated this phrase, which was a phrase first used by the claimant when looking at the agenda for the client meeting. The tribunal thinks there is nothing untoward about re-using of that phrase first used by the claimant herself.
- 50 The claimant then asked to meet with Ms Curtis after the meeting. Unfortunately, the claimant started that meeting by swearing directly at Ms Curtis, but then seems to have apologised and the meeting moved on. In the claimant’s bundle were her notes on that meeting, they contain some references to some of things she alleges, but there is no mention of the comment that she later attributed to Ms Curtis at issue 6.1.6 that Ms Curtis is alleged to have said that the claimant was “*scary*” because of cancer. There is reference to a comment alleged to have been said that the claimant might sue the company, a comment which Ms Curtis denied making. We find that these comments were not made by Ms Curtis.
- 51 Part of the discussion between the claimant and Ms Curtis was whether or not the claimant was going to be able to attend a meeting with the CWC2 clients as she had found the headteacher rather difficult to deal with. It is largely agreed that on occasions the headteacher could be slightly difficult to deal with. Understandably, in view of the claimant being unable to attend a meeting with the clients she was taken off the front facing role of that project, but otherwise left to deal with it.
- 52 On 11 April, the claimant left work early. She failed to attend work for a couple of days and then was absent for six weeks through work related stress.
- 53 On 18 April, the claimant alleges that Mr Queenan was responsible for cutting off her emails. This arises from an email that he sent to her on that day which reads as follows;

*“Hi Jo*

*Sorry for using your personal email, just to let you know IT have had to reset your password so they can redirect your emails to me temporarily in your absence. I am waiting for them to send me through the new password, which I will let you have when it comes through. Not so much of an issue as I know you are off work anyway, but don’t panic if you suddenly can’t get your emails through your phone etc.*

*Kind regards,  
Mark Queenan.”*

- 54 Apparently, it was later communicated to HR by Mr Queenan that he had

been incorrect when he had said that the password needed to be reset and he believed that the claimant should be able to access her emails. She has told us that she could not access her emails. We do not know why that would be the case but it was nothing to do with anything Mr Queenan had done.

55 On 9 May, the claimant, through her then solicitors, sent a letter which the respondent understood to be a grievance. There was a hearing of that grievance on 17 June and then after investigation and statements were taken, an outcome was given to the claimant on 28 July which she later appealed.

56 In mid-August 2016, the claimant commenced a phased return to work on reduced hours. She lodged her claim form on 24 August and returned to full time working on 31 October. She later resigned having found another job in February 2017.

## **The Law**

57 This is claim under the disability provisions of the Equality Act 2010. (EQA). The relevant parts of the sections are as follows:

### **13 Direct discrimination**

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

### **15 Discrimination arising from disability**

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

### **20 Duty to make adjustments**

- 1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

### **21 Failure to comply with duty**

- 1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

## 26 Harassment

- (1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
- (a) A engages in unwanted conduct of a sexual nature, and
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
  - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.

58 The test for deciding whether a person has a disability is contained within section 6 EQA with further assistance from Schedule 1, Part 1 EQA "*Determination of Disability*" and the "*Guidance on matters to be taken into account in determining questions relating to the definition of disability (April 2011)*". The claimant had a diagnosis of breast cancer and is therefore deemed to be disabled by virtue of paragraph 6 of Schedule 1 Part 1 EQA.

59 The burden of proof provisions as set out in s136 EQA apply to all discrimination complaints. In summary, it is for the claimant to prove the primary facts from which the tribunal could conclude there has been discrimination. If there are such facts, the burden shifts to the respondent to demonstrate that any such treatment is without discrimination.

60 S23 EQA provides that in comparisons for (in this case) section 13 - "*there must be no material difference between the circumstances relating to each case*". It goes on at s23 (2) "*The circumstances relating to a case include a person's abilities if – (a) on a comparison for the purposes of section 13, the protected characteristic is disability*".

61 Section 123 EQA provides the time limit for bringing most discrimination claims as "*three months starting with the date to which the complaint relates*" and "*such other period as the employment tribunal thinks just and equitable*".

- 62 The list of issues makes it clear what the tests are for a tribunal determining these discrimination complaints. The tribunal is, as always, concerned to find the relevant facts for each complaint as brought. We must decide, where there is a dispute, whether something was said or done. If it was said or done, we must decide whether it is unlawful under the various provisions as set out above. Where relevant we might also find assistance from the Equality and Human Rights Commission's statutory *Code of Practice on Employment (2011)*.
- 63 In detailed written submissions, Mr Roberts for the respondents, referred us to several cases but the tests are well established and are not really in dispute. We did note the guidance in IPC Media Ltd v Millar [2013] IRLR 707, Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 and Pnaiser v NHS England [2016] IRLR 170 with respect to the complaint of discrimination arising from a disability. The tribunal needs to consider what "something arising" is alleged by the claimant; whether it arose in consequence of the disability; whether she was treated unfavourably, by whom and the reason for such treatment. We also need to decide if the treatment placed her at a disadvantage. Similarly, for the failure to make reasonable adjustments complaint, the tribunal must identify the PCP. We were reminded by O'Hanlon v Commissioners for Revenue and Customs [2007] EWCA Civ 283 that it will be rare for there to be disability related discrimination (now discrimination arising from) where there are no reasonable adjustments required.
- 64 The claimant also handed in a skeleton argument, which guided us towards why she thinks we should decide in her favour.

### **Conclusions**

- 65 Following the list of issues as far as possible, these are our conclusions.

#### Issue 4 – was the claimant disabled?

- 66 It is not in dispute that breast cancer is a disability from diagnosis as defined in EQA. The other matter which the claimant raises under this issue is whether she had depression because of the side effects of the drug Letrozole. As far as the tribunal can make out, the claimant took Letrozole between sometime in June or July up to October or November and we have insufficient evidence that any impairment lasted for at least twelve months or that there was any substantial adverse effects on normal day to day activities. There has been no medical or other evidence to that effect. The tribunal does not find that any depression amounted to a disability.
- 67 The claimant still has the protection of EQA because of the diagnosis of breast cancer and our decisions below relate to that disability and matters arising in consequence of it.

#### Issue 5 – harassment

- 68 The tribunal has to determine whether the respondent engaged in unwanted conduct as alleged between paragraphs 5.1.1 and 5.1.6. The first question



is whether Ms Curtis made any denigrating and belittling comments at the meeting on 8 April. These alleged comments are set out between issues 5.1.2 and 5.1.4 with the additional one (as far as Ms Curtis is concerned) at 5.1.6 (the making a fuss allegation).

- 69 We start with issues 5.1.2 and 5.1.3. We have found as a fact that Ms Curtis did not make either of these comments.
- 70 We have found, and it is accepted, that Ms Curtis used the “unexploded bomb” comment (issue 5.1.4). Similarly, it is true that Ms Curtis did repeat the making a fuss comment (issue 5.1.6)
- 71 As far as issue 5.1.5 is concerned, that relates to the allegation that Mr Queenan said that the claimant had not been “quick enough” and, as our findings of fact make clear, we have not found that that was said.
- 72 We then consider under issue 5.2 whether any conduct found by the tribunal related to the claimant’s protected characteristic of disability. We therefore need to consider the two comments above found by us to have been said. We find that neither of these comments related to the claimant’s disability. The “unexploded bomb” comment was a reference to concerns the claimant herself had expressed about the client meeting. The other comment was merely a repeat of what Ms Curtis’s line manager had said.
- 73 In any event, even if there was some indirect connection between the claimant’s disability and either of those comments, it did not have the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive atmosphere, bearing in mind the reasonableness of any such conduct having that effect. The claimant does not succeed in her harassment claim.

#### Issue 6 – Direct discrimination

- 74 We now decide whether the claimant was subjected to the treatment set out between 6.1.1 and 6.6.6. To a large extent, our findings of fact will make this clear.
- 75 At issue 6.1.1 we have not found any evidence that the claimant was required to be in the office and work core hours when others were allowed to work flexibly. She did work from home on occasions and was sometimes late and sometimes left early. We heard from Mr Queenan that one of the comparators, Tammie Aziz did not work from home or flexibly but that the other, Robert was freelance and worked from home 2 days per week by prior arrangement. The claimant did not challenge this.
- 76 Issue 6.1.2. has not been fully pursued by the claimant. She gave no evidence on this save for a suggestion that work was taken away from her. We found that there was a reduction in work because the CWC2 project was quiet. Mr Queenan did remove responsibility for of TKA but the claimant understood that was because of concerns for her welfare. She did not pursue the allegation that Mr Queenan said she was “scary” to the company.

- 77 Issue 6.1.3 is a complaint about “housekeeping chores” and we have found that the claimant was only asked to carry out the same work as others at her level and above and below her level of seniority.
- 78 Issue 6.1.4 it is the allegation that Mr Queenan treated her in an aggressive and hostile way when she asked him to be allowed to work from home. There is no evidence whatsoever that there was anything aggressive or hostile about the way in which Mr Queenan dealt with the claimant.
- 79 Issue 6.1.5 is the allegation about cutting off her emails and as our findings of fact make clear Mr Queenan did not cut off her access, there may have been a misunderstanding about the password, but that could have been resolved if the claimant had raised the issue at the time.
- 80 Issue 6.1.6 is the allegation that Ms Curtis had said the company could not trust the claimant because she was scary because of her disability if she sued the company. The tribunal has found that Ms Curtis did not make any such comment at all.
- 81 We then turn to the next question raised by 6.2 which is whether the claimant has been treated less favourably than comparators. There is reference in the listed issues to Tammie Aziz and Rob. We only had very limited evidence on this. The claimant has failed to show any less favourable treatment.
- 82 At issue 6.3 the question is whether the claimant has proved primary facts from which the tribunal could conclude the difference in treatment was because of protected characteristic. The claimant has not proved any facts which show direct discrimination.

Issue 7 – discrimination arising from disability

- 83 At issue 7.1 the something arising alleged is the tiredness and the need for the claimant to leave early and increased absences. We accept that those are matters which arise in consequence of the claimant’s disability and from the medication used to treat it.
- 84 Issue 7.3 identifies the unfavourable treatment as that set out under the direct discrimination issues (6.1). The claimant has not made out the facts under the direct discrimination paragraphs at 6.1, save for one matter and that is the removal of her from the TKA project. We do find that, in part at least, the removal from the project was in consequence of her disability. However, we cannot find that it was unfavourable treatment. Indeed, it was for her benefit as accepted by her.
- 85 Even if we are wrong about that and have to consider, under issue 7.5, whether the respondent can show that treatment, was a proportionate means of achieving a legitimate aim. We find that it was. We are quite satisfied that Mr Queenan took that decision with the claimant’s welfare in mind. It was proportionate knowing, as he did, that the claimant was fatigued. The claimant therefore cannot succeed in that part of her claim.

Issue 8 – failure to make reasonable adjustments

- 86 Turning then to the reasonable adjustments claim. This can be dealt with relatively quickly. The first question is whether the respondent applied the PCPs set out at 8.1.1 and 8.1.2 which are very similar to the first allegation under direct discrimination at issue 6.1.1. The answer is that the respondents did not require the claimant to work core hours of 8.30am to 5.00pm at the office and not at home as requested and they did allow occasional homeworking. The claimant has not been able to show that the respondents applied those PCPs.
- 87 That must be the end of reasonable adjustments claim. For completeness, even if we were wrong about that and there are PCPs, we cannot find under issue 8.2 that the PCPs put her at a substantial disadvantage given that she did in fact have time off and some limited homeworking. Indeed, we find that the respondents did take reasonable steps to avoid the disadvantage. The respondents did have knowledge of the cancer and its effects. They made reasonable adjustments. The claim of failure to make reasonable adjustments fails as do all the discrimination complaints.

Issue 9 – claim out of time

- 88 Finally, the only other issue that we might need to touch upon is the question of whether any parts of the claim are out of time. Given our findings of fact, this only really relates to one matter where we think it might be relevant and that is the finding in relation to the removal of responsibility for the TKA project. Of course, we have doubted whether that was unfavourable treatment and have decided that, in any event, the respondents were justified in taking that step. That alleged act of discrimination was in August 2015 and the claim was not presented until August 2016.
- 89 The claimant has been unable to show any act of discrimination within the time limit which would mean there was conduct extending over a period. That claim therefore is out of time. No evidence was given as to why the tribunal should consider an extension of time on just and equitable grounds. The claim is out of time but the claimant has not succeeded in any part of her claim in any event. The claim is dismissed.

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Employment Judge Manley

Date: 21 March 2018

Judgment sent to the parties on

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For the Tribunal office