



EMPLOYMENT TRIBUNALS

Claimant:
Ms N Brown

v

Respondent:
Network Rail Infrastructure
Limited

Heard at: Reading **On:** 10, 11, 12 and 13 April 2018

Before: Employment Judge Gumbiti-Zimuto
Members: Mrs RA Watts-Davies and Mr J Appleton

Appearances

For the Claimant: Mr J Chegwidden of Counsel

For the Respondent: Mr T Adkin of Counsel

RESERVED JUDGMENT

1. The claimant's complaints of direct disability discrimination, discrimination arising from disability, disability harassment and victimisation are well-founded and succeed.
2. The claim will be listed for a remedy hearing to take place on 7 August 2018.
3. Any party wishing to rely on the evidence of any witness or rely on any documentary evidence at the remedy hearing must, no later than **14 days before the remedy hearing**, provide to the other party a written statement of the witness's evidence or a copy of any document relied upon if not already disclosed.
4. The claimant is to provide to the Respondent a schedule of loss or revised schedule of loss at least **14 days before the remedy hearing**.

REASONS

1. In a claim form presented to the employment tribunal on 9 March 2017, the claimant made complaints of direct discrimination on the grounds of disability, discrimination arising from disability, harassment related to disability and victimisation. The respondent denied the claimant's complaints and defended the claim.

2. At a preliminary hearing held on 13 June 2017, in paragraph 10 of the case management summary and orders, it was recorded that the details of the claimant's claims were set out in paragraph 6 to 17 of the ET1 statement of case. The claimant was ordered to provide further particulars relating to the statement of claim and did so in a letter dated 21 June 2017. The further particulars provided clarified parts of the claimant's claim and the issues that the tribunal has had to consider are therefore contained in the case management summary and orders read together with the letter of 21 June 2017. These are summarised as follows:
 - 2.1. Whether on the 4 November 2016 Linda Pham approached the claimant's direct reports and (i) revealed that the claimant had mental health issues, (ii) asked the claimant's direct reports whether they were happy with the claimant as their line manager in the light of these mental health issues, (iii) whether they would like another manager.
 - 2.2. If any of the said matters occurred, whether they were (a) direct discrimination, (b) discrimination arising from disability, (c) Harassment.
 - 2.3. Whether on 9 November 2016 Linda Pham found the claimant's description of her condition amusing and tried to hide her smile and sniggers through sipping of a bottle of coke.
 - 2.4. If any of the said matters occurred, whether they were (a) direct discrimination, (b) discrimination arising from disability, (c) Harassment.
 - 2.5. Whether the claimant suffered the detriments listed in paragraphs 16 (a) to (j) of the claim grounds of complaint (as amended by the letter of the 21 June 2017)?
 - 2.6. If any of the said matters occurred, whether the claimant was victimised?
 - 2.7. Whether the claimant was deliberately isolated from her team after lodging her grievance?
 - 2.8. If so, whether this was victimisation?
3. The claimant gave evidence in support of her own case. The claimant also relied on the evidence of Timothy Lulham. The respondent relied on the evidence of Linda Pham, Paul Fontaine and Gary Webb. All the witnesses produced written statements which were taken as their evidence-in-chief. The Tribunal was also provided with a bundle of documents containing 573 pages of documents.
4. From these sources, we made the following findings of fact.
5. The claimant was employed by the respondent, at the relevant time, as an information controller. The claimant's employment with the respondent commenced in September 2013 as a temporary member of staff. She was then taken on permanently as an assistant information controller in February 2015 and promoted to the position of information controller in 16 May 2016. The claimant's role involves dealing with the management of

technical documents associated with railway maintenance. The claimant was responsible for managing a team of document controllers. In about May 2017, the claimant worked with a team of four. The claimant's line manager, between May 2016 and May 2017, was Linda Pham.

6. The claimant suffers from anxiety and depression, obsessive compulsive disorder and borderline personality disorder. The claimant is able to manage her conditions so as to enable her to fully discharge the role which she is employed to perform by the respondent. The claimant's line manager was aware of the claimant's depression and mental health issues. The claimant's direct reports were not aware. The claimant's condition did not impact on the quality of her work or the management of others.
7. The respondent operates a procedure for managing sickness absence of staff known as "Managing for Health". In a letter dated 11 October 2016, the claimant was invited to attend a Managing for Health stage 1 hearing. In the letter inviting the claimant to the stage one hearing, she was informed that "Your sickness absence level has triggered stage 1 of the Managing for Health Short Term Sickness Absence procedure". The letter stated that "over the last 26 weeks" there had been recorded four periods of absence that had therefore triggered a stage 1 hearing. Had the respondent's procedure been properly applied, the claimant's absences in the relevant period did not trigger a stage 1 hearing. In the claimant's case, in triggering the stage 1 hearing at this time, the respondent's procedure had been operated incorrectly.
8. The letter inviting the claimant informed her:

"The purpose of this hearing is to help you improve your absence levels and find ways to support you to do so. You will have the opportunity to put your case at the hearing and to discuss what steps as appropriate might be taken to improve your absence levels. However, please be aware that the implementation of the Short-Term Sickness Absence procedure could lead to a stage 1 warning being issued."
9. In an email exchange, with Linda Pham her line manager, concerning staff cover over the Christmas holidays, the claimant included the following sentence: "I'll be working all over Christmas unless I end up back in hospital requiring more cancer treatment or commit suicide". In putting this in the email, the claimant intended a sarcastic comment about how she felt that she was being treated.
10. Unbeknown to the claimant, Linda Pham had experience of a member of her team having committed suicide. When Linda Pham received the claimant's email, she took it seriously and immediately made a referral to occupational health. The specific questions that Linda Pham asked occupational health concerning the claimant were: "Is Natalie fit for work when sending emails on A/L expressing thoughts of committing suicide?"; "Is Natalie fit to attend an MFH-Stage 1 hearing? Will this create additional pressure?"; "How do we support Natalie's direct reports when she as their

line manager is going through manic highs and depressive lows which is present at work?”. Occupational health advisers responded to Linda Pham on 28 October 2016.

11. The claimant and her trade union representative exchanged emails on 28 October 2016 which had resulted in Timothy Lulham sending the claimant an email on the subject of reasonable adjustments. The email referred to websites suggesting reasonable adjustments for staff with mental health issues. The email also contained personal information relating to the claimant’s own health condition and referred to a conversation that the claimant’s trade union representative had had with Gary Webb.
12. One of the claimant’s direct reports was AB. AB had been off work suffering from mental health issues of depression and anxiety. AB had triggered the Managing Health at Work procedure. On 31 October 2016 the claimant met with AB to complete her return to work. During the return to work discussion, the question whether AB needed any adjustments in the workplace came up. The claimant explained to AB that she had some useful guidance and that she would send this to AB. The guidance that the claimant was referring to is that which had been contained in the email sent to the claimant by Timothy Lulham on 28 October 2016. Without removing information relating to the claimant’s condition, the claimant forwarded the email to AB for her information.
13. On 1 November 2016, Linda Pham had a meeting with AB. There is a note of this meeting in the trial bundle (p202). The note, on its face, suggests that the claimant was present at the meeting on 1 November 2016. The parties agree she was not. The reference to the claimant made on the face of the note is to identify who is being referred to by reference to initials used in the body of the email. During the meeting, AB expressed concerns. These included the struggles that she was having with the behaviour and conduct of the claimant which she said was causing her stress and anxiety.
14. The note, produced by Linda Pham, is not just a record of what was discussed in the meeting. It contains a combination of matters which were discussed at the meeting, matters relating to the claimant’s condition (which were not discussed at the meeting) and Linda Pham’s own observations. It is unclear from a consideration of this document whether Linda Pham did refer to the claimant’s personal health issues, as mentioned in the note, at the 1 November 2016 meeting. However, what is clear from the note is that Linda Pham was aware of the claimant’s general health condition.
15. On 3 November 2016, the claimant attended the Managing Health hearing. She was accompanied by Timothy Lulham. During this meeting, the claimant gave further details about her mental health issues. She explained the impact of her disability, the distress and panic she feels, the anxiety and impact on her sleeping patterns. She explained that she was anxious about people’s perceptions of her and whether they understood her disability and how her disability impacted on communication. The

possibility of the claimant being more open with her colleagues about the impact of her disability on her day-to-day behaviour was discussed with Linda Pham and Gary Webb. During this discussion, the claimant made clear that she should be the one who was in control of when and how information relating to her disability was disclosed to her colleagues. It was agreed that the claimant would discuss the issues with her team when she felt comfortable to do so.

16. On 4 November 2016, Linda Pham had an informal conversation with GG and MC who were two of the claimant's direct reports. There is a dispute between the claimant and the respondent as to what took place in the discussion which took place in the canteen on 4 November. On 4 November, the claimant was on annual leave.
17. When the claimant returned to work on 10 November 2016, MC and GG spoke to her about the informal meeting that they had with Linda Pham on 4 November. The claimant states that she was told that Linda Pham had discussed the claimant's mental illness with MC and GG. The claimant says that this was contrary to the agreement that had been reached on 3 November 2016. She further says that it was a breach of confidentiality and that she found this report of breach of confidentiality upsetting. The claimant states that in addition to the breach of confidentiality, it was her understanding that Linda Pham had asked MC and GG if they were happy with the claimant as their line manager in the light of her mental health issues or whether they would like another manager. The claimant states that she believes her ability as a manager was being questioned and she states that she felt that she was a laughing stock and had been seriously undermined.
18. In her witness statement, Linda Pham states that the discussion in the canteen was an informal conversation in order to let GG and MC know that the claimant was off sick. This statement by Linda Pham is inaccurate. It is inaccurate because the claimant was not off sick, she was on annual leave that day. Linda Pham however continues that she wanted to make sure that GG and MC were aware that they could continue to approach her or AL, a new line manager, whilst the claimant was off sick.
19. Linda Pham states that she did not mention bipolar to GG or MC or the claimant's specific health conditions, simply that she was off sick. Linda Pham made no notes of the discussion which took place in the canteen as it was, in her words: "just a chat in the canteen". Linda Pham says there was no discussion of changing the line management. The discussion was around cover for the claimant whilst she was out of the office. When GG and MC were subsequently spoken to about the meeting on 4 November in the canteen, both made reference to bipolar and both indicated that there had been no question posed to them as to whether they should have a change of line management.
20. In respect of the meeting on 4 November in the canteen, the Tribunal is satisfied that during this informal meeting, Linda Pham mentioned the claimant's medical/mental health issues and made specific reference to

the claimant having bipolar. We are also satisfied that during the course of the formal meeting, the management of MC and GG and the claimant's absence was discussed. However, we accept that Linda Pham did not refer to the claimant being replaced as line manager for MC and GG. This was not something that they were asked by Linda Pham. The Tribunal is satisfied that in the reporting of this conversation, it may well be the case that the claimant perceived what she was being told as a reference to MC and GG being asked if they wanted the claimant replaced as their manager. We are satisfied that in fact that is not what was said to MC and GG by Linda Pham.

21. On 9 November 2016, the claimant received a call from her rehabilitation consultant suggesting changes to be made at work to help the claimant with her disability. The claimant approached Linda Pham at her desk to discuss the plans to be put in place over the period of the coming months. During their discussion, to help Linda Pham's understanding of the claimant's disability, the claimant gave examples of how her OCD affected her daily life. The claimant told Linda Pham that when she is in the car on her own, whether the car was stationary or she was driving, she would always ensure that the doors are locked and continually check that they remained locked.
22. At the time that the discussion was taking place, Linda Pham was drinking from a bottle of Coke. The claimant says that she noticed that Linda Pham was sniggering behind the bottle and trying to hide this from her. The claimant says that Linda Pham clearly found the information amusing. The claimant believes that she was mocking her disability. The claimant states that she told Linda Pham that she found her reaction hurtful and said: "You and others may find it funny or a joke but for me it is disrespectful and I would never do this to any of my direct reports". The claimant says that Linda Pham did not apologise and changed the subject.
23. Linda Pham recollecting the events of 9 November says that she does not recall the claimant giving her details of any condition and says that she is sure that if she had upset the claimant, she would know that she had done so. She denies laughing at the claimant at any point in the conversation. Following the conversation, she says the claimant carried on working as normal.
24. When Philip Mear was investigating the claimant's formal grievance, a significant part of which was the incident on 9 November, he failed to ask anything about the incident at any point. The matter was however discussed with Paul Fountaine during his meeting with Linda Pham in his appeal hearing (1 June 2017). When asked about the incident on that occasion, Linda Pham is recorded as having said: "Honestly, I don't recall that particular event. I would have remembered that, but I don't".
25. The Tribunal accepts the claimant's version of events about this incident. In coming to our conclusions on this, we note that on 9 November at 11.09, the claimant sent a text message to a friend, CA, in which she stated as follows: "Had the DWP call me this morning. I have an

assessment on Monday at 10am. This is so I can be registered disabled for my mental health issues. Told Linda and was explaining some of my symptoms and she just laughed and sniggered. It really upset me. It's not a laughing matter." Then at 11.13, the claimant sent a further text saying: "I feel I'm being made a joke of".

26. The Tribunal also notes that on 10 November 2016 the claimant found out about the meeting that had taken place in the canteen on 4 November. The claimant left work early on 10 November.
27. Early in the morning, at 5.40, on 11 November 2016 the claimant sent a text message to Linda Pham in which she wrote as follows: "You may find me locking car doors funny but for me it's part of the way I am built because of my condition. That doesn't make me any different to you or others it just means I have different ways of dealing with things. However, that doesn't give you or anyone else the right to find it amusing. It is hurtful and disrespectful. I would never do it to my direct reports."
28. Linda Pham responded to the email on the morning of 11 November at 11.21. She acknowledged that the claimant would not be coming into work that day and included the following comment: "Thank you for raising concerns with me. I am sorry if you feel that you cannot trust any of us. No-one finds the situation amusing. We want to support you in every way we can and understand what you're going through. With the support of Remploy, we should be able to put a reasonable plan in place to help all."
29. On 11 November 2016, the claimant raised a grievance. The first item on the grievance was relating to the incident on 9 November. The second item on the grievance related to an incident which had occurred on 4 November. The claimant made a third point which related to a historic allegation of a grievance made in June 2016 concerning another colleague, ZB. The claimant said the grievance had never been acknowledged or dealt with.
30. From these various near-contemporaneous assertions of an incident occurring on 9 November, the Tribunal concludes that the claimant was honestly of the view that something occurred on 9 November which involved Linda Pham sniggering at her.
31. The Tribunal has considered the question whether something happened about which the claimant is mistaken. For instance, 'horrid' or 'nervous' laughter on the part of Linda Pham which was not intended to cause any offence. However, the Tribunal is unable to conclude that was what occurred because nobody gives evidence that supports it; it is not something that the claimant accepts and it is not something that Linda Pham suggests occurred.
32. Linda Pham's account is the alternative. By her account nothing at all happened. We reject that on the basis that although the claimant suffers from mental health issues, there is no suggestion that she is in any sense delusional or somebody who imagines events when they have not

occurred. We noted that there are references to paranoia in respect of the claimant. However, it was accepted by Linda Pham that the claimant was not an unreliable reporter of events that occurred or a person that, to her, had displayed paranoia in respect of events that occurred.

33. Having had the opportunity of hearing the claimant's evidence and also having had the opportunity of considering the evidence which was given by Linda Pham which enabled us to assess the demeanour of both witnesses and also to consider whether or not we considered either of them more reliable than the other, we are quite satisfied that it is more likely than not that the claimant's account of the events on 9 November is correct in contrast to the description given to them by Linda Pham.
34. Linda Pham's evidence in our view appeared at times uncertain and she appeared to lack confidence in some of her statements. Her recollection about some events was either non-existent or poor and in some respects appeared to have changed over time.
35. We contrast that with the claimant whose account was consistent about this event and appears to have been first made soon after the events occurred. In all the circumstances, we prefer the claimant's account over that given by Linda Pham in respect of the incident on 9 November.
36. The claimant's grievance of 11 November 2016 concerned an allegation that the claimant had been discriminated against as a result of her disability. It is accepted that this was a protected act for the purposes of section 27 of the Equality Act 2010.
37. After the claimant submitted her grievance on 11 November 2016, the claimant was off work for a number of days. On 16 November 2016, the claimant received an email from Linda Pham which stated that going forward, the claimant should contact Philip Mear. This was because the grievance raised was to be discussed with Philip Mear and a new case owner/manager was to be appointed to monitor the claimant's welfare until investigation was complete. The claimant was asked to copy any correspondence to Linda Pham.
38. According to the respondent's grievance policy, a hearing should be held as soon as possible and a date agreed for the hearing within seven working days of submission of the grievance. In the claimant's case, although submitting the grievance on 11 November, by 30 November, the claimant had still not heard anything regarding a grievance meeting. Timothy Lulham sent chasing emails to Gary Webb (HR manager).
39. On 2 December, an informal meeting was arranged between Philip Mear and the claimant with Timothy Lulham. At this meeting, it was agreed that the grievance hearing would take place on 7 December 2016.
40. On 7 December 2016, the claimant set out her grievance complaints in a meeting with Philip Mear. The meeting lasted from about 9.00am until about 10.15am. During the meeting Timothy Lulham pointed out that Philip

Mear's diary was very full and asked when the matter would be resolved. Philip Mear told the claimant and Timothy Lulham: "I have cleared a number of things to try and resolve the issue. This is priority. Next couple of weeks updates on what has been going on".

41. Following the meeting on 7 November, the claimant discovered that one of her direct reports, a contractor, MC, was not having his contract renewed. The claimant wrote to Philip Mear stating that she had not been consulted on this and also pointing out that she was feeling isolated from her team.
42. Philip Mear indicated that he would look into MC's contract renewal. Philip Mear made it clear that he considered the claimant's position to have been that the claimant did not want to work with the team. The email response from Philip Mear included the following passage:

"In relation to the staff not being informed of your return, this may well be my fault. Again in our conversations you noted that you did not want to work with the team and you were concerned that they would ask questions about your condition you did not feel ready to answer. Unfortunately, I may have interpreted this as you wanting minimal contact, therefore, I have shared minimal information with the team. Obviously if you advise otherwise I can advise them of the working arrangements and expectations.

It is unfortunate, but not working with the team could leave you feeling isolated. I am open to further discussion on how we can manage the situation if you wish, I can obviously pursue other working arrangements." (p247)

43. Timothy Lulham was communicating with Gary Webb, raising concerns about the way that Philip Mear was handling the grievance. He raised concerns about communication, about how the claimant was feeling isolated and felt the fact that her direct reports such as MC had their contracts terminated without the claimant being consulted. Gary Webb informed Timothy Lulham of the discussion that he had with Phil Mear in an email dated 22 December 2016 (p252). Gary Webb stated he was confident that Philip Mear was making every effort to move things forward.
44. One of the points raised in the email (page 253) concerned the claimant's feelings of isolation. Gary Webb's email read as follows:

"Feeling isolated - Phil tells me that in his discussion with Natalie he asked for her preference with regard to which location she works from and it was her request to work from the Reading site. Phil understands the remoteness of the location and indeed the working from home creates distance from a relationship point of view with the team. Phil is a little confused that Natalie says on the one hand that she feels isolated but on the other hand says that she is concerned about the team's reaction toward her, these two things seem juxtaposed."

45. The email from Mr Webb indicated that although Philip Mear had been receiving the claimant's texts, he had not been responding to these texts as they simply contained a statement that the claimant is "feeling well and will work from home".
46. Meanwhile, the claimant was herself sending communications to Philip Mear. On 23 December 2016, the claimant sent an email to Philip Mear in

which she stated that she had tried calling on several occasions to discuss matters with him. She also raised the fact that on attending at Reading Post Office site, she found that her desk had been cleared and allocated to another member of the team even though there were other vacant desks. She explained that this upset her. She stated that she was eventually able to locate the majority of her personal belongings that had been in her desk and was going to take them home with her that day (p255).

47. Philip Mear responded on the same day and indicated that he had been ill in the period that the claimant had attempted to contact him. His email continued:

“My points remain, I offered a number of solutions for your work environment and the Davidson House option was the one that you suggested would be the better arrangement. Unfortunately through all grievances there are issues with location that can make people isolated, as previously noted, I am happy to come and discuss any changes that we can make to try and assist you.”

48. Mr Mear went on to explain that he had missed another call from the claimant the previous week, that he had been trying to sort things out in relation to her grievance and that due to other work had not been able to return her call. The email continues:

“I was unaware your desk had been reallocated and I will discuss with the team on your return your desk situation to understand why the action has been taken. In relation to new systems, you will be aware that we are developing a lot of new processes through the project to improve document management and increase efficiency. I will discuss with Linda an appropriate method to keep you updated whilst the grievance is being managed.”

49. Mr Mear then went on to point out that he would be carrying out interviews in relation to the grievance in either the first two weeks of January or the third week.

50. During this period, new systems were being introduced by the respondent into the way that the document controllers worked. Work was being done on a system called Logi Transmittals and other work was being done on a system referred to as EBIT. The claimant's direct report, GG, was the person who was carrying out work in relation to these new systems and processes. It was clear from correspondence from the claimant to members of her team that she was feeling isolated and not being kept informed of current team activities.

51. During this time, the claimant was working from Davidson House. The claimant received an email from one of her colleagues, Amy Lewis, which informed her that document controllers had been briefed on Logi Transmittals and that GG was trialling EBIT.

52. Philip Mear had meetings with AB on 4 January, AB2 on 4 January, GG on 13 January, Linda Pham on 4 January and a telephone conversation and email exchange with MC on dates not identified.

53. Timothy Lulham wrote to Gary Webb on 6 January. In his email, he stated the following position in relation to the claimant:
- “Natalie’s stress has been exacerbated to a significant degree because Phil has not assumed responsibility as her line manager as he said he would. He has not made clear to Natalie’s team (and peers) that she is still in post and that she remains as their line manager. We suspect that this is the main reason they are not responding to her emails, declining to meet with her, not including her in general communications and not involving her on matters for which she has (or shares) responsibility. The alternative is that they have been advised/instructed not to engage with her but I cannot believe anyone would be so misguided as to do such a thing. As well as upsetting Natalie, this confusion in the chain of command is causing a range of problems for the function. This is something that Natalie can evidence and that I believe is Phil’s responsibility to address. Rather than cause more stress, I feel that it would be a huge relief to her to have her line manager (meaning Phil) reaffirm her position in the organisation. I had assumed Phil would do this much sooner and I now regret not asking him.”
54. Gary Webb was asked about this part of this email. His response was that he did not recall having a discussion with Philip Mear about the matters that are raised in this part of the email. Gary Webb did however suggest a meeting with Philip Mear in order to discuss matters. At this stage, Gary Webb was suggesting that the meeting take place in the claimant’s absence. His reason for this suggestion was to attempt to avoid causing the claimant any unnecessary stress or anxiety. Mr Webb stated that it was his proposal that the claimant not be present because the meeting was to try and sort out progress. However, it was eventually agreed that the claimant would attend.
55. A grievance update meeting was eventually arranged to take place on 15 February 2017. On that occasion, Philip Mear provided the claimant and Mr Lulham with a draft grievance report (p310). Had the grievance procedure been properly followed, Philip Mear should have formally written to the claimant with the grievance outcome eight calendar days after the meeting that had taken place on 7 December 2016.
56. The grievance report prepared by Philip Mear did not address the claimant’s grievance about events on 9 November. It did uphold the complaint about the alleged breach of confidentiality. The claimant’s complaint that Linda Pham had asked the claimant’s direct reports whether they were still happy for the claimant to be their manager was not upheld.
57. The draft unsigned grievance report provided to the claimant on 15 February had completed part 1 which described the people that had been interviewed during the investigation and set out key points from the investigation.
58. Part 2 of the grievance report form was not completed at all. This is the part of the grievance form which indicates what the conclusion reached on the grievance was.

59. The claimant at this stage indicated that she intended to appeal against the grievance outcome. It was not until 21 March 2017 that the claimant received the grievance outcome. The grievance outcome informed the claimant that if she wished to appeal, she should do so in writing stating the grounds of appeal in full within 10 calendar days of the date of the letter.
60. The claimant contends that throughout the period from December 2016 to the end of February 2017, she was excluded from her team and not informed of developments. The claimant complained that she had not been given information about the EBIT and Logi Transmittals so that she could brief her team. She had asked a colleague, ZB, if he could help but her request was ignored. The claimant was informed that she would be walked through the Logi Transmittal process. However, by 21 February 2017, the claimant was informed that everyone had been trained on using the EBIT system when she still knew nothing about it.
61. The claimant had attempted to communicate with her team about meetings that she was attending in order to provide them with feedback. She received no responses from the members of her team. The claimant attempted to set up a meeting with Amy Lewis, a colleague, the meeting was cancelled and never rearranged.
62. The claimant was informed that GG, one of her direct reports, had been unsuccessful in an application for promotion. The claimant was unaware that the interviews had even taken place.
63. The claimant raised the question of lack of communication with her colleague, Amy Lewis. The claimant was excluded from team briefings. The claimant's permission to review her colleagues' calendars was removed.
64. The claimant states that these matters, training, communication with colleagues, applications for promotion by her team, were things which ought to have properly formed part of the role that she was employed to perform. However, in this period, she was not informed about these matters and not kept up to speed in respect of them.
65. In this period as well as carrying out the grievance investigation, Philip Mear was acting as the claimant's line manager. In this period, Philip Mear, apart from not communicating with the claimant in respect of the progress of her grievance, was also failing to communicate with the claimant in the way a line manager should. Philip Mear did nothing to facilitate the claimant's communications with her team or to address the issue of isolation which the claimant had raised.
66. At the meeting on 15 February 2017, the question of finding the claimant an alternative position was discussed. At the meeting on 15 February, the claimant was asked if she wished to take garden leave.

67. The claimant became unwell and was admitted to Frimley Park Hospital. The claimant says this was caused by the discriminatory acts, the outcome of the grievance, and the way it was being dealt with.
68. The claimant lodged an appeal against the outcome on 12 April 2017.
69. The claimant also lodged a grievance about victimisation. The claimant's complaint about victimisation was that since raising the formal grievance on 11 November 2016, she had been subjected to a series of detriments. She complained: "I have been subject to isolation, not by locality but by not being kept informed of any changes to process, procedures and resourcing." The claimant stated that whether it was intended or not, the effect of the treatment had been to systematically remove her responsibilities from her without her agreement and to prevent her from doing her job.
70. The claimant's grievance appeal meetings took place in May and June. Paul Fountaine considered the claimant's grievance appeal.
71. Paul Fountaine interviewed Linda Pham and spoke to Philip Mear. Paul Fountaine got the impression that Philip Mear's questioning of Linda Pham presupposed the outcome and that he had "arrived at a view of there having probably been no intentional malice and that there had been no discrimination, and as such he didn't necessarily feel the need to dissect what had gone on, therefore with all that was going on his questioning technique was not particularly searching."
72. One of the criticisms made of Philip Mear's grievance investigation is a failure to address the issue of 9 November. In his witness statement, Paul Fountaine states the following at paragraph 14:

"My impression of why Phil did not ask Linda directly (or appeared not to ask Linda directly) about the specific discrimination allegations is because he was going to ask Ginka and Michael about this, having formed an initial view in this regard. When I was discussing this with Phil, as per page 385 of the Bundle, I don't refer to it explicitly as I knew by this point I needed to re-interview Linda in order to satisfy myself."
73. It appears to the Tribunal that Paul Fountaine in the appeal compounded the criticism which he made of Philip Mear, that Philip Mear failed to address parts of the claimant's grievance, by failing to address directly with Philip Mear his failure to address parts of the claimant's grievance. Paul Fountaine carried out an investigation which failed to address all aspects of the claimant's grievance.
74. The view of the Tribunal is that even on the respondent's own account of how the claimant's complaint was handled in the grievance and at the appeal that the claimant is entitled to feel that the matter was not dealt with thoroughly by the respondent. There was a failure to investigate, i.e. to seek out facts wherever they may lead but instead Philip Mear had "presupposed the outcome" and "didn't feel the need to dissect what had gone on" and, in the case of Paul Fountaine, he had formed an "impression" of

why Philip Mear did not ask Linda Pham directly about specific discrimination allegations and but failed to ask Philip Mear why he had not done so.

75. When Paul Fontaine discussed matters with Linda Pham directly he merely asked whether Linda Pham recalled the conversation on 9 November 2016. The response from Linda Pham was as follows:

“Honestly, I don’t recall that particular event. I would have remembered that but I don’t.”

That is the extent to which Paul Fontaine interrogated the incident of 9 November 2016 which was one of the two principal matters raised by the claimant in her grievance of 11 November 2016.

76. In his grievance appeal outcome, Paul Fontaine did not consider that there had been any discrimination and he concluded by saying that he did not believe that victimisation had taken place.
77. In paragraph 30 of his witness statement, Paul Fontaine includes the following sentence:

“I wondered if perhaps the feeling of paranoia that had been engendered by the original Managing for Health process had perhaps continued to this point, giving the claimant a perception of victimisation.”

When cross-examined about this passage, Paul Fontaine stated that the “MFH was a catalyst of much of what was going on. Some of the content of text messages and behaviour around there, Natalie did fall into glass half-empty instead of glass half-full.” Paul Fontaine pointed out that he had no particular recollection of reading the references to the claimant’s paranoia either in medical reports or as set out in the notes of the claimant’s meetings with Philip Mear. Paul Fontaine’s reference to the claimant’s feeling of paranoia remains enigmatic. The Claimant disputed the references to “paranoia” and made the point that various people acting on behalf of the Respondent referred to paranoia and/or assumed paranoia on the part of the Claimant but that this was medically unjustified and she rejected it

Law and parties submissions

78. Section 136 of the Employment Rights Act 2010 provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. This does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
79. The claimant who brings proceedings relating to a contravention of the Equality Act 2010 has to prove on the balance of probabilities facts from which the employment tribunal could conclude, in the absence of an

adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 5.

80. In deciding whether the claimant has proved such facts it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.
81. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the employment tribunal will usually depend on what inferences it is proper to draw from the primary facts found by the employment tribunal.
82. It is important to note the word is "could". At this stage the employment tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage an employment tribunal is looking at the primary facts proved by the claimant to see what inferences of secondary fact could be drawn from them.
83. The employment tribunal must decide whether any provision of any relevant code of practice is relevant, and if so take it into account in determining such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
84. Where the claimant has proved facts from which inferences could be drawn that the employer has treated the claimant less favourably on the grounds of the protected act, then the burden of proof moves to the employer.
85. It is then for the employer to prove that it did not commit, or is not to be treated as having committed, that act.
86. There is a two-stage process to the drawing of inferences of discrimination. In the first place, the complainant must prove facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. A difference of status and a difference of treatment is not sufficient to reverse the burden of proof automatically. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof. Unreasonable conduct must not be equated with discrimination.
87. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the 'same, or not materially different' as those of the claimant, having regard to section 23 of the Equality Act 2010.
88. If the burden does shift, then the employer is required only to show a non-discriminatory reason for the treatment in question.

89. By section 13 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. On a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case.
90. By section 15 a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This 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.
91. By section 26 A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has the effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B; the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect must each be taken into account.
92. By section 27 A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. Making an allegation (whether or not express) that A or another person has contravened the Equality Act is a protected act.
93. The parties provided the Tribunal with written submissions which we have taken into account.

Conclusions

4 November 2016

94. The Tribunal is satisfied that in discussions with the claimant's direct reports, MC and GG, Linda Pham breached the claimant's confidentiality. The Tribunal is satisfied this breach in confidentiality related to the claimant's health and concerned matters arising from her disability.
95. The breach in confidentiality occurred no more than around 24 hours after the claimant had made it clear to Linda Pham that she wished to retain control of any disclosures to her team about her disability. Linda Pham denied breaching the claimant's confidentiality to Philip Mear. She denied it to Paul Fontaine. She denied it to the Tribunal. All the denials came in the face of accounts from persons who also reported to the claimant that she did breach confidentiality and then supported that assertion in the grievance investigation to Philip Mear. We are satisfied that the account given by Linda Pham to the employment tribunal is wrong on this point.

96. We are satisfied that there is evidence from which we could conclude that the claimant was treated less favourably on grounds of her disability in making this breach of confidentiality. We have attempted to construct a hypothetical comparator whose circumstances are not materially different (save for the absence of the protected characteristic). We have been unable to conclude that there is any evidence to allow us to conclude that Linda Pham would have behaved in the same way to avoid a conclusion of less favourable treatment on the grounds of disability.
97. We consider that the claimant has proved facts from which the Tribunal could conclude that there has been a breach of section 13 read together with section 39(2) of the Equality Act 2010. There has been no evidence produced by the respondent to show that this contravention did not occur. It is the conclusion of the Tribunal that the claimant's claim of direct discrimination in respect of the incident on 4 November 2016 is well-founded and succeeds.
98. In respect of the incident on 4 November 2016, the Tribunal is also satisfied that a claim under section 26 of the Equality Act 2010 would succeed. We are satisfied that the breach of confidentiality was unwanted conduct, that it related to the claimant's disability, and that it had the effect of violating the claimant's dignity or creating an intimidating and/or humiliating environment for the claimant by disclosing matters about her disability in circumstances which she did not have control of.
99. In coming to our conclusions on that, we have had regard to the provisions contained in section 26(4) which requires us to consider the claimant's perception, the circumstances of the case and whether it was reasonable for the conduct complained of to have that effect and we are satisfied that it does. The claimant's complaint of harassment therefore also succeeds in relation to the incident on 4 November 2016.
100. In respect of the claim made pursuant to section 15 of the Equality Act 2010, we are again also satisfied that this complaint is made out. In breaching the claimant's confidentiality, the claimant was treated unfavourably and we are satisfied that it was because of something arising in consequence of the claimant's disability. The respondent has not shown that it was a proportionate means of achieving a legitimate aim or that it did not know and could not reasonably be expected to know that the claimant was a disabled person.

The incident of 9 November 2016

101. We have explained in our findings of fact that we prefer the account which has been given by the claimant in respect of the incident on 9 November 2016. We are satisfied that there was a smirk/snigger in front of the claimant by the manager, Linda Pham. We are satisfied that there has been presented no innocent explanation that would neutralise anything that the claimant perceived as a smirk or a snigger with some other, more innocent explanation.

102. The Tribunal is satisfied that there was a smirk or snigger which arose from the claimant's account of her disabilities. The smirk or snigger was because of the claimant's protected characteristic. We have asked ourselves whether or not this was treating the claimant less favourably than others without the claimant's disability would have been treated. There is no evidence which has been presented before us from which we could sensibly construct a hypothetical comparator or come to any conclusions as to what the outcome of any comparison with the hypothetical comparator might be.
103. However, in circumstances where a disabled employee gives an account of her disability or the impact that it has on her ability to function in mundane circumstances to their manager, smirking or sniggering in our view is less favourable treatment on the grounds of disability. We are satisfied that the claimant has proved facts from which we could conclude that the respondent has contravened section 13 read to together with section 39(2) of the Equality Act 2010. There is no evidence presented by the respondent to allow us to conclude that the contravention did not occur. We have rejected the version of events which was given by Linda Pham.
104. The conclusion of the Tribunal is therefore that the claimant's complaint about direct discrimination in relation to the incident on 9 November 2016 is well-founded and succeeds.
105. Considering the complaint under section 26 of the Equality Act 2010, we are satisfied that Linda Pham is engaging in unwanted conduct related to the claimant's disability which had the effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating and offensive environment for her and we have had regard to the provisions contained in section 26(4) in considering whether or not this complaint is made out and we are satisfied that the claim under section 26 is also well-founded and succeeds.
106. In respect of the complaint under section 15, we are satisfied that this complaint is also made out. Linda Pham's conduct was such that the claimant was treated unfavourably because of something arising in consequence of the claimant's disability – that is, the claimant's behaviours in her car as a result of her having OCD and we are satisfied that the respondent has not been able to show that it is a proportionate means of achieving a legitimate aim or that it did not know and could not reasonably be expected to know that the claimant was a disabled person.

Victimisation

107. The Tribunal is satisfied that the evidence presented shows that the contract of MC was terminated without the claimant being informed. This is something the claimant could expect to be informed about before it happens. In this case, it did not happen and no ready explanation why that was the case was given.

108. The claimant's desk at the Reading Post Office building was cleared out. There is no explanation given as to why this happened.
109. The claimant gave evidence, which the Tribunal accepts, of instances where she was not informed of new tools, processes, cancelling or declining meetings with the claimant, not arranging training for the claimant in the same way as others. The way the claimant was treated in respect of the EBIT program was an example of this. The claimant's evidence is that she tried to set up a meeting with Amy Lewis for an information control work briefing. It was cancelled and never rearranged. The unchallenged evidence was that the claimant's permissions to view Linda Pham's and Amy Lewis's diaries online were removed; no explanation was given as to when or why this happened. The Tribunal accept the claimant's evidence that she was not informed of the contracts of a direct report being extended or of roles advertised where she was the appropriate manager.
110. These matters, the Tribunal is satisfied, are detriments. They are matters which the claimant is entitled to consider have put her at a disadvantage in relation to her role that she performed for the respondent as information controller.
111. We have gone to ask whether these were matters which arose as a result of the claimant's change of physical location of working. The claimant, following the submission of her grievance, either worked from home or alternatively out of Davidson House as opposed to the Reading Post Office building. The claimant says that the change in location does not account for the problems.
112. In her ordinary working life, before the grievance, the claimant managed a team which was split in various locations. She was accustomed to working from various locations including working from home. The problems that arose had not arisen previously. During the period that the claimant was waiting for the outcome of the grievance the problems that the claimant was having were pointed out to the respondent, the claimant pointed out that the issues were not arising from location but arose from a breakdown in communication.
113. In the light of all these matters, the Tribunal is not satisfied that the problems which the claimant encountered arose from a move in her location. Qualitatively, it ought to have made little difference although it is impossible to say that it would have resulted in no difference, as there would have been times when she would have been working at the same office as some of her direct reports, i.e. those at the Reading Post Office building and she was no longer doing that. However, in practical terms, we accept the claimant's evidence that working from distinct locations from direct reports was not an oddity or a strange feature following the grievance being issued but actually was an exaggerated version of the way that she had always worked. We do not accept that the problems that the claimant identified can be explained simply by saying that there was a change in the claimant's physical location.

114. When the claimant raised her grievance, Linda Pham's direct line management of the claimant was taken over by Philip Mear. The Tribunal is satisfied that Philip Mear failed to discharge his line management responsibilities in respect of the claimant. We are satisfied this has a direct impact on the way that the claimant thereafter was able to relate to her team. The claimant would have appeared to have disappeared from sight on 11 November. Philip Mear did not make it clear what the position was in relation to the claimant and neither did Linda Pham. This failure to address the claimant's line management and her position within her management line and her direct reports is the reason behind the growing isolation of the claimant from her team, or at least a significant factor in it.
115. Philip Mear had a knowledge throughout of the problems that this arrangement had caused and took no action to resolve the situation. This situation had come about as a result of the position that the claimant was in arising from the fact that she had raised the grievance, a matter about which Philip Mear was well aware and so was Linda Pham, both of whom were people who could have done something to deal with the problems that had arisen.
116. The Tribunal is satisfied that there are facts from which we could conclude that the isolation of the claimant amounted to a detriment and this arose because the claimant had done a protected act of raising the grievance.
117. We come to that conclusion because there is evidence of a breakdown in communication and isolation of the claimant from her team. There is no ready explanation for this isolation. The claimant ought not to have been isolated from her team simply because of the fact that she was no longer working from the Reading Post Office building but was now based in Henderson House.
118. The claimant's line management by Linda Pham was to be taken over by Philip Mear in this period of time. That ought to have been sufficient to allow the claimant to have the usual lines of communication notwithstanding that all the problems identified by the claimant as set out above occurred. We are satisfied that from those facts we could conclude, in the absence of an explanation, that there was a contravention of section 27.
119. We have gone on to consider the explanation which is given by the respondent. The explanation given by the respondent essentially amounts to a reliance on the change in location, a matter which the Tribunal has already concluded did not afford an explanation for the breakdowns which the claimant has identified.
120. We have gone on to consider whether it can properly be said that because this was a breakdown in communication between the claimant and her team, that the absence of any particular knowledge by the team in the circumstances surrounding the grievance means that it is shown that this was not a factor. The Tribunal does not accept such an argument. This was a case where the problems that arose in relation to the claimant's

isolation from her team came about because of changes that were made as a result of the claimant making a grievance. This led to the removal of Linda Pham and her replacement with Philip Mear in respect of the claimant's management. The claimant's physical location ought to have made no difference because, in practical terms, it made little difference to the way that the claimant would operate vis a vis her team on a day-to-day basis. Linda Pham and Philip Mear were aware of the problems that the claimant was having in relation to communication with her team and did nothing to resolve them. These were problems that had arisen since arrangements were put in place to deal with the grievance. The Tribunal is satisfied that the detriment of isolation from the team was because the claimant had raised a grievance. The complaint of victimisation in this regard is therefore well-founded and succeeds.

The grievance process

121. The Tribunal is satisfied that the manner in which the claimant's grievance was dealt with by the respondent was very poor. The respondent took far too long to deal with the grievance, whether having regard to the respondent's own policies or the guidance which is set out in the ACAS Code of Practice.
122. The investigation by Philip Mear was inadequate. Paul Fountaine too should have concluded that the Philip Mear investigation was inadequate, but he fell short of doing so. The inadequacy was illustrated by the fact that one of the two principal matters about which the claimant complained specifically in her grievance on 11 November is not dealt with at all.
123. The appeal in our view did nothing to resolve the problems which arose in relation to the Philip Mear grievance. Firstly, insofar as the 9 November incident is concerned, although it was evident to Paul Fountaine that there was a failure to explore this issue, in his own interrogation of matters relating to the grievance, he asked only one question relating to the 9 November incident and did not take the matter any further.
124. Although identifying problems with the way that Philip Mear approached the grievance process, Paul Fountaine simply restricted himself to re-interviewing Linda Pham and interviewing Philip Mear as opposed to going through the grievance in full in order to ensure that the matters had been fully investigated. In effect, Paul Fountaine adopted the failings that he himself identified in Philip Mear's grievance.
125. The Tribunal is satisfied that these defects in the process amount to detriments. We consider whether there is evidence from which we could conclude that there has been a contravention of the provisions contained in section 27 of the Equality Act 2010. We consider that they are that the delay in this case was extreme; there is no explanation for the delay in respect of the period from February onwards. While there is some explanation for the delay in the period up to the end of 2016 and this was the heavy workload but none of this came as a surprise or out of the blue, that was the working environment. It was something that Philip Mear and

anyone else involved with the respondent would have been alive to because the workload arose out of an important on-going project. It did not come out of the blue and push everything else aside. If there was to be an adjustment necessary to the timescales to deal with the claimant's grievance, those ought to have been signalled to the claimant and made clear at the time. So, whilst there may be real reasons in existence to justify some of the delay, we are not satisfied that those matters which relate to the illness of Philip Mear and his other workload, justify the length of delay. The grievance procedure provides a timescale in which matters are to be done – in this case, it was simply ignored, both by the manager responsible and the senior HR practitioner, despite the issue being raised on several occasions by Timothy Lulham, the claimant's trade union representative.

126. The Tribunal considers that the interviews conducted by Philip Mear with the witnesses are inadequate. We point to the fact that the 9 November incident appears never to have been properly dealt with. We note that the claimant makes criticisms of the way that the eye witnesses to the incident on 4 November were questioned. However, the Tribunal is not necessarily critical of Philip Mear in respect of that incident as it appears that the essence of that allegation was covered by all the witnesses, even if it is not always clear exactly how the information was specifically elicited from them.
127. The original outcome report was incomplete when it was presented on 15 February. The final report when presented was little different from the draft but it was still over a month before that happened. Although the appeal processes identified deficiencies in the grievance process, it failed to address the problems that had arisen in relation to the grievance dealing with the incident on 9 November.
128. The Tribunal is satisfied that the grievance procedure and the grievance appeal taken together were not followed by the respondent and the quality of the work conducted in our view was seriously lacking.
129. From all these circumstances, we consider that the failings are so inadequate that it is necessary to ask the respondent to provide an explanation that would show that these matters were not related to the fact that the claimant had raised a grievance.
130. The explanation given only really deals with the delay and that, as already stated, arises from the level of work that Philip Mear was required to carry out and can only partly account for the delay. The Tribunal does not consider that this is really an explanation that justifies the failings. Firstly, the workload as already stated was not a surprise; it is something that ought to have been at the forefront of everybody's mind, in particular, Philip Mear, and he ought to have made arrangements that would have allowed him to deal with the claimant's grievance in a timely manner or alternatively have dealt with it in a way that was clear and transparent to the claimant having regard to the problems that he was facing.

131. Secondly, we note that Mr Mear's level of a Band 1 manager is senior. He was both in control of his diary and able to delegate to another manager who had the time but he took neither of these actions. Philip Mear has not given evidence and provided an explanation for why his failings were so significant in this case. In the circumstances, we are not satisfied that the respondent has been able to show that the failings in relation to the grievance process were not as a result of a contravention of the Act.
132. The conclusion of the Tribunal is that having regard to the provisions contained in section 27 of the Equality Act 2010, the claimant was discriminated against by way of victimisation in the delay in dealing with her grievance and also in the conclusions that were arrived at by the respondent. The claimant's claim therefore succeeds.
133. It is the conclusion of the Tribunal therefore that the respondent discriminated against and harassed the claimant on the grounds of her disability in the 4 November 2016 canteen conversation. The respondent discriminated against and harassed the claimant related to her disability in the 9 November 2016 conversation between the claimant and Linda Pham. The conduct of the grievance and appeal amounted to victimisation of the claimant following her complaints of disability discrimination on 11 November 2016; and the claimant's isolation from her team following the 11 November 2016 grievance amounted to victimisation of the claimant by the respondent.

Employment Judge Gumbiti-Zimuto

Date: 13 June 2018

Sent to the parties on:

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For the Tribunals Office