RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss J Frost**

Respondents: **(1) Retail Design Solutions (Consultancy) Limited**
(2) Anthony Kent

Heard at: **East London Hearing Centre**

On: **1, 2 and 3 May and 6 June 2018 (in Chambers)**

Before: **Employment Judge Brown**

Members: **Mrs M Long**
Ms J Owen

Representation

Claimant: Ms R White (Counsel)

Respondents: Mr I Ahmed (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The Claimant's complaints of failure to make reasonable adjustments and indirect discrimination succeed.

2. The Claimant's complaint of discrimination arising from disability with regard to the Claimant's progression being capped succeeds.

3. The Claimant's other complaints fail.

4. The Remedy Hearing will proceed on 7 September 2018.

REASONS

1 The Claimant brings complaints direct disability discrimination, discrimination arising from disability, breach of the duty to make reasonable adjustments, indirect discrimination, harassment and victimisation against the Respondents. She also contends that the First Respondent breached the ACAS Code of Practice.

2 The legal and factual issues arising in the claims were set out in a Preliminary Hearing on 25 September 2017. They were as follows:

Disability

1.1 Was the Claimant, at all material times (from April 2016 until May 2017), a disabled person by reason of her anxiety condition?

Direct Disability Discrimination

1.2 Did the Respondents treat the Claimant less favourably that they did treat or would have treated a person who was not disabled, in the same or not material different circumstances, by doing the following:

1.2.1 Speaking to the Claimant and treating her in a demeaning and inappropriate manner, as set out in paragraphs 7, 11 and 18 of the revised Grounds of Complaint.

1.2.2 The Respondents making assumptions regarding the Claimant's disability, without establishing the facts or seeking guidance from a professional, as set out in paragraphs 6, 10, 11, 12, 15.1, 15.2, 15.3, 16, 18 and 21 revised Grounds of Complaint.

1.2.3 The Respondents capping the Claimant's pay and progression and moving her to a different job role, as set out in paragraphs 10, 11, 15.1, 18 and 21 of the revised Grounds of Complaint.

1.3 The Claimant relies on a hypothetical comparator.

1.4 If so, has the Claimant shown facts with which the Tribunal could conclude that the less favourable treatment was because of disability?

1.5 If so, have the Respondents shown that the less favourable treatment was in no sense because of disability, consistent with the Burden of Proof Directive?

Failure to make reasonable adjustments

1.6 Did the Respondents apply the following PCPs:

1.6.1 The Respondents deciding not to permit employees who were anxious to drive to or attend meetings.

1.6.2 The Respondents not allowing employees who did not attend meetings to be promoted.

1.7 If so, did the application of the PCPs put the Claimant at the following substantial disadvantages, compared to people who were not disabled:

1.7.1 The Claimant, who was disabled by reason of her anxiety condition, was more likely to suffer from symptoms of anxiety and not be permitted by the Respondents to drive to, or attend meetings.

1.7.2 The Claimant was more likely not to be permitted to drive and/or to attend meetings and, therefore, she was unlikely to be promoted?

1.8 Were the following reasonable adjustments for the Respondents to have to make to avoid those disadvantages:

1.8.1 Permitting colleagues to drive with and attend meetings with the Claimant.

1.8.2 Having discussions with the Claimant to reduce the Claimant's anxiety, for example: by telling the Claimant about environmental factor that were likely to occur at meetings; by discussing the client's expectations of the meeting and what was likely to occur at it; by providing motivational support for the Claimant; all so that the Claimant would be able to attend meetings.

1.8.3 Allowing colleagues to attend the meetings instead of the Claimant, without affecting the Claimant's promotion prospects.

1.8.4 Agreeing telephone conferencing with clients, instead of requiring the Claimant to go to meetings.

1.8.5 Allowing employees to be promoted, even if they did not attend meetings?

Indirect Discrimination

1.9 The Claimant relies on the same PCPs as in reasonable adjustment complaint and on the same substantial (particular) disadvantages as in that complaint.

1.10 Did the Respondents, therefore, apply those PCPs and were they likely to put people who shared the Claimant's disability at a particular disadvantage,

when compared with people who did not have a disability?

1.11 Did they put the Claimant at the particular disadvantage?

1.12 If so, have the Respondents shown that the application of the PCPs was a proportionate means of achieving a legitimate aim?

Harassment

1.13 Did the Respondents subject the Claimant to unwanted conduct by doing the following:

1.13.1 The Second Respondent making comments as set out in paragraphs 7 and 11 of the revised Grounds of Complaint and, in particular, with regard to paragraph 11, saying that: the move was non negotiable; that the Claimant's pay and performance would be capped; and that the move was not to help the Claimant progress, but to protect the Claimant and the health and safety of other staff; the Second Respondent comparing the Claimant's anxiety to being scared of heights; the Second Respondent saying that allowing the Claimant to drive was too much of a risk to take; the Second Respondent insisting that the Claimant had said that she had sleepless nights and that that was enough in order for the Respondents to be able to take action, regardless of what else the Claimant was saying; the Second Respondent saying that the Claimant had two choices – "to come in on Monday and carry on with her job or to …" (the Second Respondent did not complete his sentence, thereby implying that the Claimant should resign); and the Second Respondent saying, "We can and we will."

1.13.2 The Respondents' insensitive actions towards the Claimant, who was tearful and vulnerable, as set out in paragraphs 10, 11, 15, 17 and 18 of the revised Grounds of Complaint.

1.13.3 The Respondents making assumptions about the Claimant's anxiety condition as set out in paragraphs 6, 10, 11, 12, 15.1, 15.2 and 15.3, 17, 18 and 21 of the revised Grounds of Complaint.

1.13.4 Holding a disciplinary meeting to resolve the Claimant's grievances.

1.13.5 The Second Respondent telling the Claimant, during the disciplinary meeting, that she was a bully and that he had thought that "butter would not melt in her mouth," but that her emails were hurtful and that she was the ringleader.

1.13.6 The Second Respondent warning the Claimant on 9 March 2017 not to discuss her anxiety with colleagues because they could not be trusted.

1.14 If so was the unwanted conduct related to disability?

1.15 If so, did the unwanted conduct have the purpose, or effect, of violating the Claimant's dignity, or creating an intimidating, hostile, degrading or offensive environment for the Claimant?

1.16 In deciding whether the unwanted conduct had the prohibited effect, the Tribunal will take into account the perception of the Claimant, the circumstances of the case and whether it was reasonable for the conduct to have the effect.

Victimisation

1.17 The Claimant relies on the following protected acts:

1.17.1 Her grievance dated 15 March 2017.

1.17.2 The Claimant repeating the details of her grievance on 20 March 2017, in a grievance hearing.

1.18 Did the Respondents subject the Claimant to the following detriments because she had done the protected acts?

1.18.1 Even after the Claimant submitted a grievance, the Respondents failed to obtain any facts about the Claimant's disability from the Claimant or a health professional.

1.18.2 The Respondents subjected the Claimant to a disciplinary hearing to resolve her grievance, when the disciplinary allegations had no substance.

1.18.3 The Respondents making the Claimant a job offer on 24 March 2017, as set out in paragraph 18 of the revised Grounds of Complaint, to dissuade the Claimant from continuing with her grievance appeal, but which did nothing to make adjustments for the Claimant and which was expressed to be conditional on the Claimant dealing with her anxiety issues.

Discrimination arising from Disability

1.19 Did the Respondents treat the Claimant unfavourably because of something arising in consequence of her disability by doing the following:

1.19.1 Capping the Claimant's pay and progression.

1.19.2 Moving the Claimant from her job.

1.19.3 Acting as set out in paragraphs 10, 11, 12, 15.2, 15.2, 15.3, 16, 18 and 21 of the revised Grounds of Complaint?

1.20 The Claimant contends that the "something arising in consequence of the Claimant's disability" was the following:

1.20.1 The Claimant had sleepless nights.

1.20.2 The Claimant being anxious about attending meetings.

1.20.3 The Respondents' perception of the Claimant, as a person with anxiety, as being unable to cope with more work and/or being unable to go to meetings.

1.21 If so, have the Respondents shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

Knowledge

1.22 Did the Respondents know that the Claimant was a disabled person at the relevant times?

1.23 Could the Respondents reasonably have been expected to know that the Claimant was a disabled person at the relevant times?

1.24 Did the Respondents know and could they reasonably have been expected to know that the Claimant was likely to be put at the substantial disadvantages by the relevant PCPs?

Acas Uplift

1.25 If the Claimant succeeds in her claims, should the Claimant's compensation be uplifted on account of any failure by the First Respondent to comply with the provisions of the Acas Code of Practice in relation to her grievance?

3 At the start of the Final Hearing, the Respondents conceded that the Claimant was a disabled person by reason of her anxiety condition at all material times, but maintained that they did not know that she was disabled, or that she was likely to be put at any substantial disadvantage by any PCP at the material times.

4 The Tribunal heard evidence from: the Claimant; from Anthony Kent, Second Respondent and Operations Director of the First Respondent; from Kenneth Kent, Managing Director of the First Respondent and Appeal Hearing Manager; David Kent, Operations Director of the First Respondent and Grievance Hearing Manager; Aaron Tucker, Operations Manager; Benjamin Froud, Account Manager; Patricia Keightley, Accounts and Payroll Manager. There was a bundle of documents to which some additional pages were added. Both parties made submissions. The Tribunal reserved its decision and set down a provisional remedy hearing for 7 September 2018.

Findings of Fact

5 The Claimant started work for the First Respondent on 3 April 2014. The First Respondent is a Company which provides design services to clients in the retail sector. The Second Respondent has been employed as an Operations Director for the First Respondent since 31 January 2006. He is responsible for the First Respondent's Human Resources functions, including recruitment, staff development, training and succession planning.

6 Before the Claimant commenced her employment, she completed a health questionnaire (bundle pages 46 – 48). The questionnaire, page 47, asked, "Are you currently having any treatment or medicine prescribed by a doctor or taking self prescribed medicine or tablets?" The Claimant answered, "Yes," and said, "Propanolol – beta blockers controlling anxiety – no further symptoms". The Claimant indicated, elsewhere on the form, that she did not suffer from a mental illness, page 48. She also said that she did not have any other ailment which might affect her ability in her job role, page 47.

7 The Claimant was promoted to the position of Senior Designer at the Company on 1 October 2015, page 53.

8 The Claimant told the Tribunal that she does not generally speak about her anxiety and, when at work, can hide behind a confident face. She said that she becomes absorbed in her work and this masks her anxiety. The Claimant told the Tribunal that, in around December 2015, she had spoken to a colleague, Mickey Collins, about her anxiety. They then arranged a meeting with Matt Miller, Operations Manager, who was the Claimant's line manager at the time. The Claimant told the Tribunal that she informed Matt Miller that she had suffered from anxiety all her life with fluctuations. She told him that, when she had started working for the First Respondent, the anxiety was under control, but that it was now having more of an impact. The Claimant told the Tribunal that she had informed Mr Miller that she was taking medication and using Cognitive Behavioural Therapy to cope. She told Matt Miller that she had difficulties attending meetings and that Mr Miller later assured her that he had passed this information on to the Company Directors.

9 In his evidence to the Employment Tribunal, Anthony Kent agreed that Matt Miller did inform him that the Claimant suffered with anxiety and that she felt uncomfortable conducting surveys at clients' premises. Mr Anthony Kent told the Tribunal that, thereafter, he supported the Claimant by undertaking the surveys on behalf of the Claimant.

10 The Claimant told the Tribunal that, during a meeting in April or May 2016, Mr Anthony Kent made comments to her such as, "I don't understand how anyone like you could have something like this anxiety," and that, when the Claimant asked for further work, he said that the company believed that she could not cope with any more and had left her to deal with her current workload.

11 Mr Anthony Kent denied that he had ever said either of those things. He said that, on the contrary, he had encouraged the Claimant, on other occasions, to take more responsibility for a Greggs Plc account. He wanted the Claimant to develop and grow the First Respondent's branding business. Mr Anthony Kent said that he was concerned that giving the Claimant other work streams would cause her to lose focus in her own branding department at a time when it was in decline.

12 The Claimant's Progress Review dated 15 December 2016 recorded that one of the Claimant's goals was to take on a Greggs account within the branding team, to help her to develop. It was apparent from Mr Anthony Kent's oral evidence that he did have a number of discussions with the Claimant about her anxiety condition. He told the Tribunal he was sympathetic to the Claimant about her anxiety. It was clear that the Respondents had supported the Claimant by not requiring her to attend surveys. The Employment Tribunal decided that it was likely that, during 2016, Mr Anthony Kent talked to the Claimant about her anxiety in a sympathetic way. It found that, even if Anthony Kent had said that it was difficult to believe that the Claimant had anxiety, he did so during a supportive conversation.

13 The Tribunal preferred Mr Anthony Kent's evidence regarding these allegations. It found that Mr Anthony Kent encouraged the Claimant to focus on branding and to expand her coverage of branding clients including Greggs plc, in order to increase her team's turnover and performance. He did not restrict the Claimant's activities in connection with her anxiety in 2016.

14 Ben Froud became the Claimant's line manager in August 2016. The Claimant and Mr Froud were in the Respondent's branding team at the time.

15 The Respondents' witnesses told the Tribunal, and the Tribunal accepted, that the First Respondent's work can fluctuate, depending on contracts secured with different retailers. The Respondents' witnesses told the Tribunal that work in the branding department had declined during 2016 and that the Company had finished a contract for Dixons. Mr Kent told the Tribunal that, in December 2016, no invoices at all had been submitted by the branding department.

16 The Respondents' witnesses also told the Tribunal that, in the financial year May 2015 to April 2016, the branding department headed by James Bettinson had invoiced £106,440. However, in the financial year May 2016 to April 2017, the branding department of Ben Froud and Jenna Frost ultimately billed only £75,705.

17 The Respondents' witnesses said that a meeting was held in January 2017 to review the First Respondent's turnover, ahead of the end of the financial year, and the performance of the branding department was noted as a key concern. The Respondents pointed to figures at page 211H of the bundle which showed that invoices in branding had fallen during 2016. The Tribunal also noted, however, that the figures showed that, in January and February 2017, branding department invoices did increase.

18 The Respondents' witnesses told the Tribunal that it was agreed by management that Ben Froud would attend an upcoming "Plan Do Review Meeting" or "PDRM," along with the Claimant at a client's premises, to build relationships and explore new work streams.

19 The Tribunal accepted the Respondents' evidence that work fluctuated within the Company's departments and that there was a fall-off in branding invoicing during 2017. It also accepted the Respondents' evidence that Ben Froud had been asked to attend client meetings with the Claimant, to seek new streams of work. The Tribunal accepted that the Respondents felt that it was important for Mr Froud to build relationships face to face, rather than remotely. The Tribunal also noted, however, that there was no paper trail,

whether by way of emails or notes, indicating that the Respondent was considering restructuring in early 2017.

20 The Respondents' witnesses told the Tribunal that the First Respondent did move its employees between departments on a regular basis, depending on the particular needs of departments to carry out work for clients. The Tribunal noted that, for example, James Bettison, who had worked with the Claimant in branding during 2015/2016, had been moved to a different department and Ben Froud had become the Claimant's manager in 2016/2017. This corroborated the Respondents' assertion that managers and employees were moved from one department to another, depending on business needs.

21 It was not in dispute that the working relationship between Ben Froud and the Claimant was not a particularly good one. In the Claimant's progress review dated 15 December 2016, the Claimant herself noted that one of her areas for development would be building her relationship with Ben and improving on the issues of communication within the team, p72.

22 By 2 March 2017 the Claimant was emailing a colleague saying that she did not think she could work under Ben Froud anymore. She said, "… if he put as much effort into running and managing the team that (sic) he does in interfering in my work it would be the best run team in the office," page 82. The Claimant had also sent some emails to colleagues in the office, criticising fellow employees; for example, saying that they were "going on and on" about the same thing, page 72A.

23 One of the branding department's major clients was Sainsbury's. The Claimant was required to attend meetings at Sainsbury's Head Office in London as part of her role. The First Respondent company had planned that Ben Froud would attend a PDRM meeting at Sainsbury's with the Claimant on 1 March 2017. On 28 February 2017, the Claimant emailed Ben Froud, saying that she had been hoping that Mr Froud would drop coming to the PDRM the next day. She said, "I can't have you coming with me, certain members of management are aware of this and why, i.e. Matt and Tony. I'd appreciate if this did not go any further." Page 80.

24 Anthony Kent told the Tribunal that he became aware that the Claimant had asked Mr Froud not to attend the PDRM meeting. He asked Mr Miller to speak to the Claimant, to ask why she had requested that Mr Froud did not attend. Mr Miller had then relayed to him that the Claimant felt that Mr Froud's presence at the meeting would add to her anxiety; that she had been extremely anxious in advance of the PDRM meeting and had had 3 sleepless nights preceding it. She felt she could not cope with Ben Froud attending the meeting as well.

25 There was some disagreement between the Claimant and the Respondent about what the Claimant had said about sleepless nights to Matt Miller. However, it is clear that the Claimant did say that she had had "sleepless nights" and that this was passed on to Mr Kent.

26 Anthony Kent told the Tribunal that, having heard that the Claimant suffering from sleepless nights, he had serious concerns abut her ability to drive safely from Colchester to London for client meetings. The Claimant drove a company car and he felt that her condition could invalidate the First Respondent's motor insurance. He said that he

discussed the matter with Ken and Dave Kent and that a decision was taken by Directors and Operations Managers to place the branding team under the supervision of Account Manager, James Bettinson, who had previously managed it successfully (paragraphs 15 and 16 Anthony Kent's witness statement). It was further decided that Emily Alderson, a Junior Designer, would work with James Bettinson and Ben Froud would move to look after a different client account. Rebecca Hyett, a Computer Assistant Design Technician was moved to Mr Bettinson's team, to undertake the branding work and support interior design. Mr Anthony Kent said that it was decided that the Claimant would be moved to the Sainsbury's store planning team, to support the First Respondent's Lead Designer, Tom Haynes. Mr Kent told the Tribunal that he considered that this role would be an opportunity for the Claimant to develop her management skills, as she would be managing 6 people. He said that the Sainsbury's role was largely desk based and would allow the Claimant to develop, without the need to attend client meetings and site surveys. He said, "It is therefore felt that moving the Claimant to the Sainsbury's team would be the most effective means of increasing turnover within branding and safeguarding her wellbeing," paragraph 18 of his witness statement.

27 The Respondents' witnesses also told the Tribunal that it was not sustainable for the branding department to have a Senior Designer, like the Claimant, in charge of one Junior. The Respondents produced "before" and "after" Organisational Structures, showing that, after the reorganisation, Rebecca Hyett, Planner, and Emily Alderson a Junior Designer, were the only employees in the branding team along with James Bettinson. Previously, the branding team had consisted of Ben Froud as manager, with Jenna Frost, Senior Designer, and Emily Alderson, Junior Designer.

28 Aaron Tucker and Ben Froud told the Claimant about the reorganisation on 8 March 2017. There was a dispute of fact between the Claimant and the Respondents' witnesses as to what was said in the meeting on 8 March. The Claimant's evidence was that Mr Tucker told her that, because of her actions and the events that had occurred, a decision had been made to move her to the Sainsbury's store planning team. She said that Mr Tucker told her that had it been done to "help me deal with my issues" but that he could not say more, as Mr Froud was in the meeting. The Claimant told the Tribunal that she asked how the move would impact on her progression and Mr Tucker said he was unable to answer, but would find out. Mr Tucker, on the other hand, told the Tribunal that he explained to the Claimant that the business had been reviewing its turnover and that the branding team turnover had been in decline for some time. He explained that Mr Froud had been asked to attend meetings to try to drive the team forward, but that this had not been successful and it had been decided that the branding team needed to be restructured. Mr Tucker told the Tribunal that he explained that a secondary reason for moving the Claimant to the Sainsbury's store planning team was to support her and her situation. Mr Tucker told the Tribunal that he had assured the Claimant that the move would not hinder her development, as it would require her to manage more people.

29 The Tribunal preferred the evidence of Mr Tucker on what was said during the meeting. It decided that Mr Tucker explained that the reasons for the Claimant being moved to the Sainsbury's store planning team were, both, the restructuring of the team due falling turnover and the Claimant's condition and its effect on her ability to attend meetings. It also found that Mr Tucker told the Claimant that the move was not a retrograde step because she was going to be managing a team of 6 people.

30 The parties agreed that the Claimant made clear that she was not happy about the move at this meeting. The Claimant then had a meeting with Anthony Kent on 9 March 2017.

31 The Claimant told the Tribunal that, at the outset of the meeting on 9 March 2017, Tony Kent told her that she should not tell colleagues about her personal issues as they could not be trusted and that, if she did not want people to know or tell others about her anxiety, then she shouldn't tell them in the first place. The Claimant told the Tribunal that Tony Kent informed her that the moves were going to happen, regardless of whether the Claimant agreed or disagreed with them, and that her pay and progression would be capped until she managed to resolve her issues. She told the Tribunal that Mr Kent had mentioned her discussion with Matt Miller about sleepless nights and that Mr Kent said that, because of this, it was too much of a health and safety risk for the Company and the Claimant to allow her to drive a car when she was tired. The Claimant said that she responded that she had only said that she had a disturbed night's sleep but that Mr Kent was not willing to listen to her objections. Instead, he said that, if he had a surveyor who was scared of heights, he would not send him up a ladder and that, therefore, Mr Kent was not going to put the Claimant into a situation which would induce anxiety. The Claimant said that she asked how changes were going to affect her progression and Mr Kent had advised, "This certainly is not a move to help you progress. This is a move to protect you and the health and safety of our staff." He then said that the Claimant would find it difficult to progress until she managed to resolve her issues. The Claimant also said that Mr Kent had advised her that the moves for James Pottinger and Rebecca Hyett were to help them progress, because their teams in store planning did not warrant Seniors. She said that Mr Kent had told her that putting her into the team as a Senior would allow the Claimant to deal with her anxiety, as she would not be required to attend meetings. The Claimant said that Mr Kent told the Claimant that she had two choices over the weekend: either to come in on Monday and "do your job" or " – " and then he was silent. Nevertheless, he followed this with, "But you will turn up Monday and that is the role you will be doing."

32 The Claimant told the Tribunal that she was very distressed in the meeting, and was crying, and that she felt that her disability was being used to justify a detrimental move.

33 Mr Anthony Kent, on the other hand, told the Tribunal that he mentioned that he understood that the Claimant had discussed her anxiety with colleagues and that the Company was concerned that the matter might not be kept private and confidential if she did so. He told the Tribunal that he had said that her anxiety was clearly being exacerbated by the requirement to attend site visits and meetings and that the Company was concerned that her health and safety was put at risk by driving to meetings after having sleepless nights. He told the Tribunal that he said that the new position in the Sainsbury's store planning team would alleviate worry about meetings and attending site visits. This would allow her to focus on her strengths. Mr Kent said that he made it clear that she would not lose any pay and would remain a Senior, so that the move was properly categorised as a side step, rather than a promotion or demotion. He told the Tribunal that he explained to the Claimant, when she asked about her progression, that the Sainsbury's team would not require her to attend meetings and site visits, so she might find it easier to progress to a leading role within that team and that she would have more opportunity to develop her management skills as the Sainsbury's team was larger.

Mr Kent told the Tribunal that he was honest with the Claimant and explained that, as the First Respondent is a design agency, many of the senior roles are reliant on employees being able to conduct surveys and build client relationships by attending meetings and site visits.

34 Mr Tucker told the Tribunal he had attended the meeting and that Anthony Kent had explained that the First Respondent had a duty of care to its staff and there was a genuine concern about the effect of the Claimant's sleepless nights on her health and well-being. He confirmed that Mr Kent drew an analogy between an employee who had fear of heights and requiring them to work at height. Mr Tucker said that the Claimant was not told that the move amounted to a cap on her pay or career progression, but could help her development, as it involved the management of a larger team without the need to attend client meetings.

35 The Tribunal noted that, during the subsequent grievance investigation, Mr Anthony Kent met with Mr Dave Kent on 20 March 2017, page 96. Mr Dave Kent asked Mr Anthony Kent to comment on the Claimant's complaint that Tony had told her that there was no room for progression. In response, Mr Anthony Kent said that he agreed that he had mentioned that the Claimant would find it difficult to progress within the business, but stated that this would be down to her condition and how she managed it. He felt that there was room to progress for her in that department, or elsewhere in the company. He agreed that he had moved James Pottinger and Rebecca Hyett to progress them to a senior level. Mr Kent said that the Claimant's health and well being was a factor in the decision and taking her out of situations where she struggled with her anxiety would relieve the pressure on her and help her focus on delivering the job. Later in the same meeting, page 97, the minutes record that Mr Anthony Kent and Aaron Tucker summarised that they had moved the Claimant (a) because of her condition and health and (b) because of the email where the Claimant had blocked Mr Froud from carrying his job. Both Anthony Kent and Aaron Tucker felt that, due to those things, there was no resolution other than the Claimant being moved to the store planning team.

36 The Tribunal further noted that, at the end of the grievance appeal hearing, the Claimant said that she did not know whether she could progress and Mr Ken Kent, who was chairing the grievance appeal hearing said, "That is up to you Jenna. If you can overcome your anxiety and show us we have no problem with you going to meetings. This is up to you." Page 122 – 123.

37 On the evidence, the Employment Tribunal found that the Claimant's evidence was to some extent corroborated by the notes of the grievance interview with Mr Anthony Kent and by the comments made by Mr Ken Kent to the Claimant at the grievance appeal meeting. It found that Mr Anthony Kent did say to the Claimant that she should not discuss her disability with her colleagues because they could not be trusted. He told the Claimant that she was being moved because of her anxiety condition and for health and safety reasons, because she was unable to drive. Mr Kent told the Claimant that, while the move to store planning was a sideways move in which she could develop, she would find it difficult to progress within the Company unless she attended meetings and controlled her anxiety.

38 The Tribunal accepted the Claimant's evidence that Anthony Kent told her that the move was non negotiable and said, "We can and we will." The Tribunal also found, as Mr

Anthony Kent said at the time, that the reason that Rebecca Hyett had been moved into the branding department was to allow her to develop and progress to a senior level.

39 The Tribunal accepted that the Claimant was distressed in the meeting and that she felt that her disability was being used to justify a move which she did not welcome.

40 On 14 March 2017 the Claimant submitted a formal grievance to David Kent, page 88. She said that, under the Equality Act 2010, an employee was protected against unlawful discrimination arising from a disability. The Claimant stated that the Company had been aware of her difficulties in dealing with anxiety for some time. The Claimant complained that Tony Kent and Aaron Tucker had been unwilling to listen to her concerns about moving to a new team. She complained about her move, which she said had been described as a move to help her and to protect the health and safety concerns of the company. She said, "I feel the actions … have gone far beyond reasonable adjustments to support my needs without consultation of whether they were even required…" and, "I have experienced discrimination arising from unfavourable treatment, by changes to my job role, capped progression and the insensitive nature in which the issue was dealt with by management, combined with the assumptions being made about my disability and the health and safety risk to the company, without any justification. I also feel that reasonable adjustments could have been made prior to the unfavourable treatment."

41 The Claimant attended a stage one grievance hearing on 28 March 2017, chaired by Dave Kent, p93. Pat Keightley took minutes. The Claimant said that she felt that her comments about sleepless nights had been taken out of context and did not justify her being taken out of the team. She said that they did not amount to a health and safety risk and that she had not had a single day off because of lack of sleep. The Claimant said that nobody had asked what was best for her. She also said that, if she worked with her colleagues Nikki and James, they could have undertaken any meetings the Claimant had felt uncomfortable in attending, pages 93 – 95.

42 Dave Kent interviewed Tony Kent and Aaron Tucker together on 20 March 2017. As stated above, Anthony Kent agreed that he had mentioned that the Claimant would find it difficult to progress within the business, but that it would be down to her condition and how she managed it. He said that he did not disagree with the Claimant's view that she was not able to give her views regarding moving. He said that he had only shared one area of concern with the Claimant, which was her health and wellbeing. Anthony Kent said that the Claimant had refused to allow her account manager to attend a specific meeting to try to increase workload. He said that that was not a decision for the Claimant to make; the Claimant had not given the company a chance to support her when she had made that decision on its behalf. He also said that, due to the email the Claimant sent to Ben Froud, blocking his attendance at the meeting, the company had investigated more and had found other emails in which she had highlighted the issues she had with Mr Froud and had spoken about him in a degrading way. On further investigation, Anthony Kent and Aaron Tucker had also found other emails which showed the Claimant communicating in a derogatory way regarding her subordinate colleagues and the Company. In the meeting, Anthony Kent and Mr Tucker summarised that they had moved the Claimant because of her condition and health and because of an email in which she had blocked Ben Froud from carrying out his job. They said that there was no possible resolution other than the Claimant staying in the department to which she had been moved, pages 96 – 97.

43 A stage two grievance hearing was held on 22 March 2017, page 102 – 103. At it, Dave Kent reported back to the Claimant about his meetings with Tony Kent and Aaron Tucker. He said that Tony Kent had confirmed that he had mentioned that the Claimant would find it difficult to progress in the business but stated that it would be down to the Claimant's condition and how he managed it. Dave Kent reported that Anthony Kent said that there was room to progress in her department or elsewhere in the company. He confirmed that James and Rebecca had been moved to progress them to senior roles. Dave Kent said that there was no issue with the Claimant progressing, but that the Claimant health and wellbeing was a concern to the company.

44 Dave Kent also passed on to the Claimant that, as a result of her grievance, Tony Kent and Aaron Tucker had investigated other emails the Claimant had sent, in which she had spoken about Ben Froud and her colleagues in a derogatory way. He said that this could lead to disciplinary action being taken against the Claimant.

45 Dave Kent said that he had decided that the correct decision for the Claimant's health and well being and the department had been made. He told the Claimant about her right of appeal.

46 Also on 22 March 2017 the Claimant was called to a meeting with Anthony Kent. She was not told that it was a disciplinary meeting.

47 The Claimant told the Tribunal that, at the meeting, Anthony Kent had said that he was disappointed in her behaviour; he had expected better from her and had thought that she was a "nice girl" and that butter would not melt in her mouth. He then went through the emails the Claimant had sent about Mr Froud and her colleagues. He said that she had been bullying in her behaviour. The Claimant said that she told him that she had always remained professional to her colleagues and did not let her differences show, so that it did not affect their working relationships. At the end of the meeting, Anthony Kent told her that no further action would be taken along disciplinary lines and that all the emails would be thrown away and not kept on file.

48 Anthony Kent told the Tribunal that he did not commence any formal disciplinary proceedings against the Claimant, or the other employees who had sent emails criticising their colleagues. He said that, in the meeting, he described the content of the emails as unacceptable from a senior employee and remarked that he was disappointed that she had acted in that way. He confirmed that the company would take no further action. Anthony Kent said that he did not call the Claimant a bully but explained that one employee being targeted by three other members of staff, in negative emails, could be regarded as bullying behaviour. He said that the Claimant acknowledged that she had dealt with her frustrations in the wrong way.

49 Mr Anthony Kent told the Tribunal that, as a Director of the First Respondent, he recognised the need to address the inappropriate nature of the emails sent. He said that he held similar conversations with the other employees who had sent inappropriate emails.

50 The Claimant told the Tribunal that one of those other employees had been required to make an apology, whereas the Claimant had not.

51 The Tribunal found that Mr Kent conducted an informal meeting with the Claimant regarding inappropriate emails. He made it clear that formal action would not be taken against the Claimant, but did say that he was disappointed in her, particularly as she was a senior employee. He advised the Claimant that her behaviour in discussing another employee could be seen as bullying. The Tribunal accepted Mr Kent's evidence that he spoke to other employees the same way. This was corroborated by the Claimant who told the Tribunal that one of those employees was, in fact, required to give an apology.

52 On 24 March 2017 Anthony Kent invited the Claimant to have a catch-up meeting. He told her that he would consider her for a position in another area, if a role became available elsewhere. Mr Anthony Kent mentioned that there would be a potential vacancy arising in relation to the Company's AS Watson client account. The Claimant confirmed that she would be interested in that role. Mr Anthony Kent, again, said that he felt that the Claimant would find it difficult to progress to a leading position in most areas of the business if her anxiety prevented her from surveying and attending meetings. He said that completing surveys to a high standard and being able to train and coach people to carry out the tasks were fundamental elements of the First Respondent's business.

53 Mr Anthony Kent told the Tribunal – and the Tribunal accepted - that there was, indeed, a future job possibility at that time. Unfortunately the Claimant went off work, sick, before it became available. The Claimant said, in her witness statement, that on 24 March 2017 Tony Kent made clear to her that she could continue with her grievance and take it further and the possible future position would be there, whatever happened.

54 The Claimant submitted a written grievance appeal to Ken Kent on 29 March 2017, page 105 – 106. She said that no resolution had arisen out of the grievance meeting and that the way in which the company had dealt with her grievance had exacerbated her condition. She said that no discussions had been held before the decision had been taken to move her to the planning role. She said that she considered that there had been discrimination arising from her disability. The Claimant said that adjustments could have been put in place to relieve the pressure on the Claimant and allow her to focus on delivering her branding job under Nikki and James' new management, page 105 – 106.

55 Ken Kent replied to the Claimant on 3 April 2017, saying that her letter really reiterated her stage two grievance which had already been heard. He said that her grievance should be focused on new evidence to support her grievance and the reason she felt she was unfairly treated by David Kent. He asked her to give him that information, so that he could review it and potentially agree a stage three meeting with her.

56 On 18 April 2017 the Claimant replied, saying that under the ACAS Code of Practice on disciplinary and grievance procedures, an employee can appeal a grievance decision if there has not been a satisfactory outcome to it. She said that no grounds existed for excluding an appeal, page 109.

57 Ken Kent replied again on 24 April 2017, repeating his request for further information. The Claimant responded further on 26 April, reiterating her right to an appeal under the ACAS Code of Practice, page 110 – 111.

58 Ken Kent invited the Claimant to a stage three appeal on 2 May 2017, page 113 –

114. At the appeal meeting, the Claimant said that adjustments could be made because Nikki and James, who were now in charge of the branding department, had gone out with Rebecca Hyett, so could have gone to meetings with the Claimant. She felt that issues had not been covered and that there had been no resolution. The Claimant said she wanted her job role to be reinstated. She said that she was suffering with anxiety and could not progress and that Tony Kent had said that her progression was capped.

59 Mr Ken Kent said that the Claimant's progression was not capped if the Claimant could deal with the situation, page 115. He said that Senior Account Managers had to got out and attend meetings. Mr Kent asked the Claimant whether she would be able to go out with Tony, Dave, Aaron or him. The Claimant said that it was something that she would have to deal with at the time and that she had dealt with anxiety at different levels throughout her life and had coped. She said that she felt she would get back on track with no problem in the future and would be able to attend meetings. Mr Kent said that the role the Claimant was now doing was just as important as the previous role and that she was a senior employee in that role. He said that the company did not want to put the Claimant in the position of having to attend meetings if it affected the Claimant. Ken Kent said that the department the Claimant was currently in would be good for her and would help the team grow. The Claimant said that she felt that she had got more out of the stage 3 meeting and Ken Kent said that, in turn, that he was happy with what the Claimant was doing within the Sainsbury's team, page 113 – 117.

60 Mr Ken Kent held a follow up stage three grievance meeting with the Claimant on 5 May 2017, page 122 – 123. During this further meeting, Ken Kent told the Claimant that, taking into account all the information, he had decided that the correct procedure had been followed, for the right reasons, to move the teams. He said that he could not ask staff to attend meetings for the Claimant and that he did not want to put her under any pressure. He said that the Company needed to improve the turnover in the branding team and the whole team was moved. He said that all the company had wanted to do was work with the Claimant and not put her into a situation with which she was uncomfortable.

61 At the end of the meeting the Claimant said "I don't know if I can progress." Mr Kent responded, "That is up to you Jenna. If you can overcome your anxiety and show us we have no problems with you going to meetings. This is now up to you."

62 At no time did the Respondent ask the Claimant to provide a report from her own treating doctor regarding her anxiety and any adjustments which might be required for her. It did not seek advice from another Occupational Health expert regarding the Claimant's anxiety and what the Claimant could and could not do in the workplace.

63 The Respondent did not ask the Claimant's GP to report on sleeplessness, or whether the Claimant's sleepless nights posed any risk to the Claimant's work or driving. It did not refer her to Occupational Health for advice on that matter.

64 It did not appear that the Respondents regularly engaged external Occupational Health or Human Resources advisers. Mr Ken Kent told the Tribunal that he approached ACAS for advice on handling the Claimant's grievance appeal. He needed advice on the process to follow.

The Relevant Law

65 One of the protected characteristics under the Equality Act 2010 is disability, s4 EqA 2010.

66 By *s39(2)(b)&(d) EqA 2010*, an employer must not discriminate against an employee in the way the employer affords the employee access, or by not affording the employee access for receiving any benefit, facility or service, or by subjecting him to any other detriment.

67 The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

Direct Discrimination

68 Direct discrimination is defined in *s13(1) EqA 2010*:

"(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."

69 In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010*.

70 Accordingly, for a Claimant to succeed in a direct disability discrimination complaint , it must be found that:

70.1 A Respondent has treated the Claimant less favourably than a comparator in the same relevant circumstances;

70.2 The less favourable treatment was because of disability - causation;

70.3 The treatment in question constitutes an unlawful act such as dismissal or detriment.

Victimisation

71 By *27 Eq A 2010*,

" (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(*a*) B does a protected act, or
(*b*) A believes that B has done, or may do, a protected act.
Each of the following is a protected act—
….
(*c*) doing any other thing for the purposes of or in connection with this Act;
(*d*) making an allegation (whether or not express) that A or another person has contravened this Act."

Detriment

72 In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a

reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.

Causation – Direct Discrimination and Victimisation

73 The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified. Para [77].

74 If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Discrimination Arising from Disability

75 s 15 EqA 2010 provides:

> "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."

76 In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14, Langstaff P said that there were two issues regarding causation under s15:

> 76.1 What was the cause of the treatment complained of ("because of something" – what was the "something"?)
>
> 76.2 Did that something arise in consequence of the disability?

77 "Unfavourable treatment" does not have the same meaning as "detriment." It is to

be measured against an objective sense of that which is adverse as compared with that which is beneficial. Treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be, per Langstaff P in *Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams* UKEAT/0415/14 at paragraphs [27] and [29].

Indirect Discrimination

78 Indirect discrimination is defined in *s19 Equality Act 2010.*

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Proportionality

79 The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

Harassment

80 s26 Eq A provides

"(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.

…..

(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."

81 In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 the EAT held that there are three elements of liability under the old provisions of s.3A RRA 1976: (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was "on the grounds of" [now: "related to"] the claimant's race (or ethnic or national origins).

82 Under the *EqA*, the conduct must be for a reason which relates to a relevant protected characteristic, rather than "on the grounds" of the protected characteristic.

83 In the *Dhaliwal* case, the EAT said that, in determining whether any "unwanted conduct" had the proscribed effect, a Tribunal applies both a subjective and an objective test. The Tribunal must first consider if the employee has actually felt, or perceived, his dignity to have been violated or an adverse environment to have been created. If this has been established, the Tribunal should go on to consider if it was reasonable for the employee to have perceived this. In approaching this issue, it is important to have regard to all the relevant circumstances, including the context of the conduct. A relevant question may be whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence: the same remark may have a different weight if evidently innocently intended, than if evidently intended to hurt (paragraph [15]).

84 The EAT also commented that "Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any

offence was unintended. Whilst it is very important that employers and tribunals are sensitive to the hurt that can be caused by offensive comments or conduct (which are related to protected characteristics), ".. it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase paragraph [22]."

85 In *Land Registry v Grant* [2011] IRLR 748 at [47] Elias LJ said that words of the statutory definition of harassment , ".. are an important control to prevent trivial acts causing minor upsets being caught by the definition of harassment." In GMBU v Henderson [2015] 451 at [99], Simler J said, "..although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so."

Burden of Proof

86 s136 EqA provides for a shifting burden of proof in discrimination cases. In approaching the evidence in a discrimination case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

Reasonable Adjustments

87 By *s39(5) EqA 2010* a duty to make adjustments applies to an employer. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

88 *s20(3) EqA 2010* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer 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.

89 *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

Reasonableness of Adjustments

90 The test of 'reasonableness', imports an objective standard. Per Maurice Kay LJ in *Smith v Churchills Stairlifts plc* [2005] EWCA 1220, [2006] ICR 524, *Collins v Royal National Theatre Board Ltd* [2004] EWCA Civ 144, [2004] IRLR 395 per Sedley LJ para 20

91 The *Equality Act 2010* does not specify any particular factors which are to be taken into account in deciding whether an adjustment is reasonable. The *Code of Practice on Employment 2011* provides examples of some of the factors which might be taken into account in determining whether a particular step is reasonable for an employer to have to take include;

91.1 Whether taking any particular steps would be effective in preventing the substantial disadvantage;

91.2 The practicability of the step;

91.3 The financial and other costs of the step and the extent of any disruption caused;

91.4 The extent of the employer's financial and other resources;

91.5 The availability to the employer of financial and other assistance;

91.6 The type and size of the employer.

Burden of Proof – Reasonable Adjustments

92 The Disability Rights Commission ("DRC")'s Employment Code of Practice 2006 gave guidance on the application of the burden of proof in cases of failure to make reasonable adjustments. It provided, at paragraph 4.43, "To prove an allegation that there has been a failure to comply with a duty to make reasonable adjustments, an employee must prove facts from which it could be inferred in the absence of an adequate explanation that such a duty has arisen, and that it has been breached. If the employee does this, the claim will succeed unless the employer can show that it did not fail to comply with its duty in this regard."

93 In *Project Management Institute v Latif* [2007] IRLR 579, the EAT decided that, in applying the burden of proof, the Code of Practice was correct.

94 To shift the burden of proof to the Respondent, the Claimant must therefore show evidence from which it could be concluded that there was an arrangement causing a substantial disadvantage and that there was some apparently reasonable adjustment which could have been made. If the Claimant does this, the burden shifts.

95 Once the burden has shifted, the Claimant's claim will succeed unless the Respondent shows that it did not breach the duty.

Discussion and Decision

96 The Tribunal has taken into account all the facts of the case in coming to its decisions. For clarity, because of the number of different legal claims and allegations, the Tribunal has set out its conclusions separately, on separate issues. This does not mean that it has considered those issues in isolation.

Knowledge of Disability

97 From the outset of the Claimant's employment, the First Respondent had knowledge, from its medical questionnaire, that the Claimant suffered from anxiety to the extent that she took medication to control its symptoms.

98 Furthermore, from at least 2015, Anthony Kent and, it appears, other Directors, knew that, because of the Claimant's anxiety, she could not undertake surveys. They

therefore knew that the Claimant's anxiety condition prevented her from doing what was a normal part of her day-to-day job. Anthony Kent and others undertook those surveys on behalf of the Claimant because of her inability to do them.

99 The Tribunal decided that the Respondent company and Anthony Kent were aware, both that the Claimant suffered from a mental impairment - an anxiety condition, and that it had a more than minor effect on her ability to carry out normal day-to-day activities, for example travelling to clients' premises to undertake surveys of the premises.

100 The Tribunal concluded that Respondents knew that the Claimant was a disabled person at all relevant times for the purposes of the claims.

Alleged Meeting in April/May 2016 – Direct Discrimination and Harassment

101 The Tribunal has decided that Anthony Kent did not say to the Claimant that she could not cope with any more work, or that the Company had left her to deal with her current workload.

102 In so far as Anthony Kent made any comment about not understanding how the Claimant could have anxiety, the Tribunal has found that Anthony Kent and the Claimant had supportive conversations in 2016.

103 The Tribunal decided that the Claimant did not, at that time, consider that Mr Kent had said anything detrimental to her; they had a friendly and supportive relationship at that time. Nor, objectively, were Mr Kent's words derogatory, insulting or, in any sense, negative. Accordingly, there was no detriment for the purposes of the direct discrimination complaint, nor unwanted conduct for the purposes of a harassment complaint.

Meetings on 8 and 9 March: Decision to move the Claimant's Role – Direct Discrimination; Discrimination Arising from Disability

104 The Tribunal has decided that the Respondents decided to move the Claimant from her role in branding for the two reasons set out by Anthony Kent and Aaron Tucker n their meeting with Dave Kent on 20 March 2017. The meeting notes contain a contemporaneous record of the reasons that were given at the time. The reasons were:

104.1 The Claimant's conditions and health; and

104.2 The email the Claimant had sent asking Mr Froud not to go to the Sainsbury's meeting.

105 On the facts before the Tribunal, it was correct that the branding department turnover had declined in the previous year and that the Respondents took the opportunity to reorganise teams more generally.

106 Nevetheless, the Respondents' own reported reasons for moving the Claimant related to the Claimant's anxiety condition. In particular, the reasons related to her anxiety about attending meetings, along with her request to Ben Froud not to attend a meeting,

which the Claimant had related to her anxiety in the relevant email.

107 It was clear, as Anthony Kent conceded at the time, that the Claimant was not consulted about the move before the decision was made. It was also clear that the First Respondent did not ask the Claimant to provide any medical evidence about her condition, nor did it refer the Claimant to occupational health for an opinion regarding the effect of her anxiety condition on her ability to do her job.

108 Anthony Kent told the Claimant that he was concerned because of her sleepless nights about her ability to drive. He told her that he wished to avoid her anxiety about attending meetings.

109 The Tribunal concluded that the reasons the Respondents moved the Claimant arose from her disability. They moved the Claimant because of what they understood to be the symptoms of disability: her anxiety about attending meetings generally, her sleepless nights and her unwillingness to attend meetings with Mr Froud because of anxiety.

110 The Tribunal has found that Anthony Kent told the Claimant that the move was non negotiable and that the Company could and would make the changes.

111 However, the Tribunal found that moving the Claimant from a job in the branding department to a job in the store planning department without consultation, in a non-negotiable way, was not unfavourable treatment because the Claimant was moved sideways, with her seniority and pay unaffected. There were some attractive parts to the new role, including the Claimant's managerial responsibilities for six employees which were commensurate with her senior status. These matters confirmed that she had not been demoted. Furthermore, the Respondents' practice was to move employees around departments, without consultation. Ben Froud was moved without any consultation. There was no evidence that employees were normally consulted about moves. The Claimant was treated as all other employees were treated. The Claimant was not treated adversely, but neutrally.

112 For clarity, the ET has decided that the decision to move the Claimant in a non-negotiable manner did not amount to direct disability discrimination. The Claimant was not treated less favourably than other employees who were moved around without consultation. There was also no evidence that a comparator, who had expressed difficulties with attending meetings and who had asked her manager not to attend a meeting without consulting anyone, would have been treated any differently.

Job Move, 9 March Meeting – Harassment and Direct Discrimination

113 The Tribunal decided that the Second Respondent's conduct in telling the Claimant that she was to be moved and that it was non-negotiable did not amount to harassment. His conduct was unwanted, in that the Claimant did not want to move job in a non negotiable way, nor have her pay and progression capped. The decision to move her was related to her disability and the conversation in the meeting was related to her disability.

114 The Tribunal accepted the Claimant's evidence that she was tearful. However, the Tribunal has not found that Mr Anthony Kent was insensitive to the Claimant during those meetings. He had the task of relaying news which was unwelcome to the Claimant, in circumstances in which she was distressed.

115 The Tribunal found that Mr Kent's conduct had neither the purpose, nor the effect, of violating the Claimant's dignity or creating a hostile, offensive, degrading, humiliating environment for her. The Claimant was distressed in the meeting and that she felt that her disability was being used to justify a move which she did not welcome. However, taking into account the Claimant's perception, the circumstances of the case and whether it would be reasonable for the conduct to have that effect, the Tribunal concluded that a sideways move to a commensurately senior role, at a time when other people were also being moved without consultation, did not reasonably have the effect of violating dignity or creating a prohibited environment. The relevant circumstances included the fact that the Respondents had been told by Matt Miller that the Claimant was experiencing anxiety at meetings and having sleepless nights, and that this was why Ben Froud had been told not to attend the meeting. The Second Respondent was acting on information that the Claimant had provided. While he did not investigate that information further, he did not exaggerate the information, but accepted it as the Claimant had relayed it. The Company did move employees from one department to another without consultation and was entitled to do so, in accordance with its need for work to be done. Mr Anthony Kent was informing the Claimant of his entitlement, as a manager, to move employees.

116 Furthermore, in moving the Claimant, the Tribunal considered that the Respondents did not make assumptions about the Claimant's disability without establishing facts. They did establish relevant facts through Matt Miller and from looking at the Claimant's own email to Ben Froud. The facts were that the Claimant was highly anxious about attending meetings to the extent that she was having sleepless nights and had prevented a manager from attending a meeting, contrary to the Directors' wishes. They therefore did not stereotype the Claimant, or treat her less favourably because of her disability, than they would have treated another person who was reporting the same symptoms, but who did not have a disability.

117 The Tribunal has found that Anthony Kent did tell the Claimant that she should not discuss her anxiety with colleagues if she wished to maintain confidentiality regarding her anxiety, because it was likely that the colleagues would not keep the matter confidential if she had discussed it herself. That advice may well have been unwanted by the Claimant. It was related to disability. However, the Tribunal did not find that it had either the purpose, or effect, of violating the Claimant's dignity, or creating a prohibited environment. The Tribunal accepted that Mr Kent's purpose was giving the Claimant advice about maintaining confidentiality. Taking into account the Claimant's perception, all the circumstances of the case and whether it was reasonable for Mr Kent's words to have the effect, the Tribunal decided that Anthony Kent was simply giving advice to the Claimant about confidentiality, in the circumstances where other people may have been talking about her anxiety. A reasonable person would not have considered it to be harassing. It was sensible, practical advice, which did not amount to harassment.

"Cap on Progression" – 8 and 9 March Meeting and Grievance Hearings – Direct Discrimination, Discrimination Arising from Disability

118 The Tribunal found that Anthony Kent, the grievance officer and the grievance appeal officers, all made it clear that the Claimant would have difficulty progressing in the company thereafter, if she could not attend meetings and manage her condition.

119 The Tribunal found that the Respondents were saying that the Claimant's progression would be limited, or prevented, in the future, for reasons arising from her anxiety condition. That was unfavourable treatment. The Claimant was in a less advantageous position than others in the Company. Her pay and progression could not advance as others' would. Her career ambitions were stifled. It arose in consequence of the Claimant's disability in that it happened because of her reduced ability to attend meetings because of anxiety.

120 For the purposes of a direct discrimination complaint, there was not "less favourable treatment," because there was no evidence that a non disabled employee, who was reluctant about attending meetings, would have been treated differently.

121 The Tribunal went on to consider whether the Respondents had shown that this effective cap on the Claimant's progression was a proportionate means of achieving a legitimate aim. The Tribunal accepted that the Respondents had various legitimate claims in requiring for employees to attend meetings, in order to gain senior positions in the company. Senior employees were required to train other employees, to develop good client relationships and to undertake complicated surveys.

122 However, the Tribunal decided that the Respondents had not shown that the bar on progression, unless the Claimant could attend meetings, was a proportionate means of achieving a legitimate aim. The Respondents did not take any advice at all from the Claimant's GP or from occupational health as to how the Claimant might be supported in order to attend meetings, nor did they consider whether, occasionally, another colleague could attend a meeting instead of the Claimant. They did not they consider whether the Claimant could be supported by fellow colleagues in attending meetings, in order to ensure her attendance at them.

"Cap on Progression" – 8 and 9 March Meeting and Grievance Hearings – Failure to make Reasonable Adjustments; Indirect Discrimination

123 The Respondents decided that the Claimant was unable to drive and to attend meetings and that she would be very unlikely to be able to progress if she did not attend meetings. The Tribunal accepted that people suffering from anxiety and associated sleeplessness are more likely to be put at a disadvantage by a requirement to be able to attend meetings, or to drive unaffected by sleeplessness, and that the Respondents therefore were under a duty to make reasonable adjustments to avoid the disadvantage.

124 The Claimant suggested various adjustments and which could have been made to facilitate her, either attending meetings, or carrying out the tasks associated with meetings without actually attending them. She suggested that colleagues could be permitted to drive and attend meetings with her; that the Respondents could have discussions with the Claimant to reduce the Claimant's anxiety; telling the Claimant about the environment that she was likely to encounter at meetings; discussing clients' expectations of the meeting and what was likely to occur; allowing colleagues to attend meetings instead of the Claimant without affecting her promotion prospects; and agreeing telephone conferences

with clients, instead of requiring the Claimant to go to meetings.

125 On the evidence, the Respondents did not engage with any of these adjustments and did not explore whether they would work.

126 The Respondents formed the view that it was for the Claimant to manage her own anxiety condition, in order for her to attend meetings. This led to them not engaging with the possibility of adjustments and support for the Claimant, to help her to attend meetings, or occasionally to interact with clients in other ways, which would allow her to progress.

127 The Tribunal decided that the Respondents had not discharged the burden of proof on them to show that the adjustments, which the Claimant suggested would have been affective to remove the disadvantage, were not reasonable adjustments for them to undertake.

128 For the same reasons, the Claimant's indirect discrimination claim succeeds. The ET accepted that people sharing the Claimant's anxiety condition were likely to be put at the same disadvantage – because they had the same condition. Specific evidence of group disadvantage was not required.

Direct Discrimination and Victimisation – not seeking Guidance from a Professional

129 It is correct that the Respondents did not seek advice from a professional. However it appears that that is how the First Respondent conducted its business, in general. The Second Respondent was responsible for HR matters and there was no evidence that the Respondents engaged HR or OH assistance when issues arose. Mr Ken Kent had to telephone ACAS for advice on handling the Claimant's grievance appeal.

130 The Tribunal concluded that the Respondents did not treat the Claimant less favourably than a comparator when they failed to seek guidance from any professionals. They would not have treated a non disabled person, in the same circumstances as the Claimant, any more favourably. Equally, this was not victimisation of the Claimant. It was the Respondents' normal conduct.

"Disciplinary Meeting" – Harassment and Victimisation

131 The Claimant contended that the Respondents harassed her by holding a disciplinary meeting to resolve the grievances and by the Second Respondent telling the Claimant that she was a bully and that he thought that butter would not melt in her mouth but that her emails were hurtful and that she was the ringleader. She also relied on these matters as victimisation.

132 The Tribunal found that, while the meeting was unwanted by the Claimant, it was not related to her disability. The meeting was caused entirely by the Respondents discovering that the Claimant had sent emails critical of colleagues in the Company, including junior colleagues.

133 With regard to the victimisation complaint, the Tribunal decided that holding an informal meeting to discuss inappropriate emails did not amount to a detriment. Holding

such a meeting, which was justified by the Claimant's behaviour, could not amount to detrimental treatment. Mr Kent's comments, that the Claimant was a senior employee and that colleagues gathering together to discuss another colleague could be seen as bullying behaviour, was entirely justified on the facts of the situation and again could not amount to a detriment. Insofar as Mr Kent expressed disappointment in the Claimant as a senior employee, the words he used did not go beyond proportionate chastisement. Furthermore, the Claimant was, in some respects, treated less harshly than those colleagues who were also involved in the email chains. One was required to apologise, when the Claimant was not.

Job offer on 24 March 2017 – Harassment and Victimisation

134 The Tribunal has found that, on 24 March 2017, Anthony Kent did mention to the Claimant the possibility that a job might be coming up in the future. The Tribunal did not find that he did so in an attempt to dissuade the Claimant from continuing with her grievance appeal. The Tribunal accepted Mr Kent's evidence that there was indeed a future job possibility at that time. The Tribunal noted that the Claimant herself stated that Mr Kent made clear to her that she could continue with her grievance and take it further and the position would be there, whatever happened. On those facts, the Tribunal concluded that Mr Kent's discussion of a potential role was not in any way designed to dissuade the Claimant from pursuing her grievance. He specifically said that she was free to pursue the grievance and the job would be there, whatever she decided to do. Highlighting a potential future job was not a detriment and it was not done because the Claimant had done a protected act.

135 The ET also concluded that Mr Kent's conduct in this regard did not amount to harassment. It had neither the purpose nor the effect of violating the Claimant's dignity or creating the prohibited environment. The offer was a genuine offer, well-intentioned, with no conditions or negative consequences attached.

Failing to Obtain Facts of the Claimant's Disability from the Claimant - Victimisation

136 The Claimant alleged that the Respondents failed to obtain facts from her about her disability and that this amounted to victimisation.

137 The Tribunal found that the Respondents did have a number of discussions with the Claimant regarding her job move, her future progression and her disability, both before and after she submitted her grievance and grievance appeal. The Respondents did not change their decisions following these meetings. The ET did not find, however, that the Respondents failed to obtain facts from the Claimant. The Claimant was given the opportunity to say everything she wanted to say at the grievance and grievance appeal hearings. This allegation failed on the facts.

Conclusion

138 Accordingly, the Claimant's complaints of failure to make reasonable adjustments and indirect discrimination succeed. Her complaint of discrimination arising from disability with regard to the Claimant's progression being capped succeeds. The Claimant's other complaints fail.

139 The remedy hearing will proceed.

140 The ET will consider the First Respondent's alleged failure to follow the ACAS Code as part of the remedy hearing.

Employment Judge Brown

25 July 2018