



# EMPLOYMENT TRIBUNALS

**Claimant:** MISS MARY SHINE

**Respondent:** COMMISSIONERS FOR HM REVENUE AND CUSTOMS

**Heard at:** London Central

**On:** 8-12 October 2018

**Before:** Employment Judge Henderson  
Mr G Bishop  
Mr B Tyson

## Representation

**Claimant:** In Person

**Respondent:** Ms K Balmer (Counsel)

# RESERVED JUDGMENT

**It is the unanimous decision of the Tribunal that:**

- The claimant's claims for direct disability discrimination (other than the claim related to the delay in hearing the disciplinary appeal) are out of time and the Tribunal does not have jurisdiction to hear those claims;**
- The remaining claim for direct disability discrimination is dismissed; and**
- The claims for failure to make reasonable adjustments are dismissed.**

# RESERVED REASONS

## The complaints

1. By an ET1 lodged on 14 November 2017 the claimant brought complaints of disability discrimination under the Equality Act 2010 (EqA) (namely, direct discrimination (section 13) and failure to make reasonable adjustments (section 21). The claimant's disability was Ulcerative Colitis. The claimant also claimed disability by association: namely as the carer of her mother who had been diagnosed with cancer.
2. There were two preliminary hearings on 9 March 2018 and 9 May 2018 at which Case Management Directions were made and which identified the issues for determination by the Tribunal. Some of the claimant's complaints were struck out on 9 May and also in July 2018, following her failure to pay a Deposit as ordered in May 2018. The remaining complaints are set out in the List of Issues (see below), which was agreed by the parties at the commencement of the hearing.

## List of Issues

### Disability Discrimination

#### Protected Characteristic – The Claimant

3. *Disability*: It is accepted by the Respondent that the Claimant was a disabled person (within the meaning of section 6 EqA) at the material time by reason of a physical impairment, namely Ulcerative Colitis.
4. *Knowledge*: Did the Respondent know, or should the Respondent have known, that the Claimant was a disabled person prior to 22 May 2017? The Respondent admits knowledge of disability from 22 May 2017 when the Claimant's line manager, Ms Louise Kollmer, received a report from Occupational Health (dated 22 May 2017), advising her that the Claimant had Ulcerative Colitis and that that condition was likely to fall under EqA 2010. The claimant says that she had told Ms Kollmer about her colitis in December 2016 when she requested leave to attend a hospital appointment for scans and blood tests scheduled in January 2017.

#### Protected Characteristic - The Claimant's Mother

5. *Disability*: It is accepted by the Respondent that the Claimant's mother was a disabled person (within the meaning of section 6 EqA) at all material times by reason of a physical impairment, namely Breast Cancer.
6. *Knowledge*: It is accepted that the Respondent knew that the Claimant's mother was disabled at all material times. The claimant says that the

respondent was aware from early November 2016 that her mother had breast cancer. The respondent says that it only learned that the claimant's mother had breast cancer after the claimant had lodged her grievance against Ms Kollmer in May 2017.

### Jurisdiction

7. Did any of the acts of discrimination relied upon by the Claimant occur more than three months before the date on which the Claimant submitted her claim to an Employment Tribunal?
8. If so, do any such acts form part of "conduct extending over a period" for the purposes of section 123(3) of EqA 2010, and was the claim brought within three months of the end of that period; and
9. If not, would it be just and equitable to extend time for any reason?

### Direct Discrimination (s 13)

10. Did the Respondent treat the Claimant less favourably than it treated or would treat a non-disabled comparator and/or a comparator without an association to a disabled person in materially similar circumstances? The Claimant relies on the following alleged acts of less favourable treatment:

-The way the Claimant was spoken to Ms Louise Kollmer including, in November 2016, Ms Kollmer allegedly making an unreasonable comment ("I know people who have had Mastectomies and they are back at work the same day") and, on various occasions, huffing and puffing, failing to provide support/training or to show empathy/sympathy to the Claimant.

- i. *Comparator.* The Claimant relies on a hypothetical comparator. The Respondent submits that an actual comparator, Sharleen Gayle, is appropriate in relation to the alleged failure to provide support/training.

-On 25 April 2017, Ms Kollmer allegedly bullying and harassing the Claimant by requiring her to allow the Respondent access to all of her emails.

- ii. *Comparator.* a hypothetical comparator.

-On 12 June 2017, Ms Kollmer allegedly leaving the Claimant's private Occupational Health report open for the whole public to view in her calendar.

- iii. *Comparator.* a hypothetical comparator.

-Between March and May 2017, Ms Kollmer allegedly refusing to make an Occupational Health referral for the Claimant.

- iv. *Comparator.* a hypothetical comparator.

-Between 10 August and 12 December 2017, alleged delay by the Respondent in the appeal process.

v. *Comparator*: a hypothetical comparator.

11.If so, was any less favourable treatment because of the Claimant's disability and/or because of her association with a disabled person?

Reasonable Adjustments (s 21)

12.Did the Respondent apply a provision, criterion or practice (PCP) to the Claimant?

13.The Claimant alleges that the following PCPs were applied to her:

- a requirement that the Claimant must remain with her manager Ks Kollmer until 10 October 2017;
- -a requirement that the Claimant must return to full time work after four months sick leave on 6 October 2017;
- a refusal to make an Occupational Health referral between March and May 2017.

14.Did the above PCPs place the Claimant at a substantial disadvantage because of her disability (Ulcerative Colitis) in comparison to a hypothetical non-disabled comparator? The Claimant alleges that the substantial disadvantage was as follows:

- the Claimant continuing to be bullied and harassed;
- the Claimant's health being set back; and
- the Claimant's physical and mental health being affected and the Claimant being required to attend numerous upsetting meetings.

15.If so, would the substantial disadvantage to the Claimant have been avoided by making reasonable adjustments?

16.The Claimant alleges that the following adjustments should have been made:

- a. appointing the Claimant another manager;
- b. allowing the Claimant to do a phased return to work in October 2017; and
- c. referring the Claimant to Occupational Health between March and May 2017.

17.Did the Claimant request any or all of the proposed adjustments above?

18. In all of the above circumstances, is it reasonable to require the Respondent to have made any or all of the proposed adjustments?

### Remedy

19. What, if any, injury to feelings has the Claimant suffered as a result of the matters above?
20. The Claimant has no financial losses as she remains employed by the Respondent.

### Conduct of the Hearing

21. As the claimant was unrepresented, the Employment Judge (EJ) explained to her at the commencement of the hearing the process which would be followed at the hearing; the significance of the Issues and the fact that the Tribunal would wish to hear evidence which was relevant to those Issues. At the start of the hearing, the Tribunal checked with the claimant (and other witnesses) whether there were any reasonable adjustments needed for the hearing. The claimant confirmed that she may need regular breaks, which were taken during the course of the hearing. Whilst the Tribunal adjourned to read the documents, the claimant was allowed the morning of the first day to agree the List of Issues with the respondent's counsel. It was also agreed that the hearing would be for liability only.
22. From the afternoon of Day 1 to the afternoon of Day 4, the Tribunal heard evidence from the Claimant and, also, from Claire Keenan (the claimant's PCS Trade Union representative) and Sharleen Gayle (a colleague who had worked in the same team as the claimant). Both Ms Keenan and Ms Gayle attended the hearing under Witness Orders (dated 4 October 2018) made on the claimant's application. It was explained to the claimant at the commencement of the hearing that as Ms Keenan and Ms Gayle were the claimant's witness, she would not be allowed to cross-examine them. This was explained in non-legal terms.
23. The Tribunal heard evidence on behalf of the respondent from: Louise Kollmer (Senior Solicitor and Team Leader Counter Avoidance Litigation Team and the claimant's line manager until December 2017); Jeffrey King (Senior Solicitor, who heard the claimant's appeal against her Final Written Warning of 26 June 2017); Paul Smyth (Operation Lead -Direct Technical and Senior Review Team) and Paul Rooney (Assistant Director of Counter Avoidance Litigation Team and Ms Kollmer's line manager).
24. Each of the witnesses relied on their written statements as their evidence in chief. Ms Gayle made substantial amendments to her witness statement at the hearing. There was an agreed bundle (3 volumes) of just over 1000 pages and page references in this Judgment and Reasons are to that

bundle. The Tribunal heard submissions from both parties and were handed written submissions from the respondent.

25. The Tribunal reserved its judgment, which is now given with Reasons.

### **Findings of Fact**

26. The Tribunal heard detailed evidence over the course of four days but will only make such findings of fact as are relevant to the Issues set out above.

### **Credibility of the witnesses**

27. The Tribunal found that on several matters the claimant's evidence was unreliable due to her exaggerating the facts or to her inconsistent recollections when compared to the objective evidence available. The Tribunal also found that the claimant often perceived discrimination where this was not borne out by the facts: for example, where the treatment complained of was applied to others who were not disabled. The Tribunal acknowledges that the claimant's belief that she had been unfairly treated, given her personal circumstances, was a genuine and heartfelt one; however, that is not the standard or test which the Tribunal is required to apply in assessing a discrimination claim.

28. The Tribunal found the respondent's witnesses to be generally credible in the light of the documentary and objective evidence available.

### **Background- overall sequence of events**

29. The following is an overall summary of the events which have led to this Tribunal claim (with key dates or events underlined). More detailed analysis of the relevant facts is set out below.

30. The claimant joined the Counter Avoidance Litigation Team at HMRC on 31 October 2016, having previously worked at the Food Standards Agency. The role with HMRC was a promotion to senior officer grade and the claimant knew that she would have to undertake a professional tax qualification within a two-year time frame. Ms Gayle commenced work at HMRC on the same day as the claimant in the same role, but this was not a promotion for her and failure to obtain the qualification would not affect her grade.

31. On 28 October 2016, the claimant's mother had been diagnosed with breast cancer. This had come as a great shock to the claimant as she was very close to her mother. The claimant became the main carer for her mother when she had to attend for tests; surgery and chemotherapy. On her first day, the claimant told Mr Smyth about her mother's diagnosis. The claimant's line manager Ms Kollmer was covering two roles at the relevant

time (from October 2016-April 2017) and after a brief meeting with the claimant and Ms Gayle, had asked Mr Smyth to be the main point of contact for both of them for induction and training purposes for the first two months of their employment with HMRC.

32. The claimant says that as a result of caring for her mother, and also as a result of the lack of training and support she received from the respondent generally (and Ms Kollmer specifically) she suffered from stress. This exacerbated the symptoms of her long-term condition, namely ulcerative colitis (an inflammation of the bowel, which caused abdominal pain; increased the need to go to the toilet and also fatigue.
33. In February and March 2017 Ms Kollmer had sent emails containing taxpayers' details to the appellant's personal email account. On 9 March 2017, the claimant sent papers to her own personal email so that she could work on these away from the office. This action resulted in a disciplinary investigation (by the Internal Governance (IG) team) and disciplinary action being taken against the claimant for a data security breach. The claimant maintained that she had never received the relevant mandatory training with regard to data security processes and further maintained that Ms Kollmer had committed the same breaches but had not been disciplined.
34. The claimant sought assistance from Ms Keenan (her PCS TU representative) at this stage. Ms Keenan noted that the claimant was suffering from stress, although in her oral evidence she said that she was not aware that the claimant had ulcerative colitis until a meeting with the claimant on 13 April 2017. Ms Keenan felt that because of the claimant's stress, she should seek an Occupation Health (OH) referral and obtain a report.
35. Both the claimant and Ms Keenan asked Ms Kollmer for an OH referral in early April 2017 (pages 430 and 434). Ms Kollmer initially did not feel that the claimant needed such a referral. Ms Kollmer said that at this stage she was unaware of the claimant's colitis – she was aware of the claimant's carer role for her mother (who had cancer) and was also aware of the corresponding stress this had caused and of the stress on the claimant from the disciplinary investigation. However, at that time, the claimant was awaiting stress counselling via her GP and had also been given access to the respondent's Wellness Team counselling service. Ms Kollmer therefore believed that the claimant's stress issues were being addressed.
36. On 2 May 2017 the claimant submitted a formal grievance against Ms Kollmer to Paul Rooney (pages 472-488). This was based on Ms Kollmer's lack of support and sympathy towards the claimant; her attitude to the claimant's carer role for her mother and her refusal to agree to an OH

referral and to put reasonable adjustments in place to help the claimant. The claimant believed she was the victim of bullying and harassment from Ms Kollmer, because of her association with a disabled person (her mother) and also because of her “own medical conditions”. The claimant accepted that the written grievance and attachments did not specifically mention ulcerative colitis.

37. There was eventually an OH referral on 11 May 2017 (pages 501A-B) which referred to the claimant’s stress and anxiety (arising from her mother’s situation and the internal investigation on the data security matters) and “personal issues”, but with no specific mention of ulcerative colitis.
38. An OH Report dated 22 May 2017 (page 518-520) was produced which noted that that claimant was not prescribed any medication for her stress/anxiety but was under the care of her GP and was waiting for her counselling sessions to begin. The report also noted the claimant’s long-term condition of ulcerative colitis, which could constitute a disability within the meaning of the EqA. The claimant took medication which controlled this condition and had regular hospital appointments to monitor the situation. The last “flare up” had been 15 months previously. The report noted that the medication lowered the claimant’s immunity and made her prone to infections.
39. On 19 June 2017 there was a disciplinary hearing about the data security breach. There was a grievance investigation meeting on 26 and 27 June 2017 (pages 644-680). On 26 June the claimant was also issued with a Final Written Warning (FWW) in respect of the disciplinary process relating to the data security breach (page 583), which was to be kept on her personnel file for two years. The claimant was extremely concerned by this because she said that she had already begun to look for other roles within Government Departments but believed she could not do so if she had a disciplinary warning. The claimant also felt that the FWW was extremely unfair as she believed the Ms Kollmer had also sent documents to the claimant’s personal email address and had not been disciplined for her actions. The claimant went on sick leave from 28 June 2017 due to stress and anxiety and did not return until 6 October 2017.
40. The claimant submitted an appeal against the FWW on 10 August 2017 having obtained extensions of time. This was done with assistance from Ms Keenan.
41. There was a grievance outcome decision from Mr Rooney dated 18 August 2017, which did not uphold the claimant’s grievance (page 865). The claimant had some problems opening the attached grievance investigation report but confirmed on 6 September 2017 that she had managed to read it. The claimant did not appeal the grievance. She said in her oral evidence that she was too ill to be able to deal with such matters-

however, the claimant was able to submit her appeal against the FWW at around the same time.

42. The claimant returned to work on 6 October 2017. During August/September Mr Rooney (in compliance with the claimant's request) had looked for a new manager and arranged for her to return to work as part of Karen Rourke's team, but this fell through at the last minute. On 5 October evening Mr Rooney left a voicemail on the claimant's 'phone to explain that the transfer could not take place on the following day. Mr Smyth then arranged for the claimant to work in his team from October 2017 (on a temporary basis) and he met with her around 10 October to discuss this new role. They did discuss a phased return to work (which the claimant had raised with Mr Rooney) but it was not necessary as Mr Smyth was to provide flexi-time, which allowed the claimant time to work from home, and meant she did not get too tired. The claimant's role in Mr Smyth's team was made permanent in mid-December 2017.

43. The claimant's appeal against her FWW was heard by Mr King on 4 December 2017. The claimant complains that the delay (since 10 August 2017) was an act of direct discrimination by the respondent. Mr King explained in his witness statement (paragraphs 8-23) and in his oral evidence the reasons for the delay, which were essentially due to absences (for various reasons) of several of the parties and the claimant's reluctance to confirm her own unavailable dates. (This is set out in more detail below). On 12 December 2017 Mr King sent the claimant the appeal outcome (page 926). He upheld the appeal and quashed the FWW. This meant that the claimant had a clean disciplinary record and had been confirmed in her new role as part of Mr Smyth's team.

44. The FWW and the disciplinary proceedings are, therefore, not relevant issues as part of the claimant's disability discrimination claim. The following findings of fact relate specifically to the Issues in this claim.

#### Knowledge of the claimant's disability

45. The claimant says that she told Ms Kollmer about her colitis in or around December 2016 as she had a regular hospital check-up (which was scheduled every three months) in January 2017. This is denied by Ms Kollmer, who says that she first knew of the claimant's colitis when she received the Occupational Health Report on 22 May 2017. The claimant accepted that there was no specific mention of colitis in her emails to Ms Kollmer confirming the regular medical appointments, but said that she had told Ms Kollmer about in her condition in the conversations she had with her.

46. The claimant referred to a note (page 430) of a meeting with Ms Kollmer on 4 April 2017 in which she said she mentioned colitis in relation to the

pressures she was undergoing. Ms Keenan gave differing evidence to the claimant. She said that the claimant had told her that she had first mentioned her colitis to Ms Kollmer in a meeting on 11 April 2017 and that she herself (Ms Keenan) had only learned of the claimant's colitis on 13 April 2017.

47. Prior to her long sickness absence from June-October 2017, the claimant had two short-term absences. One in December 2016 (page 337) which was self-certified and where the claimant described flu-like symptoms and another in April 2017 (page 469) which related to ear-ache, headache and sore throat. Ms Kollmer said that she had no reason to believe these absences were linked to a long-term medical condition. The claimant said that the colitis medication affected her immune system and made her prone to infections, but she accepted that she had not told Ms Kollmer this until much later.
48. In response to Tribunal questions, Ms Kollmer explained that initially, she had not thought it appropriate to ask about the details of the claimant's medical appointments as it was a personal matter. She said that she later suspected that the claimant may have specific medical issues of her own, but the claimant had refused to discuss these. The Tribunal was referred to the claimant's notes of a meeting of 25 April 2017 (pages 461-2) with Ms Kollmer and it was put to the claimant in cross-examination that she appeared to have added (written at a different angle) a reference to colitis at a later stage. The claimant denied this.
49. In response to Tribunal questions, Ms Kollmer said that at that meeting (25 April) which related to sickness absences and the OH referral, she had realised that there were probably other issues over and above the claimant's caring responsibilities for her mother and the stress of the IG disciplinary investigation. She said that when she had attempted to raise this with the claimant she was told to "mind your own business" and so she did not feel it was appropriate to probe any further. The Tribunal accept on a balance of probabilities Ms Kollmer's evidence that the claimant did not wish to discuss her own medical condition with her, especially as their working relationship had broken down by that time. The Tribunal also notes that the claimant had never mentioned her colitis in any of her written communications with Ms Kollmer, which also supports the Tribunal's decision to prefer Ms Kollmer's evidence.
50. Further, (at page 449) the Jobholder reduction of stress at work form dated 11 April 2017 (which the claimant had been asked to complete as part of the decision as to whether an OH referral was required) contains no mention of colitis, but mentions only the claimant's role as carer for her mother and the ongoing IG investigation. This is consistent with Ms Kollmer's account and inconsistent with the claimant's (and Ms Keenan's) evidence that she told Ms Kollmer about her colitis in a meeting on 11

April. If she had done so, there was no reason for her not to mention it on the form completed on the same date.

51. In addition, even after Ms Kollmer had agreed to an OH referral (in late April 2017), and a referral form (pages 501A-B) was completed on 11 May 2017, which was seen and agreed by the claimant, this form contained no mention of colitis. The section headed “Relevant Conditions” says “Stress, Anxiety, Personal Issues”. There could be no reason for the claimant not to include her colitis in this section (especially as she then disclosed it to the OH professional at her assessment) other than her being unwilling to share this information with Ms Kollmer.
52. As there is a dispute between the parties on this point, the Tribunal must decide whose evidence it prefers, and the documentary evidence supports the evidence of Ms Kollmer, which the Tribunal prefers. The Tribunal finds that Ms Kollmer and the respondent were unaware of the claimant’s disability until 22 May 2017 when that information was contained in the OH Report.

#### Knowledge of the nature of the claimant’s mother’s disability

53. It is accepted that the claimant told Paul Smyth about her mother’s cancer on 31 October 2016 when she began work at HMRC. It is also accepted that she told Ms Kollmer about her mother’s cancer on 2 November 2016. The claimant says that she made it clear from the beginning that her mother had breast cancer, although she accepted that the documents (including those sent by the claimant) refer only to “cancer”. Ms Kollmer said that she first formally knew that the claimant’s mother had breast cancer from the claimant’s grievance against her on 2 May 2017. However, she accepted that the claimant had referred in their conversations to the “removal of lumps” and had also made hand gestures about her mother’s cancer, which led Ms Kollmer to suspect that it was breast cancer.
54. As there is a dispute between the parties on this point, the Tribunal must decide whose evidence it prefers, and on a balance of probabilities, the Tribunal prefers Ms Kollmer’s evidence. Her evidence was supported by that of Mr Smyth who said he could not recall the claimant specifically mentioning breast cancer to him in October 2016 and he could not say exactly when he was first aware that her mother had breast cancer. Further, the documents up to and including the OH referral form and the OH Report (when the claimant disclosed her own medical condition) refer only to her mother’s cancer or illness which suggests that this was how the claimant chose to describe her mother’s condition to others.

55. The Tribunal finds that the respondent and Ms Kollmer were not aware that the claimant's mother had breast cancer until May 2017 (the claimant's grievance against Ms Kollmer).

Ms Kollmer's comment in November 2016

56. Sometime in November 2016 (the claimant could not recall the exact date) she had a meeting with Ms Kollmer to inform her that her mother had seen her cancer specialist and had been given a date of 30 November for her operation. The claimant said that she specifically said that this was a mastectomy and that the doctor had told her that she would need several days' leave to take her mother to the hospital and then to care for her immediately after the operation. The claimant says that Ms Kollmer then said words to the effect of "I know people who have had mastectomies and they are back at work the same day". Ms Kollmer denied making that statement or anything like it. She said that at that time she did not know that the claimant's mother had breast cancer and she was only aware that she was due to have an operation. Ms Kollmer also said that in any event, the statement was clearly wrong and she would never say anything like that.
57. The claimant called Ms Gayle as a witness to confirm that she had been told by the claimant of Ms Kollmer's comment soon after it had allegedly been made. Ms Gayle said that she had been shocked by the comment and had put this on WhatsApp to her own friends and family. There was no evidence of this message presented to the Tribunal to support this assertion.
58. Ms Gayle's evidence was essentially about what the claimant reported to her and on the basis of the Tribunal's own finding of fact (set out above) that Ms Kollmer was not, at that stage, aware of the claimant's mother's breast cancer, the Tribunal finds on a balance of probabilities that it was unlikely the claimant would have told Ms Kollmer the details of her mother's operation and therefore that the comment was not made.
59. As there is a dispute between the parties on this point, the Tribunal must decide whose evidence it prefers, and on a balance of probabilities, the Tribunal prefers Ms Kollmer's evidence

Failure to provide training or support to the claimant.

60. Mr Smyth in his oral evidence explained that until about 3 to 4 years ago the training for the equivalent grade to that of the claimant would have involved one day a week in a classroom setting, with a further day allocated for study and three days of practical experience in the workplace. The more recent process involved being provided with learning manuals online, with very little structured or face-to-face training which meant that the training was much more "self-driven". However, he

explained that there was no formal examination and the final assessment was an open book test which could be re-taken unlimited times.

61. The claimant accepted that she had been sent a Schedule of Tax Training/support (page 347 and following) which set out the relevant modules and which was the equivalent of the Tax Academy training. However, she said in her oral evidence that she did not believe that she had received any meaningful induction or training. When she was taken to various documents (including her own record and her annual review at page 410) the claimant accepted that she had attended various seminars etc. However, she then said that these had only been lectures and had not involved any real training.
62. The claimant appeared to believe that a document had to be headed "induction" in order for it to comprise part of a formal induction process. She complained that she was simply given links to various websites and was expected to read documents and then ask questions. She initially said that she could not access the links, but subsequently accepted that she had been able to access the majority of the information she had been sent. The claimant also accepted that she had been allowed time during her working hours to read the various documents sent to her.
63. The claimant further accepted that she had been allocated a mentor (though she complained that he was based in Bournemouth). Ms Kollmer explained that HMRC worked regularly across several locations and had email; telephone and video-conferencing links and the Tribunal accepted her evidence that the claimant would not be prejudiced by her mentor's location.
64. The Tribunal finds that the claimant had unrealistic expectations of the nature of the training available to her in a professional environment: she expected more guided support and teaching and struggled with the online methods of training.
65. Ms Gayle's evidence was that she and the claimant had access to the same training documentation and methods: both were offered and received the same training. This was confirmed by Mr Smyth and Ms Kollmer. The claimant said that there were some occasions where she missed training sessions as she was away on sick leave or to care for her mother or on holiday.
66. As regards practical training, the claimant complained that she was only given photocopying and compiling bundles and was not involved in any of the real work of the department, though she accepted that she had been taken to two hearings in the Tax Appeal Tribunal. Ms Kollmer was asked

about this in Tribunal questions and she referred to the claimant's self-assessment at page 410, which set out details of the work she had done. The claimant then alleged that Ms Kollmer told her what to write in that part of her assessment but accepted that other parts had been written by her without any input from Ms Kollmer. As this allegation was not part of the claimant's evidence the Tribunal makes no finding of fact on this matter, but notes that in her own evidence to the Tribunal the claimant did not deny (when referred to her self-assessment) that she had done the work listed there. (This was an example of the inconsistency of the claimant's evidence, which rendered it unreliable).

67. The Tribunal finds that the claimant and Ms Gayle had the same training offered and made available to them at all material times.

#### Ms Kollmer's characteristics

##### "Huffing and puffing"

68. Mr Smyth was asked about this in his evidence, he said that it was a general trait of Ms Kollmer to "make a lot of noise", especially if she was impatient about something: he gave the example of this happening on the day of the hearing when they were waiting in a queue to go into the Tribunal. Ms Kollmer very honestly said that until she heard Mr Smyth's evidence she had not been aware of this tendency. She said that she would now attempt to curb this behaviour. The claimant did not present any specific evidence of incidents of this behaviour but made a general allegation. The claimant did not explain why she believed that such behaviour from Ms Kollmer was because of the claimant's disability.

#### Lack of empathy/sympathy

69. The claimant accepted in her evidence that Ms Kollmer had never refused to allow her time off to care for her mother. The Tribunal were referred to emails from Ms Kollmer to the claimant about her own sick leave (pages 335 and 338 on 6 and 12 December 2016) which were written in a friendly tone and did not suggest a lack of sympathy. However, the Tribunal observed that Mr Smyth's manner and tone (email of 3 November 2016 at page 314) were more expressive and overtly sympathetic. The claimant responded more favourably to Mr Smyth's style of dealing with people than to Ms Kollmer's, which was less forthcoming.
70. Ms Kollmer said in her oral evidence that she had recognised that the claimant was having a difficult time starting a new role and training while attempting to care for her mother and that she was sympathetic with her situation. However, Ms Kollmer accepted that she had probably never expressed this directly to the claimant, relying on her actions (by not refusing any time off etc) to demonstrate her sympathy. It is most likely this difference in approach between Mr Smyth and Ms Kollmer, which the claimant has identified. The Tribunal does not find that Ms Kollmer's

different approach was because of the claimant's disability or because of her association with her mother.

#### Requirement for the claimant to give access to her emails

71. Both Mr Smyth and Ms Kollmer's gave evidence that the need for access to the claimant's emails was for general business continuity reasons and that this applied to the whole team (page 317 – email dated 3 November 2016, which Ms Kollmer chased up on 25 April 2017 at page 466). The claimant had said that the Business Continuity Plan had not commenced till much later in 2017 but the evidence was that the reference to business continuity was a practical one, in the case of absences or emergencies.
72. In Tribunal questions, Ms Kollmer accepted that because of the nature of the disciplinary investigation she could understand the claimant's reluctance to allow her access to her emails and she confirmed that the claimant was the only member of the team who did not give such access to Ms Kollmer.

#### 12 June 2017 – Access to the OH Report on Ms Kollmer's calendar

73. The Tribunal was referred to pages 528 and 528a which showed an entry on Ms Kollmer's outlook calendar for 31 May 2017, which if "clicked" on would reveal that the meeting was with the claimant and contained a description of the reason for the meeting as "to discuss the outcome of the OH referral and to consider what measures we may need to put in place". The claimant complained that anyone could access this description. Ms Kollmer accepted this and said that as soon as this was pointed out to her (by the claimant in an email of 12 June 2017- at page 545) she ensured that the particular entry was "locked" so that only she and the claimant could read the description.
74. The claimant further alleged that the relevant invitation also had the OH Report attached, which meant that anyone could access a confidential report about her medical condition. The Tribunal notes from page 528 (the description of the meeting) that there is no indication of any attachment. The claimant could not explain why she believed that the report was attached. The Tribunal finds that based on the evidence presented, the claimant has not shown on a balance of probabilities that Ms Kollmer gave external access to the OH Report

#### Refusal to make OH referral from March to 12 May 2017

75. The evidence presented to the Tribunal shows that Ms Keenan first asked for an "urgent" OH referral for the claimant in early April 2017 (during the disciplinary investigation process). There is no evidence to show that such a request was first made in March 2017.

76. Ms Kollmer said that she had not refused to make a referral but wished to understand why such a referral was necessary as the claimant already had access to the Wellness counselling service to receive support for her stress. The Tribunal have accepted Ms Kollmer's evidence that at the meeting on 11 April 2017 they discussed that the claimant had seen her GP about her stress but did not mention her colitis. Following this meeting Ms Kollmer asked the claimant to complete the Jobholders help card to identify and additional reasons for an OH referral: the claimant completed this, but again this document did not mention her colitis.
77. Ms Kollmer referred to the guidance to managers (pages 959-960), which said that if there was any doubt about the need for an OH referral, managers should use the OH Assist telephone help-line. Ms Kollmer contacted OH assist on 25 April 2017 and made a note of the call (page 458). The note refers to the claimant's mother's "illness"; however, in response to Tribunal questions Ms Kollmer said that she had told them that the claimant's mother had cancer and had also explained all the other stress factors on the claimant as far as she understood them – she had not been aware at that time that the claimant had colitis. Ms Kollmer had not put the details in the note for confidentiality reasons. The Tribunal accepted Ms Kollmer's evidence on this matter. OH, Assist said in the circumstances there was no need for an OH referral bearing in mind the claimant's access to counselling for her stress. The Tribunal finds that it was reasonable for Ms Kollmer to rely on that advice.
78. Ms Kollmer relayed this to the claimant who insisted upon an OH referral and said she would take the matter further if she was not allowed to do so. Ms Kollmer then spoke to Marina Donaldson (in HR) who advised her that, given the strength of the claimant's objections, she should agree to make the referral. Ms Kollmer confirmed to the claimant on 27 April 2017 that she would make the referral in the next week (page 470). This was eventually done on 11 May 2017, which is a further 2 weeks.
79. On the basis of the evidence, the claimant's complaint is more properly expressed as a delay in making an OH referral from early April to 11 May 2017 (although Ms Kollmer indicated that she would do so on 27 April). This is a delay of some 3-4 weeks. In any event, the Tribunal has found that Ms Kollmer was not aware of the claimant's colitis during this period and so her conduct could not be linked to the claimant's disability.

Delay in holding the appeal against the FWW (from 10 August to 4 December 2017)

80. The Tribunal heard and saw documentary evidence which indicated that the delay in this matter was the result of a combination of circumstances. The claimant accepted that she had been waiting for further disclosure to be made before she would agree to an appeal date; there were issues with the availability of Ms Keenan (the claimant's TU representative) and

also of Mr King (based on the impending birth of his child and his paternity leave). Most influential to the Tribunal on this point, was Ms Keenan's acceptance in her evidence that the delay in arranging the appeal hearing was not connected to the claimant's disability.

### Comparators

81. Generally, on the direct discrimination claims, the claimant relied on a hypothetical comparator. However, on the allegation relating to lack of training/support the respondent cited Ms Gayle as a non-disabled comparator who received exactly the same treatment. In Tribunal questions Ms Gayle accepted that the respondent had not been aware of any disability of hers within the meaning of the EqA at the relevant times, though she said that she did suffer from a medical condition which meant she had fibroids and very heavy periods. The Tribunal finds that the claimant and Ms Gayle (who is a non-disabled comparator) received the same training and induction process.

### PCP's

#### Requiring the Claimant to remain with Ms Kollmer as her manager (until 10 October 2017)

82. On 1 August 2017 Mr Rooney confirmed to the claimant that although her grievance against Ms Kollmer was on-going, he was exploring options to find the claimant a new team. At this stage the claimant was still on long-term sick leave, so the Tribunal accepts that there was no immediate rush to complete this action. Mr Rooney then went on annual leave. On 18 August 2017 (page 735) Mr Rooney sent the claimant the grievance outcome, which did not uphold her grievances but he nevertheless was searching for other teams for the claimant (page 736). The claimant chased what was happening at the end of August and on 7 September 2017 Mr Rooney told her that he had found a place in Karen Rourke's team in Bush House (page 765). Unfortunately (as set out in the summary above) this fell through at the last minute on 5 October and it was not until 10 October that the claimant was put in Mr Smyth's team.
83. The Tribunal accepts that from the claimant's point of view she was not working under a different manager until 10 October 2017 when she was temporarily transferred to Mr Smyth's team. However, the Tribunal does not find that there was any PCP requiring the claimant to continue with Ms Kollmer as her line-manager. Following her raising her grievance (which was not decided until 18 August) there were efforts being made to find her alternative roles with a new manager. Further, the claimant was on long-term sick leave from 28 June 2017 and so was not actually working with Ms Kollmer after that date.

Claimant to return to full time work after her sick leave (28 June to 6 October 2017)

84. There was no evidence presented by the claimant to support this allegation. On the contrary the evidence showed that on 22 September 2017 Mr Rooney wrote to Ms Keenan, copied to the claimant (page 776) to say that he could not see why a phased return would not be appropriate. Further Mr Rooney's emailed the claimant of 6 October (page 795-6) saying that he was "content" to agree a phased return to work. The claimant has not shown that there was such a PCP.

Refusal for OH referral (March to May 2017)

85. The Tribunal has found (see above) that there was no refusal to make an OH referral, though there was a delay while Ms Kollmer considered whether this was necessary. Further, there was no evidence presented by the claimant to show that the respondent had any provision criterion or practice which refused OH referrals.

Claims out of time

86. The Tribunal heard evidence from the claimant and from Ms Keenan on this point. The claimant said that she was first aware that she could make a Tribunal claim for disability discrimination in August 2017 and that she was first aware of the existence of the three-month time limit at the first case management discussion at the Tribunal in March 2018. This evidence was contradicted by Ms Keenan who said that she had made the claimant aware of the three-month time limit when the claimant sought her assistance, but that she had mistakenly believed that the three months ran from the date of the grievance decision (which was given on 18 August 2017).
87. The Tribunal does not find the claimant's evidence on this matter to be credible (especially given the direct contradiction by her own witness and TU representative). The Tribunal does not accept the claimant's evidence that she was unaware of the three-month time limit prior to March 2018. The claimant said that she had not done any research online into the possibility of Employment Tribunal claims or how to bring them, given the claimant's general level of education and ability the Tribunal does not accept her evidence as credible.

## **Conclusions**

Knowledge of Disability

88. The Tribunal has found that Ms Kollmer and the respondent were unaware of the claimant's disability until 22 May 2017 (see Findings of Fact above)

Claims out of time

89. The claimant first contacted ACAS for Early Conciliation on 15 September 2017 and the certificate was issued on 15 October 2017. The ET1 was lodged on 14 November 2017. This means that any discriminatory act which occurred prior to 16 June 2017 (three months before the contact with ACAS) would be out of time. The only act of direct discrimination which falls within this time limit would be the alleged delay in the disciplinary appeal process (August-December 2017). The Tribunal heard no evidence which would show that the alleged acts of discrimination amounted to a continuing act rather than a succession of unconnected or isolated acts (**Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**). As regards the Reasonable Adjustments claim, the relevant PCP's would all fall within the time limit.
90. Where claims are outside the time limit, the Tribunal may exercise its discretion to extend time in discrimination cases where it feels it would be "just and equitable" to do so (section 123 (1) (b) EqA) but it is for the claimant to convince the Tribunal that it should extend the time limit on this basis (**Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327**).
91. The Tribunal did not accept the claimant's evidence that she was not aware of the time limit until March 2018. Further, the Tribunal did not accept that the claimant relied on Ms Keenan's incorrect advice with regard to that time limit and accordingly does not exercise its discretion to extend the time limit. In doing so, the Tribunal is mindful of the decision in **Huntwicks v Royal Mail EAT 0003/07**.
92. The Tribunal will therefore only consider the remaining "in-time" claims below.

#### Direct Discrimination

93. The only relevant remaining claim relates to the delay in the appeal process from August to December 2017. The Tribunal have found that the delay was not connected to or because of the claimant's disability and her claim for direct discrimination cannot succeed.
94. As regards the out of time direct discrimination claims, the Tribunal notes that even if it were to be wrong on its decision not to extend time on the just and equitable ground, given the Findings of Fact set out above, none of the remaining claims for direct discrimination would have succeeded in any event. Therefore, overall conclusion would remain the same.

#### Failure to make reasonable adjustments

95. The Tribunal have found (see above) that the claimant has not established any of the alleged PCP's and therefore her claims for failure to make reasonable adjustments cannot succeed.

#### General Comments

96. The Tribunal recognises that the events described in this Judgment and Reasons have been a difficult time for the claimant (and her family members). However, as indicated in the Findings of Fact the claimant has effectively obtained what she requested: she had an OH referral; the FWW was removed from her disciplinary record; she has a new manager and she is able to work flexibly to take account of her disability and her mother's disability. The claimant said that her mother's cancer was now in remission and that she has been confirmed in her new role since December 2017. The Tribunal hopes that the claimant will be able to move from the matters set out in this Tribunal claim and to make a success of her future career.

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Employment Judge Henderson

Date 23 October 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

24 October 2018

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FOR THE TRIBUNAL OFFICE