EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms J Ryley	**v**	**Secretary of State for Justice**

Heard at: Watford **On**: 1-5 April 2019

Before: Employment Judge Smail
Ms J McGregor
Mrs A Brosnan

Appearances

For the Claimant: In person
For the Respondent: Mr T Kirk, Counsel

JUDGMENT

1. The Claimant's claims of disability discrimination fail and are dismissed.

REASONS

1. By a claim form presented on 7 May 2017 the Claimant claims disability discrimination. The Claimant was and remains employed as a Tribunal clerk administrative officer allocated to the Social Security Tribunal in Enfield. This is administered locally from Anchorage House in Docklands. The matter came before Employment Judge Hawksworth on 16 March 2018 and the issues that we are to determine were identified. These are set out at Appendix 1.

The law

2. There is a claim of direct discrimination. By s.13 of the Equality Act 2010, sub-section (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. By s.23, sub-section (2), dealing with comparators in cases of disability, the comparator's circumstances include a person's abilities. This means that for the purposes of direct discrimination the comparator in this

case is going to be a hypothetical non-disabled person but who has substantially the same abilities as the Claimant.

3. In respect of the claim of discrimination arising from disability, by s.15, sub-section (1), a person A discriminates against a disabled person B if A treats B unfavourably because of something arising in consequence of B's disability and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

4. S.26 deals with harassment. By sub-section (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. By sub-section (4) in deciding whether conduct has the effect referred to in sub-section (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. Sub-section (5) confirms that disability is a relevant protected characteristic.

5. Victimisation is dealt with under s.27. By s.27(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. A protected act includes doing any other thing for the purposes of or in connection with the Equality Act 2010 and making an allegation, whether or not express, that A or another person has contravened the act.

6. Time limits may arise in this case. We therefore remind ourselves of s.123 of the 2010 Act. Proceedings on a complaint may not be brought after the end of (a) the period of three months starting with the date of the act to which the complaint relates; or (b) such other period as the employment Tribunal thinks just and equitable. By sub-section (3) for the purposes of this section: (a) conduct extending over a period is to be treated as done at the end of the period and (b) failure to do an act is to be treated as occurring when the person on question decided on it.

7. Burden of proof is important in discrimination cases. That is covered by s.136. By s.136(2) if there are facts from which the court could decide in the absence of any other explanation that a person A contravened the provision concerned, the court must hold that the contravention occurred. By sub-section (3) it is provided that (2) does not apply if A shows that A did not contravene the provision. What this means in practice is that the Claimant has to show a prima facie case that there could have been disability discrimination. If that is the case the burden transfers to the Respondent to show that disability played no role whatsoever in the matter: Igen v Wong [2005] IRLR 258 (CA).

Findings of fact

8. Disability

8.1 The Respondent conceded that the Claimant is a disabled person at the time of the amended response. At paragraph 4 of that the Respondent accepted that the Claimant was a disabled person at all material times by reason of an anxiety condition. In the course of the hearing, having denied it up until that point, the Respondent conceded that the Respondent had constructive knowledge of the disability, that is to say, it should have known of the disability for the purposes of the s.15 discrimination arising from disability claim. In his submissions on behalf of the Respondent, Mr Kirk submitted that the condition should be described as "situational anxiety with phobic elements as a road user both as a driver and a passenger". The constructive knowledge position was conceded by reason of the existence of a workplace agreement made between the Claimant and managers on 16 December 2013. The Claimant was assisted at that time by a union representative. There was a change resulting from this to the Claimant's work pattern. She went down from five days to three days and accessed her pension, resulting in the arrangement being described as a partial retirement. It is perhaps instructive to look at various paragraphs in the workplace agreement because it indicates what was known in 2013 and which the Respondent now concedes ought to have been known for the purposes of our case.

8.2 So, paragraph 2 of the agreement read as follows:

> "2. Enfield Tribunal will be Ms Ryley's base work location as part of the reasonable adjustment agreed. Ms Ryley will be called to attend at Anchorage House no more than four times per year for the purposes of any training that may be required. All of these attendances will be subject to the reasonable adjustment allowing Ms Ryley to adjust her travel arrangements to Anchorage House to avoid rush hour traffic/footfall. A target arrival time should be for 10am approximately. Her departure time should also be such that her homeward journey would also enable her to once again avoid rush hour traffic/footfall. Ms Ryley will suffer no detriment of worktime credit for such travel adjustments.
>
> 3. There is to be an occupational health referral organised for Ms Ryley to ensure that she can have an appropriate workplace regime with consideration made for the current health issues that Ms Ryley is experiencing be addressed and any reasonable adjustments implemented…
>
> 5. A named manager will undertake the rotation of work schedule such as hearing types. This would be to address the issue of ensuring a balance of work distribution to enable and ensure fairness of the workload distribution for all at this Tribunal venue."

8.3 The Claimant had at this point raised six grievances and it was a result of the workplace agreement that those six grievances would be placed on hold so as to allow implementation of the matters, the subject of the workplace agreement. We note that the language of disability in the form of reasonable adjustments is used in this agreement and it seems that this prompts the concession of constructive knowledge in this case.

8.4 There was certainly a travel element to the anxiety in the Claimant's condition. We have seen a psychological report dated 7 December 2015 prepared by Dr Michael George, a chartered and clinical psychologist. This was prepared for a series of road traffic accidents sustained by the Claimant in March and April 2013. He identified the phrasing "situational anxiety with phobic elements as a road user both driver and passenger" that Mr Kirk has adopted, but he also noted in the report from the medical records longstanding panic disorder, claustrophobia and stresses within the workplace which he described all had a profound impact on the Claimant. This report was not available to the Respondent until these proceedings but it does shed light on the true nature of the Claimant's condition. We find it is too restrictive to focus on the travel aspects and we find that the condition is more in line with the original concession in the amended response, namely an anxiety condition.

8.5 We find that the condition is a generalised anxiety condition not restricted to travel. As we acknowledged, the Respondent did not see this documentation until considering its position for the Tribunal's purposes as to whether the Claimant was a disabled person. Whilst some of the workplace agreement concerns travel, by no means all of the observations did. We find that the Respondent knew or ought to have had knowledge of the generalised anxiety condition as from the date of the workplace agreement, namely 16 December 2013. In practical terms it may seem right to distinguish between the Respondent - the entity - and the individual managers in this case, but the claim is being brought against the Respondent - the entity - and that entity had knowledge, as we say, from 16 December 2013.

8.6 It is a feature of this case that there has been a considerable number of line management changes during the Claimant's employment. She suggests at least 14. Carole Doyle was told by the Claimant early after taking over the line management for her, which was September 2015 albeit based at Anchorage House, about the existence of the workplace agreement. She did not read it until the end of 2016. Mr Arif, the delivery manager, the manager next in line, had sight of it in May 2016 when he met the Claimant with her union representative. The turnover of managerial staff was such that the importance of the workplace agreement was missed on changeovers. We find that the managers should have been alert to the fact that the Claimant was disabled by reason of anxiety from the workplace agreement when assuming management responsibility for her. That

said, as we record below, there were difficulties these managers had in getting the Claimant to co-operate with occupational health and stress risk assessments.

8.7 Whilst they were on notice that the Claimant was or might be disabled, the Respondent was hampered in its dealings by reason of difficulties in perfecting instructions to occupational health and stress risk managers.

8.8 It is, further, a theme of the case which amounts to criticism of the Respondent that its record keeping leaves a lot to be desired in respect of individual employees. There is a centralised HR. The centralised HR seems to perform a minimal function when it comes to the day-to-day management of individual employees. That day-to-day management seems to be very much at local level and it is unclear to us that there were comprehensive records kept at a local level.

8.9 We recommend arising from this case that the Respondent reviews its keeping of records at local level compared with its centralisation of HR records. Be that as it may, whilst this is a recommendation, it has only limited relevance to the determination of the issues in the case.

9. <u>The Claimant's absences in 2016</u>

9.1 The Claimant was on sick leave between 5 September 2016 and 17 October 2016, a total of 19 working days. This engaged the absence management policy. The Claimant claims unreasonable contacts from Carole Doyle during this period and puts this forward as harassment. Further, upon her return to work at a return to work meeting the Claimant says she was harassed by Carole Doyle in the way of an interrogation. The Claimant telephoned the office on 2 September 2016 to say she was signed off for two weeks starting on 5 September. Carole Doyle sent two text messages, one on 5 September, the other on 12 September, asking the Claimant how she was. As it happens we have not seen these messages. Carole Doyle then rang the Claimant at home on 13 September. The call is recorded in a handwritten note by Ms Doyle on the first call checklist. Ms Doyle states the following and I quote:

> "Rang Jackie today as I have not spoken to her since she has been off sick and I wanted to offer my support. I have previously sent a text on Monday 5 September and Monday 12 September to offer support and to wish her well. Jackie was surprised I rang. I reminded her of the staff welfare networks and asked if she needed anything from me. Jackie said that I was the reason she is feeling the way she is along with other managers. She went on to give several examples where I said something she disagreed with. She said I was pressurising her for her certificate, which I was not. I informed her that her certificate did not come through on the fax and I wanted to let her know. I said I was genuinely concerned and wanted to ask if she was okay and needed anything from me. I apologised that she felt I was the reason for her being

> unwell and said that was never my intention to stress her. Jackie said she'd be going back to her doctor and she will show the doctor everything. I wished Jackie well and said again I was only enquiring as to her welfare and out of genuine concern. Jackie said I should be concerned while she is at work and not when she is off. I said that I am concerned even though she is off sick. Jackie said she will send her certificate again by the Goldfax number and I confirmed that I will let her know when we get it."

9.2 Ms Doyle felt it necessary to write a separate note of the conversation which was recorded as being 37 minutes long. She felt it appropriate to keep a record of the nature of the Claimant's criticisms. The note echoes many of the themes in this case which leads us to conclude that the note is accurate.

9.3 On the same day the Claimant rang back to speak to Ms Doyle to check that she had received the doctor's certificate. The Claimant felt it appropriate to record the conversation. The conversation was played to us and Ms Doyle's tone in our judgment was proportionate and appropriate and we could infer no harassing disposition from Ms Doyle's comments. The Claimant sent in a series of doctors' notes, the first expired on 19 September 2016, the second 30 September 2016 and the third on 14 October 2016. The Respondent has a well-defined absence management policy. We will refer to several of its features at this point because it plainly provides an important background to the management of the Claimant's absence.

9.4 There is a section called "Notifying Absence". It reads as follows:

> "17. The employee should telephone their manager to report their absence from work by 9.30am or as soon as reasonably possible before their scheduled start time on the first day of their sickness absence. Where the employee's line manager is unavailable they should speak to another manager. In the event that a manager is not available they should leave their contact number and the message that they are unwell. They will then receive a call back. In exceptional circumstances the employee can arrange for someone else to ring and report their sickness absence on their behalf.
>
> 18. Text messages or an email should only be used in exceptional circumstances if a telephone call is not possible and the manager should make a follow-up telephone call to the employee.
>
> 19. The manager should complete the first call check-list during the call. During the telephone call the manager and the employee should adopt a work focussed approach. If this is not appropriate, for example if the employee is in hospital, this should be delayed until a more appropriate stage in their recovery.
>
> 20. The manager should agree "keep in touch" arrangements with the employee during the first conversation. Further information can be found in the Managing Attendance Gateway.

21. Following the initial contact with the employee the manager should (1) record the sickness absence on the single operating platform; (2) consider a referral to occupational health, an early referral is strongly recommended if the absence is due to stress or a muscular skeletal condition; also see the Managing Attendance Gateway for more information on managing specific conditions; (3) carry out an individual stress assessment if the absence is stress related. Further information is contained within the "How To" guide on supporting employees experiencing stress at work and the Stress Awareness and Management Guidance. Our employee assistance programme can also provide support and advice."

9.5 There is a section entitled 'Certifying the Sickness Absence' so at:

"24. The employee must complete a self-certificate for sickness absences of 7 calendar days or less, unless a fit note is provided from the start of the sickness absence. Self-certification forms are contained within the absence pack which is generated by the SOP".

9.6 There is a section headed 'During Sickness Absence':

"28. The manager should keep in touch with the employee during the absence, information on keeping in touch can be found within the Managing Attendance Gateway.

30. If the employee reaches or exceeds their trigger point during their absence, the manager should carry out a formal attendance meeting when the employee returns to work.

31. If the absence reaches 14 consecutive calendar days, the manager should follow the guidance on continuing sickness absence".

9.7 There is a section called 'Managing Unsatisfactory Attendance':

"49. Attendance is unsatisfactory if an employee's sickness absence level reaches or exceeds 8 working days, less pro-rata for employees who do not work every day of the normal working week or 4 spells of sickness absence in a rolling 12-month period. This is called the trigger point. The rolling 12-month period is the 12 months up to the last day of the most recent sickness absence.

53. If the employee has exceeded the trigger point as a result of an illness that may be deemed to be a disability, or any illness directly related to a disability, the manager must consider in consultation with the employee whether reasonable adjustments would assist them with their attendance. This may include seeking current OH advice and/or reviewing existing arrangements. This should take place before the formal attendance meeting."

9.8 All the doctors' notes attributed the reason for absence as work related stress. Ms Doyle was expecting the Claimant back on Monday 17 October. It seems that Ms Doyle prepared an invitation to an informal attendance management meeting on 3 October 2016,

for a meeting to be held on 19 October 2016. The letter we find was sent on 3 October 2016, when of course the Claimant was still signed off. The letter was sent in expectation of the return. Ms Doyle says this letter was in keeping with the policy. The Claimant says it should not be sent whilst she was still off. Looking at the policy extracts we have referred to above, it is clear that the Claimant had hit a trigger point. Paragraph 53 concerns where the trigger may have been hit by reason of a disability and the advice that is given is to contact occupational health for a view. The fact that at that point, Ms Doyle had decided to treat the matter as informal did not remove the need for there to be a meeting. The policy does not say that management must wait until the employee actually returns before sending an invitation to a meeting. The meeting was described in the letter as informal and we do not find that there was a prima facie breach of procedure by Ms Doyle in the way that she was managing the absence management process at this time. She was entitled to telephone the Claimant to fill out the first contact sheet. She was entitled to invite the Claimant to an informal meeting in the expectation of the Claimant's return. We find that Ms Doyle was acting in good faith.

9.9 The invitation is in the bundle and is dated 3 October 2016. The meeting is to take place on 19 October. Ms Doyle writes –

> "at the informal attendance review meeting, I would like us to discuss the possibility of arranging a referral to occupational health; whether there is a need to take further stress risk assessment if appropriate, what other options may be available to assist your current situation and whether there are any steps that can be taken to assist your return to work and a possible date for your return to work and a possible need for a formal attendance review meeting."

All of that in our judgment is entirely sensible. So, at this point then, we conclude that that it was not reasonable for the Claimant to regard that any of this amounted to harassment. We do not find that the Claimant establishes a prima facie case of harassment. The burden does not transfer on the Respondent to show that it was not discriminating on the grounds of disability by way of harassment at this point.

10 <u>Return to work meeting 19 October 2016</u>

10.1 The Claimant claims she was harassed in the way of an interrogation. We have already noted that the intention was that there would be an informal meeting. Ms Doyle took a note of the meeting on the appropriate form. We see that the following issues were considered.

10.1.1 First, the Claimant's trigger points had been met, which pro-rata were four spells of absence and five days of absence in a rolling 12-month period.

10.1.2. Secondly, the Claimant was raising her workload, flexi-time and her performance management review, together with difficulties that security were pressurising her to leave the building towards 6pm each evening before the Claimant says she could finish her work.

10.2 The issue of stress risk assessment was raised and we understand that by this point, the Claimant had seen a stress risk assessment expert, with the Claimant expressly stating at this meeting that she did not want to talk about it. There would be a phased return to work; the Claimant would work 9-3 for two weeks and would clerk in the morning sessions only. There would be a referral to occupational health and the Claimant was informed that, in line with the policy, there would be a formal attendance review meeting and a possible outcome was a first written warning. The Claimant consulted her union about this meeting and we see the union advice from Mr Fremantle on 26 October 2016. He did confirm that a warning was a potential outcome on these occasions irrespective of the reason for absence, but they would seek to persuade the management otherwise. There appears to have been some confusion as to whether the phased return to work would be over 3 days or over 2 days. The Claimant was raising the possibility of working 2 days and not working the third day of the 3 days a week. Ms Doyle was expecting 3 days a week and made the point that if the Claimant was not to work the third day, then there would be no alternative to treat that day as a day of annual leave.

10.3 The Claimant's note of the meeting confirms the subject matter of the various issues that were discussed. The two notes of the meetings at least corroborate each other to the extent that the topics were common. The Claimant's perception was a little different on occasions, in particular the Claimant wanted to return to work for 2 hours in the 3 days only; but it was agreed in the end to 3 days clerking mornings only.

10.4 On the balance of probability, Ms Doyle conducted this meeting in accordance with the policy. It is not, in our judgment, reasonable for the Claimant to have regarded this meeting as involving harassment. As to disability matters: there was to be a referral to occupational health and the Claimant was refusing to discuss the stress risk assessment. At this point, Ms Doyle, was simply complying with her managerial responsibilities in following the sickness absence policy. There was no actual harassment.

11 <u>11 January 2017 – Formal Attendance Meeting</u>

11.1 The Claimant was given a formal warning on this occasion. It was recorded in a letter dated 18 January 2017 where the absence of 19 days in a rolling 12-months was almost 4 times the trigger of the pro-rata'd 5 days. There had been, it is right, no adjustment for

disability. Ms Doyle did record that the Claimant had a previous excellent sickness absence record but she did not feel there was reason not to issue the warning. Ms Doyle took account of what she described as the Claimant's failure to co-operate with management in important respects. First, there had been an individual stress assessment. We note that the Claimant had disagreed with its findings and did not engage with the process further. The assessment had in fact taken place, at least the first part of it, on 29 June 2016. Secondly, the Claimant had been referred to occupational health but would not consent to release the report and occupational health had withdrawn from the process. We understand that there had been one meeting, occupational health wanted a further telephone conference, and the Claimant refused to engage with that. The Claimant was taking issue with information on the referral form. It is clear that the process hit the buffers and management's understanding of the Claimant's condition and its implications did not advance as a result. The lack of progress in the stress risk assessment and the occupational health processes had led to the formal attendance meeting being postponed on at least 3 occasions. It had been due to take place on 8 November, 29 November and 14 December 2016. A formal warning then did result and according to its face, it was to last between 9 – 12 months. Now it was right that the warning was not clearly expressed as to what was involved in terms of duration. The following was written and I quote:

> "Having reached this decision, you will now be subject to an improvement period, during which you will be expected to meet a proportion of your usual trigger points set out in the attendance management policy and procedure. This will be 1 spell and 1.5 days which is 25% of your usual trigger points. This will last for 3 months; however, this can be extended by a further 3 months if appropriate. If your attendance is satisfactory during the improvement period, you will then be subject to a further 6 months sustained improvement period."

The Tribunal itself has struggled to understand what that meant. Further, however, it is clear that the intention was for there to be a further occupational health referral and the Claimant was referred to the employee assistance programme.

11.2 The warning was overturned on appeal by Amy Vashi, an operations manager for the Immigration and Asylum Tribunal. She described the basis for the overturning the warning as being a matter of a technicality. She wrote, and we quote:

> " My reason for reaching this decision is that the formal attendance meeting outcome letter of 18 January 2017 does not give explicit reasons for the decision to issue a first written improvement warning. I found that whilst your line manager explained the support offered to you and issues encountered during the rolling 12-month period and spell of sick absence, the reasons do not outline that the level of absence incurred is

> unsustainable by the business. At the time of the formal attendance meeting on 11 January 2017, your level of sickness absence was high at 19 days in 1 spell between 5 September 2016 and 17 October 2016. The attendance management policy states that attendance is unsatisfactory if an employee's sickness absence level reaches or exceeds 8 working days or spells, in your case this is now 5 days or 4 spells pro-rata. These thresholds constitute the trigger point for a manager to arrange a FAM and to follow the procedure from managing unsatisfactory attendance. Clearly, the absence level reached at the time of 11 January 2017, 19 days in 1 spell was very high and considered in excess of the 5-day trigger point at which attendance is generally considered unsatisfactory. The18 January 2017 outcome letter did not indicate this as the main reason for issuing a written warning, or the impact that this has on the local business in the context of the MOJ attendance management policy. However, it is clear that a considerable amount of support has been provided to you throughout in order to manage your wellbeing. Whilst you may not agree with the level of support received, I am satisfied that management have made sufficient attempts to help you deal with the stress at work".

She then, as mentioned above, goes on to state that her decision is based on a technicality.

11.3 We need to analyse all of this against the causes of action brought by the Claimant. For the purposes of discrimination arising from disability, the sickness absence did arise from the disability. The warning was, we find, unfavourable treatment, even if it was in force for only 2 months. Accordingly, the Respondent has to show that it was a proportionate means of achieving a legitimate aim. The aim of encouraging good attendance at the work place, is a legitimate aim. The question is proportionality. The Tribunal has considered whether the apparent failure by management to regard this as a disability case means that the Respondent does not show a proportionate means.

11.4 The Tribunal finds that the Respondent did try to obtain external assistance to shed light on the Claimant's position through 2 means. First, the risk assessment and secondly occupational health. However, it was the Claimant's position in respect of both these which meant that the Respondent did not obtain the benefit of the outside assistance. Not only did the Respondent not obtain that benefit, the Claimant did not also. It seems to us that the Claimant needed to co-operate with the stress risk assessment and occupational health so as to address any problems effectively. Both processes were frustrated. Management did not get the information despite having sought to do so and effectively was left with applying the standard policy unqualified by a further information that it was otherwise seeking. The fact that the warning was overturned on a technicality does not assist the Claimant in this regard.

11.5 Accordingly, the Tribunal's conclusion is that the Respondent did act proportionately by issuing the improvement warning in the first place. Any qualification related to disability that it might have made

was prevented to be made not by the Respondent's position but by the Claimant's position and in those circumstances, it was proportionate to follow the policy unqualified by any matter of disability. So, the Respondent shows its statutory defence under section 15, sub-section 1(b) of the 2010 Act.

11.6 There was no direct discrimination because a non-disabled comparator with the same abilities would have been treated in the same way. The Claimant could not reasonably regard the matter as one of harassment because the Respondent was following in good faith appropriate procedures.

11.7 The Claimant also runs in respect of this matter and others, a series of arguments of victimisation. The Claimant says she was subject to detriments because she had raised grievances, which she argues amounted to protected acts.

11.8 There had been 6 grievances leading up to 2013. These were stayed under the workplace agreement. Ms Doyle had no knowledge of the contents of those. The 2013 grievances were not operating on the minds of the relevant managers at the times relevant to this case. They did not - the 2013 grievances - furnish a reason for victimisation. The Tribunal is clear that the 2013 grievances played no causative role and were irrelevant to this case.

11.9 There was a grievance dated 19 October 2016. The grievance was against Mr Martin, the delivery manager and Ms Lee, operations manager. It was 32 pages long, it did make reference to matters of stress. Regrettably, the Claimant struggles frequently to express herself succinctly and effectively. The witness statement for the Tribunal, in its first draft, was 159 pages and it's second draft 206 pages. The grievance we now consider was 32 pages. We have sought to make ensure that the good points that are available to the Claimant have not been concealed by the sheer weight of material that she puts before us. We do not accede to the Respondent's submission that the 19 October 2016 grievance did not amount to a protected act because it did not raise matters under the Equality Act. The matters of stress and sickness and health were raised by the Claimant so we do not say it was not a protected act. However, it is clear to the Tribunal that this grievance played no causative role on the decision making of Ms Doyle or the other managers. The attendance management procedure was followed as such. Ms Doyle had followed the attendance management procedure because that was her job to do so. The letter of 3 October 2016, for what it is worth, pre-dated the 19 October 2016 in any event. But the management processes followed by the Respondent were not affected by the Claimant's grievances. The processes were followed because they were the appropriate processes for the matters in question.

11.10 There is a further grievance dated 3 November 2016. This grievance was against Ms Doyle. This grievance was succinctly expressed. A box was ticked alleging disability harassment. This grievance is likely to amount to a protected act. However, again, it did not influence Ms Doyle's adherence or application to the appropriate policy. It is accordingly irrelevant.

11.11 There is a further grievance dated 13 February 2017. It relates directly to the performance management rating of 'development needed'. We refer to that below. It was not relevant, not least because of its date to the application of the attendance management policy. Similarly, a further grievance dated 28 February 2017, again focussing essentially on the performance management rating ('PMR') and one-to-ones. We deal with these matters below. Again, this grievance pre-dates the attendance management policy and is not relevant to that matter.

11.12 There is, we find, no prima facie case that the formal warning of the 11 January 2017 was given because the Claimant had brought a grievance. The warning was fully explained by the policy itself, and the reasons for giving it made sense entirely separately from any grievance. Accordingly, there is no prima facie case of victimisation.

11.13 There is no liability in respect of the warning of 11 January 2017.

12. <u>The marking of 'development needed' on the Claimant's PMR dated 30 January 2017</u>

12.1 There was a mid-year marking of 'development needed' for the year 2016-2017. Mr Arif, the delivery manager, overturned the mid-year marking. That marking, however, was confirmed for the end of year marking in a process, said to be a benchmarking validation. The issue that we are to determine appears to be restricted to the mid-year marking. A regrettable lack of paperwork was kept by the Respondent in respect of its decision-making for these markings. This may be down to the process.

12.2 The idea is that the PMRs are completed electronically. The employee is to fill in his or her sections and e-mail them across to management; management is then to fill in its' sections. The idea, as we understand it, surprised though we are, is that it is an individual employee who should then keep the final PMR documentation. Whilst the Claimant completed her contribution to the PMR document, it seems that she printed these out, rather than e-mailed them. Having printed it out, Ms Doyle took the copy with her and the Respondent is unable to show us a completed document from Ms Doyle. We do know, however, that the PMR marking was 'development needed'. And the best clue to this is the

content of the decision of Mr Arif, the delivery manager, when he overturned the marking. He did this in an e-mail dated 1 March 2017. He amended the mid-year marking to good. He made reference to a discussion he had with the Claimant, he said he was concerned about the fact that it was clear that she was unaware of how the PMR system worked and that when they spoke the previous month, the Claimant was clearly confused about the marking that she had received. He needed to explain to her what the marking meant and how her behaviours had led to that marking. He was concerned that nothing had been issued in writing to her and for that reason he overturned the marking from improvement needed to good. He however went on to say the following, and I quote:

> "Although I have done this, please be aware that I remain concerned about your behaviours. We simply cannot have a situation where you are constantly in conflict with your line manager to the point where you are questioning why she is holding regular discussions with you. The fact remains that Carole is your manager, and it is her job to meet regularly with her staff. I recognise that for a long time before I took over, you rarely had management visits, however, it is my opinion that managers should have regular contact with their staff and this will not be changing. You need to work with your manager and your colleagues. This is a basic behaviour expected of all staff and I am confident that Carole's regular visits will help in this area. I would urge you to work with Carole in a constructive manner so that when your next review comes up your behaviours are consistent with the very good work you do on a day-to-day basis in your clerking role".

12.3 So what behaviours is he talking about? It was alleged and found in a disciplinary process that on 25 October 2016 the Claimant spoke to an agency colleague in an inappropriate way. The colleague was called Louisa Mark. Louisa Mark prepared a statement having first telephoned Ms Doyle. The statement said the following:

> "On 25 October, approximately around 09:15 in the morning, I was approached by Jackie Riley, she seemed to be quite annoyed with me for clearing out the cabinets that is based in our main office. In an abrupt confrontation manner, she said "who gave you permission to clear out the cabinets", I explained to Jackie that because she had just come back from sick leave, whilst she was being phased into work I had to find something to do, particularly in the mornings whilst she clerked. I tried to explain that between me and the management I had to see if there was anything that needed to be done in the office, ie clearing old books, and to make myself useful with any help that was needed around the office. Jackie began to complain that it was very rude and disrespectful of me to go into the office cabinets and clear things out without consulting her. She began to say very abruptly that she also works in the office, has done for many years and that I had disposed of her things. I apologised to Jackie and asked her what I might have thrown away. She stated I threw away records of proceeding sheets, she had under laptop. I was a bit puzzled by this, because as to my knowledge, I never went nowhere near her laptop. However, to avoid any further confrontation I just kept apologising saying it wasn't intentional. At this point Jackie said she was going to report the incident as I had no right to

throw things away without speaking to her. The problem I have with this matter, firstly, were the panel members in Court 1 that could hear our conversation, I take this very seriously as I pride myself on being efficient and gracious, not rude and disrespectful as Jackie described. I wasn't particularly impressed that the panel members could hear this. Secondly, when I was clearing out the cabinets I was supervised partly by Tatiana. Things I can recall throwing away were old Yellow Pages books dated 2007, old TNT records dated 2011 and other old materials. At no point did I see anything with Jackie's details. However, I cannot be too sure. Nevertheless, I do not deserve to be spoken to in that manner. As a result of how she spoke to me I became very distressed and upset and she said that she was going to report me. Being as I am only a temp, I take these comments very seriously as I know how easy it is being disposed of. I was also very nervous to see Jackie the next day as I wasn't sure if she was going to complain again. She hardly spoke to me the following day, only to say hi and bye which I thought was very immature, but I can respect her decision. As a result, this has caused massive tension in the office, making it very awkward and uncomfortable to work in her presence."

12.4 Ms Doyle then came to see the Claimant on 16 November 2016, hoping to deal with this matter informally. She wrote up that experience as follows:

"Jackie said it was Louisa who was being disrespectful by throwing away her stuff. I asked Jackie what was thrown away and Jackie said her laptop stand. I asked Jackie what exactly this was, to which Jackie explained it was polystyrene packaging which the laptop came in originally. But she placed her laptop on top of it every night and this stopped the laptop from rolling around the cabinet. I said that Louisa or anyone could have thrown that away not knowing what is used for and that Louisa did not intentionally throw away her stuff. Jackie said that Louisa also threw away TNT slips which she says she was keeping to investigate overcharging by TNT some time last year. I again said that if these things were not marked up as belonging to her, these things could be thrown away by anyone. I said Jackie had not made me aware of any overcharging by TNT and if I was made aware, I would deal with it or pass it on to someone in finance to investigate. I informed Jackie that the way she spoke to Louisa was unacceptable and Louisa was left very upset. Jackie said she was upset and annoyed her things had been thrown away. I replied that she could have called me to discuss this matter but she should not have confronted Louisa in the manner she did. Jackie was becoming quite aggressive with me and said that I was the reason she is like she is. She went on to say that she had raised a grievance against me and she will be doing another one against me. I asked Jackie to calm down and said she doesn't need to speak to me in this manner. Jackie was raising her voice, saying her stuff should not have been thrown away. She also brought up the issue that she has more work than the other clerk. Tatiana came out of Room 1 and said she can hear Jackie's voice in her Tribunal. I informed Jackie that the way she spoke to Louisa and the way she was talking now is not acceptable and we have all signed up to the Civil Service Code of Conduct and this incident should have been dealt with differently."

The clerk, Tatiana, produced a short statement stating that she could hear the Claimant raising her voice against Ms Doyle.

12.5 In her witness statement, Ms Doyle says it was a result of these upsets which led her to give the Claimant a marking of 'development needed' at the mid-year review. On the balance of probability, we find that although the PMR is very poorly documented by the Respondent, these reasons are valid. The reason why the Claimant received a 'development needed' PMR was down to the behaviours recorded in these statements.

12.6 To analyse this then against the issues in the case. The reason for the marking then, was the behaviour. Does the behaviour relate to a disability? It has been the Claimant's case, as pointed out to us by Mr Kirk, that the feature of her disability is said to be something arising from it, was her absence. It has not been said that her outburst was a something arising from her disability. As a pleading point then, Mr Kirk submits that the Claimant is not entitled to argue that her outbursts were in anyway arising from her disability. In terms of direct discrimination, the likelihood is that a non-disabled person, with the same capacities of the Claimant, would have been subject to the same marking. Such a person also, would have been challenged about their behaviour. Even if this behaviour arose from the Claimant's disability for the purposes of a section 15 claim, the Respondent would be justified in saying that the behaviour had to be improved. So, it would be able to justify as a proportionate means of achieving a legitimate aim giving an 'improvement needed' grading. It cannot be reasonably be said by the Claimant that this matter amounted to harassment because the behaviour, on the balance of probability, took place. Further, Ms Doyle was entitled to challenge it in the way that she had done. Initially, Ms Doyle wanted to deal with the matter informally but the Claimant's response to that meant that an informal attempted failed and it was open to Ms Doyle to record the matter as PMR issue, as well as escalate to a disciplinary matter. There is no prima facie evidence that any grievance brought by the Claimant interfered with the process or gave the Respondent any reason to deal with the matter otherwise than it would have done so anyway, as a matter of minor misconduct. There is no prima facie case of victimisation.

12.7 The end of year marking is not in the list of issues. We know, however, that the end of year marking was also 'development needed' and that this matter was the subject of a validation meeting that took place at the end of the year. The validation meeting is recorded, Mr Arif approved the marking, although checked for himself that the same matters were not relied upon as had been relied upon for the mid-year marking, which of course he had overturned. But the view expressed in respect of the Claimant by Ms Doyle and validated by Mr Arif and other managers, was that there was good performance; there was however non-cooperative behaviour; a lack of respect towards management and colleagues; an ability to understand objectives; but creates conflict amongst the

team and can isolate team members with behaviour; makes it difficult to plan work; does not act on advice about behaviours when a change is required; higher than expected level of interventions by management; fails to adopt the required professional behaviour by the business. The Respondent points to the outcome of some one-to-one meetings that it sought to introduce as a result of the mid-year PMR. But as we have recorded, the end of year marking is not a subject of the issues. The mid-year marking was.

12.8 In terms of the liability issues we have to deal with, there is no prima facie case of liability attaching to the mid-year marking.

12.9 That said, the Tribunal is surprised and expresses its concern and hopes that the Respondent will respond positively to the clear lack of adequate recording in this case of the basis for the PMR. The whole process of PMR recording needs to be reconsidered, it seems to us by the Respondent.

13. Requiring the Claimant to attend one-to-ones on the 1 February 2017, 15 February 2017 and 1 March 2017

13.1. Ms Doyle decided it would be a good idea to conduct more regular one-to-ones with the Claimant to try and resolve matters between the Claimant and the Respondent. The PMR marking was the reason for, together with the recent episodes resulting in the disciplinary process. Mr Arif supported Ms Doyle in this regard. We should point out that the Enfield Tribunal has no resident manager. There is some security provision provided by a third-party contractor. There was one full time clerk, Tatiana, the Claimant working 3 days a week and other clerks would be sent across from Anchorage House in Docklands to make up the rest of the week or to cover annual leave. Ms Doyle reached the conclusion that it would be sensible to attend more frequently to provide greater management assistance.

13.2. On 30 January 2017, the day before the first one-to-one was due, the Claimant objected to Ms Doyle attending because she had brought formal grievances against her. The matter went to Mr Arif who advised the Claimant that Ms Doyle was still the Claimant's line manager and would be conducting the one-to-ones with her. He mentioned the need for the one-to-ones, given the 'development needed' marking. This further corroborated that it was that marking, not absences, which indicated the need for more frequent one-to-ones. There was a brief meeting on 1 February 2017 to explain the processes that would be followed. Again, Ms Doyle's records of these one-to-ones are not full, but what records there are suggest these meetings were not successful.

13.3. There is a note which must be 15 February 2017 of a one-to-one meeting with Jacqueline Ryley. The notes are to the effect: Meeting

with Jackie to discuss concerns regarding her performance, and in particular her attitude and behaviours. The incident with Louisa is referred to, it was explained that her behaviour towards Louisa was unacceptable, as was the way she talked to her and they discussed the work changes that were being implemented and whether she understood that those changes were centrally controlled by the listing team in Sutton.

13.4. There is a brief reference to the third meeting on 1 March 2017. The meeting is recorded as not having been a productive meeting.

13.5. Again, there is an unfortunate lack of detail in record keeping. However, the Tribunal is satisfied that the requirement to have the one-to-ones was not less favourable treatment on the grounds of disability: a non-disabled person with the same abilities and the same position as the Claimant, would have been subject to the same management response. If it is possible to link behavioural outbursts to the disability, and we accept Mr Kirk is right, that this has not been pleaded, then nonetheless, the Respondent justifies having these one-to-ones for the reason that Mr Arif set out in his e-mail. It was entirely reasonable, that there should be greater management involvement in the Enfield office, given the history. We have little doubt that the Claimant did regard this as harassment, but it was not reasonable for her to do so. She should have acknowledged that Ms Doyle was trying, in fact, to help smoothen relationships in Enfield in the hope that the service could be delivered in a functioning, acceptable way. No grievance influenced the course of the decision to hold one-to-ones. Management was exercising its managerial discretions as to the appropriate way to run the office uninfluenced by any grievance. There is no prima facie case of any disability discrimination cause of action here.

14. <u>The formal disciplinary warning on 25 April 2017</u>

14.1 Samantha Pardoe, the delivery manager in Sutton in Surrey conducted the disciplinary hearing. She found the behaviour described above in the witness statements as being proved on the balance of probability and found that to be minor misconduct meriting the issuing of a written warning be on the Claimant's record for 6 months. It was entirely open to Miss Pardoe to find that on the balance of probability, the misconduct had taken place. She found correlation in account between what the Claimant said and what Louisa Mark said, and the Claimant accepted to her that she had raised her voice when dealing with Ms Doyle, when Ms Doyle came to discuss the matter. The Claimant has made some observations of detail before us, but in terms of the guts of the matter, Ms Pardoe was entitled to reach the conclusion she did. She did not do so on the basis of any discrimination. There was no less favourable treatment on the grounds of disability. A non-disabled person

having behaved in the same way as the Claimant, would have been treated in the same way. Insofar as the behaviour is said to arise out of the disability, then the employer can justify issuing a warning as a proportionate means of achieving the legitimate aim of requiring good behaviour at work. The Claimant cannot reasonably regard this as harassment. It is simply the Respondent doing its job. No grievance operated on the mind of Ms Pardoe, Ms Pardoe was unfamiliar with the background detail of the Claimant's case. There is no prima-facie case of victimisation. The decision was upheld on appeal by Julia Johnson on the 14 July 2017.

15. <u>The allegation the Claimant makes relates to workload</u>

15.1. The Claimant had a long-standing complaint that the case load she is asked to clerk is too great. She says she regularly does not enjoy a lunchbreak and regularly has to stay at work until 6pm when security insists she leaves.

15.2. We accept that the listing for the judges and the panel members is administered out of Sutton in Surrey. The Claimant's workload in this regard is the same workload as the judges and panel members. Social Security clerks have to perform duties different, for example, from Employment Tribunal clerks in that they have to record the decision and indeed upload it into the system. That said, the workload is essentially controlled by listing in Sutton. The Claimant wishes to argue that Ms Doyle and the Respondent's managers have routinely given her the heavier lists in comparison with her colleague, Tatiana. She says they have done this by way of victimisation and by way of harassment. The Claimant does not adduce any cogent body of evidence, showing that as a matter of routine, the lists of the cases she clerks are more demanding than the lists of her colleague, Tatiana. We understand that the Claimant routinely works in Tribunal 2, Tatiana in Tribunal 1. Ms Doyle can allocate the pre-existing list to a clerk. She says that she has tried to mix it up. Internal grievances have looked at this matter and they have not found any pattern of allocation singling out the Claimant. The Claimant has pointed to several examples of days in the documentation before us, in which her lists are more onerous but she has not adduce a body of cogent evidence showing that this routinely is the case. And in the absence of such a body of evidence, this allegation simply does not get off the ground. Furthermore, we note that the Claimant has been raising matters of workload before 2013 and insofar as that is the case, it seems difficult to isolate the issue of workload to the managers in respect of the more recent issues that we are concerned with.

15.3. It may be that the Claimant has working time points to be made about the amount of cases that are listed to her Tribunal. It may be that there is insufficient consideration given to the implications for those who have to clerk the cases. It seems to us that if there are

points to be made, the level is at a higher level, at listing level in Sutton. It does not appear to be in the hands of the local managers in Anchorage House. Be that as it may, the Claimant has not adduced a coherent, cogent body of evidence from which we can find any such pattern in the context of the present claims. Accordingly, these claims in respect of workload fail.

16. The Future

16.1. It is perhaps not appropriate for us to make any substantial comments about the future. The Claimant will be subject to management processes, as appropriate. But Mr Arif did lead us to believe, and we hope he is right, that there is a job open for the Claimant to perform at Enfield. She is presently signed off. We understand that again, difficulties have been encountered in arranging effective consultation with occupation health. We express the hope that the Claimant will engage with occupational health, that she will not find obstacles preventing her from engaging with them and with stress risk assessments. Occupational health reports and stress risk assessments would be able to take into account any features of the Claimant's disability that might be addressed by way of reasonable adjustments for example. But preventing stress risk assessors and occupational health from doing their work, neither assists the Respondent nor the Claimant.

16.2. All we say is that we hope those matters can be resolved and we hope that the Claimant can, once again, perform her role well. We have seen plenty of evidence of the papers that she has been described as a good performer. However, in terms of any claim of disability discrimination the allegations that she has brought before us fail and we dismiss the claims.

Conclusions

17. The Respondent knew or ought to have known that the Claimant was disabled by reason of a generalised anxiety condition from the date of the workplace agreement, being 16 December 2013. She remains so disabled.

18. The Respondent did not discriminate against the Claimant, however, in –

(a) the Claimant's workload;

(b) contacting the Claimant during sickness in 2016;

(c) a return to work to work meeting on 19 October 2016;

(d) issuing a formal attendance warning on 11 January 2017;

(e) giving a 'development needed on the Claimant's PMR on 30 January 2017;

(f) requiring, or in the course of 1:1 meetings with Carole Doyle on 1 February and 1 March 2017;

(g) issuing a formal disciplinary warning on 25 April 2017.

19. The detailed reasoning is set out under the sub-headings above.

20. At paragraphs 16.1 and 16.2 we express our hopes for the continuing employment relationship.

21. At paragraphs 8.8 and 8.9 we make some comments about poor record keeping by the Respondent, in particular a lack of co-ordination between central and local records.

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Employment Judge Smail

Date: 27 June 2019

Sent to the parties on: 8 July 2019

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For the Tribunal Office

APPENDIX 1: THE ISSUES

1. Time limits / limitation issues

1.1 Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010? Dealing with this issue may involve consideration of subsidiary issues including: whether there was conduct extending over a period; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred.

1.2 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 25 November 2016 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

2. Disability

2.1 Was the Claimant a disabled person in accordance with the Equality Act 2010 at all relevant times because of her anxiety condition?

3. Direct discrimination because of disability (section 13)

3.1 Did the respondent subject the Claimant to the following treatment:

3.1.1 the issuing of a formal attendance warning by Carole Doyle on 11 January 2017 (ET1 paragraph 54 on page 156);

3.1.2 the marking of 'development needed' on the claimant's PMR on 30 January 2017 (ET1 paragraphs 59-65 (1));

3.1.3 the one to one meetings which the Claimant was required to attend with Carole Doyle on 1 February 2017 and 1 March 2017 (ET1 paragraphs 59-65 (1));

3.1.4 the issuing of a formal disciplinary warning on 25 April 2017 (ET1 paragraph 65(2)).

3.2 Was that treatment "less favourable treatment", i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

3.3 If so, was this because of the Claimant's disability and/or because of the protected characteristic of disability more generally?

4. Discrimination arising from disability (section 15)

   4.1 Did the Claimant's sickness absence during the period 5 September 2016 to 17 October 2016 arise in consequence of the Claimant's disability?

   4.2 Did the Respondent treat the Claimant unfavourably as follows:

      4.2.1 the issuing of a formal attendance warning by Carole Doyle on 11 January 2017 (ET1 paragraph 54 on page 156);

      4.2.2 the marking of 'development needed' on the claimant's PMR on 30 January 2017 (ET1 paragraphs 59-65 (1));

      4.2.3 the one to one meetings which the Claimant was required to attend with Carole Doyle on 1 February 2017 and 1 March 2017 (ET1 paragraphs 59-65 (1));

      4.2.4 the issuing of a formal disciplinary warning on 25 April 2017 (ET1 paragraph 65(2)).

   4.3 Did the Respondent treat the Claimant unfavourably in any of those ways because of her sickness absence?

   4.4 If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

   4.5 Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

5. Disability harassment (section 26)

   5.1 Did the Respondent engage in conduct as follows:

      5.1.1 unreasonable contact with the Claimant while she was off sick by her manager, Carole Doyle during the period 5 September 2016 to 17 October 2016 (ET1 paragraphs 39-40);

      5.1.2 interrogation of the Claimant by her manager, Carole Doyle at a return to work meeting on 19 October 2016 (ET1 paragraph 43);

      5.1.3 the issuing of a formal attendance warning by Carole Doyle on 11 January 2017 (ET1 paragraph 54 on page 156);

      5.1.4 the marking of 'development needed' on the claimant's PMR on 30 January 2017 (ET1 paragraphs 59-65 (1));

5.1.5 the one to one meetings which the Claimant was required to attend with Carole Doyle on 1 February 2017 and 1 March 2017 (ET1 paragraphs 59-65 (1));

5.1.6 the issuing of a formal disciplinary warning on 25 April 2017 (ET1 paragraph 65(2)).

5.2 If so was that conduct unwanted?

5.3 If so, did it relate to the protected characteristic of disability?

5.4 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6. Victimisation (section 27)

6.1 Did the Claimant do a protected act for the purposes of section 27 of the Equality Act 2010? The Claimant relies on:

6.1.1 six grievances made in 2013;

6.1.2 a grievance dated 19 October 2016;

6.1.3 a grievance dated 29 November 2016;

6.1.4 a grievance dated 13 December 2016;

6.1.5 a grievance dated 28 February 2017

6.2 Did the Respondent subject the Claimant to any detriments as follows:

6.2.1 during the period from her return to work on sick leave on 18 October 2016 to date of claim, giving the Claimant a higher workload than her full-time colleague (including a higher number of cases, having to stay later and not having a lunch break) (ET1 paragraphs 1-2 and 26);

6.2.2 the issuing of a formal attendance warning by Carole Doyle on 11 January 2017 (ET1 paragraph 54 on page 156);

6.2.3 the marking of 'development needed' on the claimant's PMR on 30 January 2017 (ET1 paragraphs 59-65 (1));

6.2.4 the one to one meetings which the Claimant was required to attend with Carole Doyle on 1 February 2017 and 1 March 2017 (ET1 paragraphs 59-65 (1));

6.2.5 the issuing of a formal disciplinary warning on 25 April 2017 (ET1 paragraph 65(2)).

6.3 If so, was this because the Claimant did a protected act?