



EMPLOYMENT TRIBUNALS

Claimant: Miss K. Almutairi

Respondent: Booking.com Customer Service Centre (UK) Limited

Heard at: East London Hearing Centre

On: 19-21, 25 and 26 June 2019
15 July 2019 (in Chambers)

Before: Employment Judge Massarella
Mr T. Burrows
Mrs T. Alford

Representation

Claimant: Mr V. Khanna (Representative)

Respondent: Mr P. Strelitz (Counsel)

JUDGMENT

The unanimous Judgment of the Tribunal is as follows.

1. The Claimant's claims of victimisation are dismissed on withdrawal.
2. The claims of failure to make reasonable adjustments do not succeed.
3. The claims of discrimination because of something arising in consequence of disability do not succeed.
4. The claims of indirect disability discrimination do not succeed.
5. The claims of harassment related to disability do not succeed.

REASONS

Earlier case management: the ambit of this hearing

1. This is a disability discrimination claim relating to the Claimant's employment by the Respondent as a Customer Service Executive. It contains complaints in relation to the period between September 2017 and April 2018. The last specific complaint relates to a decision which the Claimant alleges was taken on 9 April 2018. The ET1 was presented on 6 July 2018.
2. This claim was case managed by EJ Russell at a preliminary hearing on 20 September 2018, at which it was listed for a full merits hearing on the above dates in June 2019. On 26 March 2019 EJ Russell ordered that the hearing should deal with liability only.
3. The Claimant lodged a second claim on 7 February 2019 (Case No.3200301/2019), by which time she had resigned. This second claim contains further complaints of disability discrimination and a claim of constructive dismissal. The Claimant relies on the whole course of conduct, including the matters complained of in the first case, in support of her contention that there was a breach of the implied term of trust and confidence, entitling her to resign. Accordingly, any findings that this Tribunal makes in relation to the period up to April 2018 may also be relevant to her constructive dismissal claim.
4. A preliminary hearing to case manage the second claim took place on 17 April 2019 before EJ Barrowclough. The parties agreed at that hearing that the two claims should not be heard together. The Judge gave directions for the second claim and listed a further, closed preliminary hearing for 3 September 2019, by which time the outcome of the first claim would be known.
5. However, on 24 May 2019 the Respondent applied for the claims to be consolidated. That application was rejected by REJ Taylor on 14 June 2019. She ordered that the first claim should proceed on the dates already listed in June 2019 and that any applications in respect of the second claim could be considered at the September PH.
6. Insofar as either party led evidence in their witness statements in relation to matters which postdate April 2018, the Tribunal did not have regard to it.

The hearing

7. The Tribunal had an agreed bundle of documents, running to some 630 pages. Pages in the bundle are referred to below in square brackets.
8. We heard evidence from the Claimant, from her mother, Ms Fawziah Alkhelawii, and from her sister, Ms Najla Almutairi. We also had statements from Mr Malik Attitallah and Mr Amel Saci in support of the Claimant's claims. At the beginning of the hearing Mr Strelitz (Counsel for the Respondent) confirmed that he had no questions for those witnesses.

9. For the Respondent we heard evidence from Ms Alisa Westwood (Customer Team Leader and the Claimant's manager from mid-November 2017 onwards); Ms Caroline Bedford (Customer Service Manager and Ms Westwood's manager at the material time); and Ms Grace Gingo (HR Generalist at the time).
10. The Tribunal asked Mr Khanna (the Claimant's representative) whether she required adjustments for the purposes of the hearing. He confirmed that she might require additional rest breaks; she did not need a special seating arrangement or other adjustments. Accordingly, the Tribunal ensured that the Claimant's evidence was broken into manageable sessions and checked from time to time that she felt able to continue.
11. Having agreed a timetable for the hearing, the Tribunal spent the rest of the first day reading the witness statements and the majority of the documents referred to in them. At the beginning of the second day there was some discussion with the parties to clarify the issues.

Refinement of the list of issues at the start of the hearing

12. At the preliminary hearing EJ Russell had already produced an agreed list of issues [62-64] with the assistance of the parties (representation at that PH was the same as it was before us).
13. At the start of the hearing Mr Khanna asked to clarify one aspect of the Claimant's case on disability. With regard to her gastric disorder, Mr Khanna explained that this related to surgery that the Claimant had on her stomach, including earlier failed surgeries, and consequent difficulties arising from that, which manifested themselves in diarrhoea and vomiting every time she ate. The Respondent did not object to this clarification. Its position remained that disability was not conceded in respect of this impairment, although it was conceded in respect of the Claimant's mental health conditions.
14. There was also discussion about the reasonable adjustments claim. It appeared to the Tribunal that, given the nature of the PCPs, the Claimant must be understood to be contending for two further adjustments: disapplying published requirements as to punctuality; and exercising discretion to disregard disability-related absences for the purposes of the Respondent's sickness absence procedures. Mr Khanna agreed and these were added to the list of issues, again without objection from the Respondent.
15. The Respondent confirmed that the legitimate aims relied on for the purposes of the indirect discrimination claim were set out at para 41 of the ET3 [78]; those relied on for the purposes of the disability-arising claim at para 44 of the ET3 [79] (essentially the same aims).
16. For the avoidance of doubt Mr Khanna confirmed that a claim of direct disability discrimination was not pursued.
17. Finally, in the course of cross-examination, the Claimant clarified that the date of the first warning referred to in paragraph 4.15 of the list of issues was 19 October 2017 (not September).

The issues

18. Accordingly, the issues between the parties which fall to be determined by the Tribunal are as follows. The original numbering used in the PH Order of EJ Russell has been retained as the parties referred to this in their closing submissions. The clarifications referred to above are underlined.

Time limits/limitation Issues

- 4.1 Were all of the Claimant's complaints presented within the time limits set out in s.123(1)(a) & (b) of the Equality Act 2010 ('EqA')? This will include consideration of whether there was a series of acts or conduct extending over a period.
- 4.2 If out of time, is it just and equitable to extend time?

Disability

- 4.3 Was the Claimant a disabled person in accordance with the EqA at all relevant times because of the following condition(s):

- (a) depression;
- (b) anxiety;
- (c) ADHD; and/or
- (d) gastric disorder.

(a) to (c) are conceded; (d) is not.

'Gastric disorder' relates to surgery that the Claimant had on her stomach, including earlier failed surgeries, and consequent difficulties arising from that, which manifested themselves in diarrhoea and vomiting every time she ate.

Discrimination arising from disability: s.15 EqA

- 4.4 Did the Respondent treat the Claimant unfavourably by:
- (a) Ms Caroline Bedford refusing to amend her calls per hour target following her grievance on 6 April 2018;
 - (b) commencing disciplinary proceedings by reason for her absence;
 - (c) disciplining the Claimant for her lateness.
- 4.5 Was any such unfavourable treatment because of something arising in consequence of the Claimant's disability?
- 4.6 If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

The legitimate aims relied on in respect of the s.15 claim are set out at paragraph 44 of the Respondent's amended ET3 [79]. These are the same as those relied on in respect of the indirect discrimination claim set out below.

- 4.7 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?

The Respondent accepts that it had knowledge of the Claimant's mental impairments from 6 August 2017.

Indirect disability discrimination: s.19 EqA

- 4.8 Did the Respondent apply the following provision, criterion or practice (PCPs) to the Claimant and to persons who are not disabled?

- (a) a requirement to be punctual;
- (b) absence criteria; and/or
- (c) a required level of calls per hour.

- 4.9 Did the PCPs put disabled persons and the Claimant at a particular disadvantage?

- 4.10 If so, has the Respondent shown the PCPs to be a proportionate means of achieving a legitimate aim?

The legitimate aims relied on by the Respondent are as set out at paragraph 41 of the amended ET3:

- in relation to all three PCPs, the aim of maintaining good levels of customer service;
- in relation to PCP(a), the additional aims of ensuring a smooth transition between shift changeovers, consistency and customer service and fair distribution of workload between staff members;
- in relation to PCP(b), the additional aims of ensuring a fair distribution of workload and maintaining reasonable general absence levels; and
- in relation to PCP(c), the additional aims of enhancing efficiency of operations and employee effectiveness, maximising the availability of support to customers and providing a system for making performance-related decisions.

Failure to make reasonable adjustments: ss.20 & 21 EqA

- 4.11 Did the Respondent apply the PCPs as identified in the indirect discrimination claim?

- 4.12 If so, did the PCPs put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

- 4.13 Did the Respondent fail to take reasonable steps to avoid such disadvantage? The reasonable adjustments contended for are:

- (a) reducing the call per hours rate;
- (b) changing the Claimant's shift pattern from night shifts to day shifts;

- (c) disapplying published requirements as to punctuality;
- (d) exercising discretion to disregard disability-related absences for the purposes of the Respondent's sickness absence procedures.

4.14 Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was a disabled person?

Did the Respondent know, or ought it reasonably to have known, that the application of the PCPs put the Claimant at a substantial disadvantage?

Harassment related to disability: s.26 EqA

4.15 Did the Respondent engage in unwanted conduct related to disability as follows:

- (a) giving the Claimant warnings on 19 October 2017 and 15 January 2018;
- (b) placing the Claimant on a performance improvement plan;
- (c) disciplinary proceedings for being late/absent/not meeting the calls per hour requirement; and/or
- (d) delay in implementing day shifts.

4.16 Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Findings of fact

19. The Tribunal makes the following unanimous findings of fact.

The structure of the organisation

20. Booking.com Customer Service Centre (UK) Ltd (the Respondent) is part of the Booking.com group of companies, which provides online accommodation booking services. The Respondent specifically provides customer support services.

21. Most employees join the Respondent as agents, working on the frontline of the business, primarily taking calls or handling emails from customers. It is a 24-hour operation. Agents work on one of four shift patterns: 'earlies' (start time between 0700 and 0930 for 8-hour shift); 'mids' (start time between 1030 and 1230 for either an 8 or 10-hour shift); 'lates' (between 1530 and 2330); and 'nights' (starting at 2200 for either an 8 or 10-hour shift).

22. Agents report into Team Leaders, who are responsible for around 15 agents each. Team Leaders report into Customer Services Managers, who are each responsible for 7 to 10 Team Leaders, wherever possible for those Team Leaders who work on the same shifts as them.

The Claimant's health conditions

23. The Claimant was diagnosed with depression and anxiety with psychotic symptoms in around August 2013, when she was first admitted under the care

of Dr Jonathan Beckett at the Nightingale Hospital in Lissom Grove, London. He has continued to treat her since then.

24. The Claimant was diagnosed with ADHD in July 2014.
25. The Claimant also has a long history of issues relating to her weight. She first had a gastric band fitted in 2005, which was removed in 2011. She had a gastric balloon for six months from October 2015. She then had a gastric sleeve fitted in October 2016. Unfortunately, as a result of this last operation, she experienced ongoing pain. She consulted her GP several times and initially it was thought that it related to the number of surgeries that she had had. It was subsequently discovered that a piece of plastic tubing had been left behind after the removal of the gastric band. This was removed by way of an urgent operation on 23 August 2017, by which time she was in the Respondent's employment.

The start of the Claimant's employment

26. The Claimant commenced her employment on 9 January 2017 as a Customer Service Executive. She provided customer service over the telephone and by email, spoke to customers when they were experiencing problems or when they had an enquiry. She also liaised with hotels and sometimes had to change bookings or modify room types. She was part of a team dealing with calls in Arabic, which was her specialisation. She also dealt with calls in English when there were insufficient agents to deal with them on other lines. The same principle applied to others: so, for example, an agent specialising in French language calls might also be required to deal with English calls from time to time.
27. When the Claimant first joined the Respondent she completed a medical questionnaire [124a]. She accepts that she did not disclose in it any of the health conditions which she later raised, and on which she now relies in these proceedings. She explained that this was her first job and she was concerned that the Respondent might not wish to continue employing her if they understood the full extent of her health difficulties.
28. The Claimant was put on a night-shift pattern.
29. On 20 June 2017, by which time the Claimant had been working for the Respondent for some five months, Dr Beckett wrote to the Claimant's GP providing some information about her current mental state. That report was not provided to the Respondent at the time, nor seen by them until it was disclosed during these proceedings. Amongst other things he wrote:

'she is now working on a full-time basis as a customer services executive working in a call centre overnight to doing ten-hour shifts. She works four days a week. She seems to be tolerating the shift work quite well without any noticeable effect on her mental state. She has a previous history of having suffered quite a severe psychotic depression ... She also has a diagnosis of ADHD ... [her] major problem in recent times has been her weight. Things have improved to a certain extent since I last met with her as she has had a gastric sleeve operation carried out in October 2016, and following this she has lost 25 kg in weight and appears to have been able to sustain this for the moment at least.'

The Respondent's policy regarding punctuality and absence

30. The Respondent's disciplinary procedure [126] provided that three instances of lateness in excess of the grace period would be treated as misconduct. Clarification of this policy is contained in an email of 6 January 2017 [145]. Although this slightly predates the commencement of the Claimant's employment, she accepted in oral evidence that she was familiar with the policy, the substance of which is as follows:

'An employee is classified as being late if they are more than 15 minutes late for their shift, thus exceeding their 15-minute grace period. Lateness back from a break, lunch or personal time will not be considered lateness within our new procedure. However, if lateness back from breaks, lunches or personal time becomes excessive then your manager will raise their concerns regarding this with you and will take the appropriate steps to reduce this.

If an employee has three instances of lateness in a 12-month rolling period than expectations going forward will be set, along with appropriate support and our disciplinary policy will be initiated.

A new procedure for lateness is as follows:

- 3 instances = formal meeting with a potential outcome of a verbal warning.
- For each further lateness = a formal meeting to discuss the nature of the lateness with potential to progress within the disciplinary process.

Managers will apply discretion where appropriate depending on the individual case and all justified lateness will not count as an instance.'

31. The Claimant was late on three occasions: 15 March, 4 May and 27 July 2017. The Tribunal finds that there was no evidence that any of these instances was related to any of her health conditions. The Claimant later asserted that 'on one occasion I think I forgot my medication and had to return home – the others I can't remember' [304]. However, we know that that occasion was on 9 March 2017 because it is recorded in an email from her to Mr Ashwell of the same date [148]. Mr Ashwell appears to have accepted the Claimant's explanation and disregarded it.

32. With regard to sickness absence, the Respondent's policy is at [587]. The disciplinary process may be initiated once the employee has had three instances of absence in a 12-month period. The email at [145] referred to above provides clarification:

'if an employee has three instances of absence, or an instance lasting more than 10 days in duration, in a 12-month rolling period, absence expectations will be set, support discussed, and if required our disciplinary policy will be initiated.

- 3 instances = verbal warning

- 1 more absence = written warning
- 1 more absence = final written warning
- 1 more absence = dismissal.

...

Managers will apply discretion where appropriate depending on the individual case.'

33. The Claimant was also absent through illness on a number of occasions and these are set out below.

The Respondent's policy regarding performance targets

34. The Respondent also set targets in relation to performance.
- 34.1. The 'adherence' criterion related to the amount of time an agent made themselves available to deal with customers. For example, if an agent was scheduled to be available for four hours, but they only spent three of those hours logged into the system as available and servicing calls, they would have an adherence of 75% [133].
- 34.2. The 'finalise time' criterion relates to the amount of time an agent spends dealing with the consequences of a customer call which had been completed, for example the administration arising out of it.
35. The Claimant consistently had difficulties meeting those targets. However, it was not suggested as part of her claim that they ought to have been adjusted and consequently the focus of evidence and submissions was exclusively on the third target: calls per hour ('CPH'). This related to the number of calls or emails the agent was expected to deal with per hour. The normal target which agents were expected to meet, which was applied across the whole organisation, was 6.5 CPH. In analysing performance the Respondent looked at average figures and a single day's failure to meet the target would not in itself lead to action. This recognised the fact the some calls lasted much longer than others.
36. Finally, with regard to customer satisfaction there is no question that the Claimant was able to meet this requirement. There are many examples in the bundle of positive feedback in terms of the Claimant's customer service. Moreover she was a popular member of staff, who involved herself with great enthusiasm in the life of the organisation.

The Respondent's knowledge of the Claimant's mental health conditions

37. With regard to the Claimant's mental health difficulties, we find that the Respondent first had knowledge of these when she provided her line manager, Che Ashwell, with a letter from Dr Beckett dated 27 July 2017 [166], under cover of an email on 6 August 2017 [169]. In that letter, addressed 'To whom it may concern', Mr Beckett explained in some detail the seriousness of her long-standing mental health conditions and asked that adjustments be made to the Claimant's working arrangements in light of the impact the current arrangements were having on her mental health:

'I have been made aware that Khulud has been working nights on a shift system for Booking.com over the last few months. She has also been set a number of performance targets which she is finding very hard to meet. I would like to indicate that both of the above situations are currently impacting on her mental health. When I most recently met with her on 24 July 2017, she presented as more depressed and anxious in light of the pressures she feels under at work. The night shifts are impacting on her mood in her sleep pattern both directly and also indirectly by the lack of opportunity she has to engage in exercise and socialising for instance. The fact that [she] may be unable to meet her performance targets is likely to be a reflection of her mental health conditions and not necessarily a reflection of underperformance at work in my view. I would like to point out that Khulud's conditions meets the criteria for falling under the Equality Act and as such are deemed to be disabilities.

In light of the above, I would like to request that a number of adjustments are made to Khulud's working pattern. In the first place I would like to request that she is granted the opportunity to work day shifts rather than night shift as this will promote better mental health for her. Secondly, I would like to request that adjustments be made to reduce the expectations of her performance targets which in my view seem to be unrealistic in relation to what can be expected of her given her condition.'

38. We do not accept the Claimant's evidence that she told Mr Ashwell about her mental health problems before that date. There was no evidence to support this.

The Claimant's health in August 2017

39. The bundle also contains a letter from Dr Beckett dated 16 August 2017 [479], in which he records a crisis in the Claimant's life, describing a very serious incident which it is not appropriate to record in this Judgment. In her witness statement (para 20) the Claimant gives the impression that this incident was work-related. According to Dr Beckett's account, however, it was precipitated by factors in her private and family life wholly unconnected to work. Indeed, the only reference to work in that letter is as a positive factor ('Khulud is now relatively more independent as she has a full-time job').

The initial response to the notification of the Claimant's mental health problems

40. Mr Ashwell forwarded Dr Beckett's letter to HR on 6 August 2017 [169], asking how he should proceed. Ms Gingo of HR replied on 7 August 2019, suggesting that Mr Ashwell seek more background information, advising that they initiate the recommendation regarding a change from night to day shifts and proposing a referral to OH in case there was anything else they needed to consider [168].
41. Mr Ashwell had a meeting with the Claimant on 10 August 2017 and gleaned more information about her health conditions [172]. With regard to her depression he notes that 'sometimes working nights has an impact on mental state due to being fatigued'. With regard to ADHD he notes that 'Khulud is easily distracted. Sometimes Khulud struggles to complete tasks doing to getting distracted so somethings can take longer to complete and for someone

without the condition.' There was no mention of the Claimant's gastric disorder in the email, the tone of which was supportive.

42. The OH appointment took place on 6 September 2017 [182] with Dr Jayne Moore. Although Dr Beckett's letter had not been included with the referral, the Claimant's mother, who attended with her, provided a copy. The report dealt with the depression and ADHD, noting that the latter disorder caused a difficulty in maintaining focus and attention to tasks in hand. There was a reference to the fact that the Claimant had had bariatric surgery in the form of the gastric sleeve, 'which means that she has to maintain a regular routine with her eating'.
43. The OH report noted that the Claimant was 'struggling with working night shifts, which did not allow her to maintain a regular day/night balance, interfering with her sleep pattern and her ability to take her medication on a regular basis'. Later in the report Dr Moore commented that 'allowing her to work daytime shifts would allow her to keep her medication pattern intact, give her the opportunity to eat a normal meal times and therefore keep her metabolism in order, and allow her to manage the gastro-intestinal changes that she has experienced after her surgery'. There was no reference in the OH report to the Claimant experiencing diarrhoea and vomiting whenever she ate.
44. Dr Moore recommended that a move to daytime shift work could be considered as a reasonable adjustment. There is no reference to any recommended adjustment to her CPH targets. The Tribunal is surprised by this omission, given its prominence in Dr Beckett's letter. The Respondent appears to have overlooked the issue.
45. Perhaps as a result of this, Mr Ashwell ignored the advice contained in Dr Beckett's July letter and continued to apply the standard CPH target of 6.5. He did not apply flexibility to the targets, unreasonably in our view. By email of 7 September 2017 Mr Ashwell wrote to HR, noting that the Claimant's performance continued to be a concern, saying that he had already extended the Claimant's probation and was considering terminating her employment [183B].
46. The Tribunal notes at this point that, although the Claimant received consistently good feedback in terms of customer relations, she often fell far short of the 6.5 target for CPH. For example, in an email on 18 May 2017 [159] Mr Ashwell noted that her results had dropped from 5.21 in the previous quarter to 3.9 in the current quarter. In the email of 7 September 2017 Mr Ashwell records that the Claimant's CPH score for July was 5.23.
47. However, despite his indication that he was considering moving to dismissal, no steps were taken in that direction and Mr Ashwell continued to manage the Claimant's performance through September and October [184, 187].
 - 47.1. In an email of 13 September 2017 he wrote to the Claimant again saying that her CPH for the previous week had been 'very low'.
 - 47.2. On 18 September 2017 [194] Mr Ashwell records that her CPH for the previous week was 3.82.
 - 47.3. On 27 September 2017 [200] her CPH was 6.2.

47.4. On 2 October 2017 [197] it had fallen again to 3.19.

48. In this last email Mr Ashwell informed the Claimant that he would be arranging a formal meeting with her to discuss her performance. We accept that Mr Ashwell's approach to performance management caused the Claimant considerable anxiety.

The change to day shifts

49. The Respondent did not act on the OH recommendation that the Claimant be moved to day shifts until 1st October 2017. On that date the Claimant wrote to Mr Ashwell:

'after seeing my Dr and occupational health doctor I think it would be best to change my shift to days. I would like to start the mid shift Saturday to Tuesday 10 hours shift' [sic].

50. When he received the email of 1 October 2017 Mr Ashwell passed on the Claimant's request [192] and by 5 October 2017 [204b] the request had been approved, but the start date was not until 1 January 2018. The Claimant knew this at the latest by 11th October because it was mentioned in her Performance Improvement Plan ('PIP') [205]. Given the lapse in time and the fact that Mr Ashwell is no longer employed by the Respondent, the Respondent was in a position of having to speculate as to why a date so far in the future had been set. Its witnesses believed that it may have been a decision taken by the capacity planning department. Ms Bedford's evidence was that that capacity planning appeared not to have been told that this request related to the making of reasonable adjustments for an employee and that there was a degree of urgency in the matter.

51. On 12 October 2017 Dr Moore of OH wrote to HR:

'[the Claimant] has been in contact with occupational health and she is concerned that the adjustments being considered for her condition may not come into play until the beginning of the year. She reports finding that her symptoms have increased she would like to avoid further deterioration of her condition. She is thus requesting that the adjustments are considered in the near future.'

52. The Claimant also emailed Mr Ashwell to the same effect on Friday 13 October. On the following Monday Mr Ashwell replied that he had 'escalated' the issue [211].

53. The Claimant was informed at the meeting of 18 October 2017 (see below) that management and HR supported a start date on 1 November 2017, but they were still 'waiting for confirmation'. The Tribunal infers from this that they were still awaiting confirmation from capacity planning. The Claimant chased confirmation of this by emails of 23 and 25 October [227, 229]. On 26 October Caroline Jansen (CS Seasonal Team Leader) chased on her behalf. On 27 October the Claimant wrote to Caroline Bedford, setting out the position.

54. It is apparent that once Ms Bedford became involved in the matter a resolution was achieved almost immediately. In cross-examination she said: 'I had the shift pattern changed within a day'. She provided final confirmation of the

change by email of 30 October 2017 [241]. The Claimant started on day shifts on 13 November after a short period of annual leave between 4 and 12 November 2017 [237, 251].

55. It took the Respondent just under three months from receipt of Dr Beckett's letter to arrange this change of shift. Although a date of 1 November was agreed in principle by 18 October, and the Claimant informed, it was clear that the delay in final confirmation of the move date did cause the Claimant anxiety, as evidenced by her chasing a final answer on a number of occasions (see para 53 above). In view of the fact that, when Ms Bedford became involved confirmation of the Claimants move to days from 1 November was given within 24 hours, we consider it is likely that an earlier intervention by her (or another member of the management team) would have led to an earlier confirmation and prevented the Claimant's feeling anxious.

Disciplinary action regarding absence and lateness

56. In the meantime, on 18 October Mr Ashwell invited the Claimant to a disciplinary meeting concerning her absences from work through illness [215]. This related to seven periods of absence, the reasons for which are conveniently summarised in the later email from the Claimant herself, dated 23 October 2017 (in which she lodged her appeal against Mr Ashwell's decision):
- '7th March – 1 day – ear infection.
 - 2nd May – 1 day – admitted to hospital due to stomach problem. (Dr note attached)
 - 7th June – 1 day – related to stomach problem. (Dr note attached).
 - 19th July – 3 days – family issue/my sister was admitted in the hospital with a serious complication. (Dr note attached)
 - 23rd August – 2 days – surgery day (surgery discharge letter attached)
 - 30th August – four days – post surgery not fit to work assist by doctor. (Doctors note attached)
 - 6th October – 5 hours 45 mins – mental status (Dr note attached).'
57. The Tribunal notes that only one of these absences (the last) related to the Claimant's mental health condition; one was unrelated to her own health; the others all related to the Claimant's stomach problems.
58. The meeting took place on 19 October 2017. Mr Ashwell pointed out that, under the Respondent's policy, 3 absences would normally be regarded as excessive, and that on this occasion, no action had been taken until the Claimant had had 7 absences. The notes of the meeting record that Mr Ashwell treated the absence of 19 July 2017 as family-related, in respect of which 'we won't take any further action'; they also record that he treated the absence of 23 August as emergency leave rather than sickness absence, which again suggests he discounted it. However, the outcome letter itself [218] relies on all the absences without distinguishing between them, including the single absence connected with the Claimant's mental health issues.

59. The Claimant was issued with a verbal warning under the Respondent's Attendance Policy [218]. This had an effect on her bonus (which would be reduced by 50%). The record of the meeting is at [223].
60. On 23 October 2017 the Claimant lodged an appeal against the verbal warning [226]. She subsequently withdrew that appeal. In her statement (para 43) she asserts that 'I was pressured by both Werner Baron and Libby Hinton to not proceed with my appeal'. The Tribunal does not find that she was pressured, rather that she was encouraged to put the matter behind her and she agreed. In our view, this is regrettable: firstly, because the Claimant appears to have a tendency to wish to please and to be compliant, which the Respondent must have been aware of; and secondly, because Mr Ashwell's analysis of the reasons for the absences lacked clarity. If anything, she should have been encouraged to proceed with her appeal.

The Performance Improvement Plan initiated by Mr Ashwell

61. On 11 October 2017 Mr Ashwell put the Claimant on a Performance Improvement Plan ('PIP'), which was scheduled to last for 30 days. The Claimant was required to achieve a minimum level of 6.5 CPH by 11 November 2017. In the Tribunal's view this was not a reasonable course of action. Mr Ashwell was aware of Dr Beckett's advice, including the fact that the Claimant was struggling with the performance targets because of her mental health condition. Moreover, he put her on the PIP at a point when, over two months after Dr Beckett had recommended a change from night shifts to improve her mental health, a resolution still had not been achieved. We find support in our conclusion from the fact that the PIP was revoked almost as soon as Ms Westwood took over line management of the Claimant.

The move to day shifts

62. When the Claimant moved teams in order to start work on the day shift, Ms Bedford asked Ms Westwood to line manage the Claimant. She identified her as a suitable person because Ms Westwood had previous experience of managing an employee with mental health issues, as well as relevant experience from her personal life.
63. Mr Ashwell sent a handover email to Ms Westwood on 12 November 2017 [248]. He mentioned the verbal warning he had issued in October and the PIP he had initiated. In this email, which is generally very positive in tone about the Claimant as an individual, Mr Ashwell specifically flags up her mental health issues and the impact they had on her work. He states that, in his opinion, she was distracted easily because of her ADHD. He notes that any additional task distracted her from completing her core duties and did not recommend any distractions (such as involvement in organising social activities) until she had reached the required performance levels. He notes his understanding that the Claimant's depression was 'controlled and currently not an issue'. Mr Ashwell refers to the Claimant's history of surgical intervention on her stomach; he mentions the removal of the plastic tube; he does not refer to any ongoing problems thereafter, such as diarrhoea or vomiting.
64. The Claimant had a meeting with Ms Westwood on 13 November [266]. Ms Westwood proposed that the Claimant aim to improve her CPH to 6 by the end

of the quarter. We note that this is already an adjustment down from the 6.5 which Mr Ashwell was seeking to impose. By 21 November 2017 Ms Bedford had advised Ms Westwood to revoke the PIP, a decision which the Claimant welcomed [269A].

Ms Westwood's management of the Claimant's performance between 13 November 2017 and 11 February 2018

65. Ms Westwood initiated informal, regular weekly one-to-ones with the Claimant; her progress can be tracked in a series of tables at [277 to 283]. The holding of weekly meetings was itself an adjustment to the normal practice, which was to hold such meetings monthly. The Claimant agreed in evidence that Ms Westwood encouraged her to set targets for herself, which she did; they were not imposed on her. She agreed that Ms Westwood was doing what she could to help her achieve them. We accept Ms Westwood's evidence that she encouraged the Claimant to be realistic in setting those targets. They were initially quite modest, beginning at 5.5 in the week commencing 27 November 2017 and moving very gradually over the few weeks to 6. By 28 January the agreed target had still not exceeded 6. Generally, the Claimant was able to meet the CPH targets and sometimes exceed them. It was in respect of other targets, not relied on for the purposes of this claim, that the Claimant appeared to struggle more.
66. On 7 December 2017 the Claimant had another appointment with Dr Beckett. In a letter dated 11 December [501], which the Respondent did not see at the time, he wrote:

'This was my first opportunity to meet with Khulud since September. Her mental state has improved. I was encouraged to hear that she has been moved back onto doing day shifts at work as her working on night shifts was clearly affecting her mental state. She reports feeling well.'

There is no reference to the Claimant struggling with targets at work. He goes on to record other external stressors, unconnected with the Claimant's work, which it is not appropriate to record in this Judgment.

The sickness absence/lateness disciplinary procedure in January 2018

67. On 26 December 2017 the Claimant left work 3 hours before her shift was due to end because she was experiencing pain in her jaw. She was then absent for a further three days. At the return to work meeting [283A], the notes record that 'this is the first time this has happened – not connected to any other sickness'. The Tribunal heard no evidence, other than a bare assertion by the Claimant, that it was related to the Claimant's mental health conditions or indeed her gastric disorder. We find that it was not.
68. This triggered a further disciplinary hearing, which took place on 15 January 2018, conducted by Ms Westwood [303]. At the meeting she stated that it was to consider six instances of sickness absence and three instances of lateness since March 2017. It is clear from the letter inviting the Claimant to the meeting [291-293] that instances of sickness absence relied on did not include the Claimant's absence on 6 October 2017 which, the Tribunal has already found (at paras 56-57 above), was the only absence which related to her mental

health condition. That this instance was disregarded was confirmed by Ms Westwood in her witness statement (at paragraph 28).

69. The Claimant was issued with a written warning.
70. On 18 January 2018 the Claimant appealed against the warning [328]. She argued that the three instances of lateness should not have been taken into account as they had already been dealt with the previous year by Mr Ashwell. The Claimant also asked that the Respondent consider her health conditions, over which she said she had no control. Ms Bedford invited the Claimant to an appeal meeting scheduled for 23 January 2018 [331].
71. The rationale given in Ms Bedford's decision as to what was and was not taken into account by Mr Ashwell and Ms Westwood appears to us to be confused. She found [336] that Mr Ashwell had dealt with the issue of lateness (which it appears to us he had not) and that it had formed no part of Miss Westwood's decision (which we think it had).
72. Ms Bedford rejected the appeal. In her outcome letter [338] she summarised the policy we have set out above, including the various triggers for disciplinary action. The absence on 26 December 2017 was the sixth instance within a 12-month period, which could have resulted in a more serious outcome than the written warning which had been issued. She recorded that the Claimant had agreed at the appeal meeting that this last absence was unconnected with her mental health conditions.

Ms Westwood's initiation of a PIP on 12 February 2018

73. On 12 February 2018 Ms Westwood initiated a further 45-day PIP, which set a CPH target of 6, rather than the 6.5 (the usual target). The initial plan [341] recorded that, with regard to current performance, the Claimant had already achieved an average of 6.11 for the month of January, although her performance was variable, sometimes comfortably exceeding it, sometimes falling some way short of it. Under the PIP the Claimant was required to 'reach and maintain a consistent CPH of 6'. The plan did not focus solely on CPH; it also recorded concerns in relation to the Finalise and Adherence criteria and targets were set in relation to them. The PIP also contained a note of support measures and strategies which Ms Westwood intended to put in place to assist the Claimant.

The Claimant's working relationship with Ms Westwood

74. At this point it is appropriate to record that all the evidence, including numerous WhatsApp messages between the Claimant and Ms Westwood which were in the bundle, suggests that they had an extremely positive relationship. Indeed, the Claimant accepted in cross-examination that they were friends as well as colleagues. In the welfare meeting on 9 April 2018 to which we refer below, the Claimant made a point of saying '[I] want to mention Alisa my team leader [Ms Westwood], she is very supportive and always checking how I am feeling, if I'm having a down day how she can help me.' That evidence is quite at odds with the Claimant's assertion in her witness statement that Ms Westwood treated her in a belittling and condescending manner.

The Claimant's health in February and March 2018

75. On 19 February 2018 there was another very serious episode related to the Claimant's mental health, which it is not appropriate to record in this Judgment [506]. In a letter of 26 February 2018 [508], which again the Respondent did not see at the time, Dr Beckett wrote that 'Khulud is clearly under a huge amount of stress at the moment and in the context of this has relapsed back into depression with mixed anxiety features'. In the remainder of that paragraph he outlines a number of causes for the Claimant's condition, including serious financial pressure and acute personal conflict within her family, which we do not summarise, other than to say that they include very serious immigration concerns: the family was at risk of deportation to Saudi Arabia. We note in passing that Ms Westwood later agreed to provide a letter in support of the Claimant for a forthcoming immigration hearing.
76. Only in the last sentence does Dr Beckett mention that 'she has not been coping at work and has had to take time off recently'. In fact, her last period of absence had been at the end of 2017. Insofar as the Claimant's witness statement (at paragraphs 55 and 56) suggests that Ms Westwood's decision to put her on a PIP caused this very serious episode, we reject that suggestion. It is clear from Dr Beckett's letter that the operative causes were factors in the Claimant's private life, not her working life.
77. The Claimant then had a further period of sickness absence between 2 and 29 March 2018.

The Claimant's grievance and the welfare meeting on 9 April 2018

78. On 31 March 2018, anticipating the Claimant's return to work, Ms Westwood wrote to the Claimant inviting her to a welfare meeting [358]. She explained:

'The purpose of the meeting is to discuss the following:

- Your medical condition and the prognosis for the future.
- Discussion of what Booking.com can do to help [you] return.
- What are you doing to mitigate your absence?
- Consideration of job adjustments, if applicable.
- Consideration of alternative employment/job roles to enable you to return.
- The way forward/ongoing reviews/our process.'

79. On 31 March 2018 [350] the Claimant emailed Ms Westwood, stating:

'On 22 March 2018 at my appointment with my Consultant Dr Jonathan Beckett, we discussed about going back to work. He still believes that number 2 of the adjustment[s] he stated on my medical report attached below, dated 27th of July 2017, has not been addressed and needs to be addressed as soon as possible and [in] a timely manner, for it not to affect and impact my mental health and well-being negatively. As I fit under the Equality Act. Thank you for your continuous help and support.'

The adjustment referred to was in relation to targets.

80. Ms Westwood replied:

‘So I think this would be good to have a really good discussion about it on Tuesday when we catch up with HR and possibly Caroline.’

81. On 6 April 2018 the Claimant raised a formal grievance [362]. She wrote (amongst other things):

‘I want to raise a grievance. The reasonable adjustment for my disability has not been put in place and I see this as disability discrimination. The first matter that needs to be dealt with immediately and urgently is the 2nd work adjustment point on the medical report dated 27th of July 2017 by Consultant Psychiatrist Dr. Jonathan Beckett.

Secondly, my absence due to my health with proven medical record and evidence, and how it was dealt with, whether it was directly or indirectly related to my disability. Moreover, how the last action against me affected my mental health dramatically.

Thirdly, I was upset by the length it took to change my shift pattern from night shift to day shift and the impact of the lengthy transition period on my health.

I would like you to respond to me in 5 days, if you don't respond to me and have my work adjustments put in place, I have the legal right to go to an Employment Tribunal.’

82. The welfare meeting took place on 9 April 2018. In her opening remarks at the meeting Ms Westwood said this: ‘before I start I am aware you raised a grievance and we would like to clarify anything which you need us to respond to or if you would like to proceed with your formal grievance’.

83. In the course of the meeting agreement was reached about a way forward. Ms Gingo explained that she, the Claimant and Ms Westwood would sit down together to prepare a referral form to OH, which would include all the necessary information about the Claimant's health conditions and how she said that work was negatively impacting on them. A request would be made for recommendations as to what support should be provided to avoid that impact. An OH meeting would then take place. OH would then provide a report of recommendations, including recommendations as to further reasonable adjustments. The Claimant said that she was happy with this proposal.

84. Ms Bedford asked the Claimant whether, in the light of this plan, she still wanted them to look at her grievance and the Claimant said No.

85. The Claimant asserts that at this meeting Ms Bedford closed the door on any further flexibility in the application of her performance targets. We reject that. The notes specifically record that Ms Bedford said towards the end of the meeting:

‘we will refer you to occupational health, be fair with your targets and make reasonable adjustments, work on your plan, i.e. development. It's important when you have a bad day as soon as you come in to inform us so we can support you as always.’

86. On the other hand, we find that it was highly regrettable that the Respondent sought to deal with the question of the grievance at this meeting without even warning the Claimant that it intended to do so. Some of the issues the Claimant had raised in her grievance (the forward-looking matters) could properly be addressed at the welfare meeting; some (the retrospective issues, such as the delay in implementing the shift change) could not. It would have been better practice, and ultimately more reassuring to the Claimant, to hold a separate grievance meeting. We do not accept that the Claimant was deliberately ambushed, as she suggests, but we consider that the approach taken, although well-intentioned, was ill-advised.
87. On the following day, 10 April 2018, in the middle of her shift, the Claimant noticed that her speech was slurring and she was dribbling slightly when she was drinking. She then experienced a severe headache and pain in her face. It later emerged that she was suffering an episode of Bell's palsy. She had had a previous episode of this in 2006 [510]. As soon as Ms Westwood became aware of what was happening, she called an ambulance and the Claimant was taken to hospital.

The law

Time limits

88. S.123(1)(a) EqA provides that a claim for disability discrimination must be brought within three months, starting with the date of the act to which the complaint relates.
89. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.
90. A relevant factor in whether or not a series of acts is to be regarded as an act extending over a period is whether the same person is responsible for each of the acts: *Aziz v FDA* [2010] EWCA Civ 304 at para 33.
91. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so. That is a very broad discretion.
92. In exercising that discretion, the Tribunal should have regard to all the relevant circumstances. They will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

93. Failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused (*Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278 at para 16). There is no requirement for exceptional circumstances to justify an extension (*Pathan v South London Islamic Centre*, UKEAT/0312/13/DM at para 17).
94. In a claim for a failure to make reasonable adjustments, the limitation period runs from the time at which the employer could reasonably have been expected to make the adjustments. This should be assessed from the Claimant's point of view (*Abertawe* at paras 14 to 15).

Disability

95. S.6(1) EqA provides:
- A person (P) has a disability if –
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and adverse long-term effect on P's ability to carry out normal day to day activities.
96. 'Substantial' is defined in s.212(1) EqA as meaning 'more than minor or trivial' and is a low threshold.
97. The 'long-term' requirement is developed in para 2, Sch.1 to the EqA which provides, so far as relevant:
- (1) The effect of an impairment is long-term if –
 - (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.
98. The statutory Guidance on the definition of disability (2011), in the section 'Meaning of Impairment' at paragraph [A3] states:
- 'The definition requires that the effects which a person may experience must arise from a physical or mental impairment the term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to forward the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.'
99. At paragraph [A7] the following example is given:
- 'A woman is obese. Obesity in itself is not an impairment, but it causes breathing and mobility difficulties which substantially adversely affect her ability to walk.'
100. In *Walker v Sita Information Networking Computing Ltd*, UKEAT 0097/12 at para 18 the Eat confirmed that obesity is not in itself a disability but it may be

related to, or make it more likely that, someone is disabled by reason of some other impairment.

Failure to make reasonable adjustments: s.20 EqA

101. The requirements of the duty to make reasonable adjustments are set out in ss.20-22 and 39 EA 2010, and paras 1, 2, 5 and 20 of Schedule 8.
102. By sch.8, Part 3, para 20(1)(b) Equality Act 2010 the duty to make adjustments does not arise unless:
 - 102.1.the employer knew, or should have known, that the employee was disabled and additionally:
 - 102.2.the employer knew, or should have known that the PCP(s) placed the employee at a substantial disadvantage compared to others.
103. The EHRC Code (Para 6.16) emphasises that the purpose of the comparison with persons who are not disabled is to determine whether the disadvantage arises because of the disability and that, unlike direct or indirect discrimination, there is 'no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's'.
104. However, there must be a causative link between the PCP and the disadvantage; the disadvantage must arise out of the application of the PCP (*Nottingham City Transport Ltd v Harvey*, UKEAT/0032/12/JOJ at para 17).
105. In *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160, the Court of Appeal held that a disabled employee whose disability increased the likelihood of absence from work on ill-health grounds, was disadvantaged in more than a minor or trivial way by the application of a sickness absence procedure, as the risk of being ill in circumstances which might lead to disciplinary sanctions was obviously greater for a person whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirement relating to absenteeism and therefore be disadvantaged by it.
106. The reasonableness of an adjustment falls to be assessed objectively by the ET (*Morse v Wiltshire County Council* [1998] IRLR 352). The focus is on objective reasonableness in terms of the expectations on the employer, not on whether the employee subjectively regards the adjustment as reasonable: see the Code at para 6.23.

Discrimination arising from disability (s.15 EqA)

107. S.15 EqA provides as follows:
 15. Discrimination arising from disability
 - (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

108. The correct approach to a claim of this sort was considered by the Court of Appeal in *City of York Council v Grosset* [2018] IRLR 746 *per* Sales LJ:

‘36. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability.

37. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something" ...

38. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something"’

109. The Code of Practice issued by the Equality and Human Rights Commission offers the following explanation of what is meant by something arising in consequence of disability for the purposes of s.15 of the EqA:

5.9 The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.

110. It is then necessary to look to the employer's defences of justification (s.15(1)(b)). The issues for determination are: whether the treatment in question had a legitimate aim, unrelated to any discrimination based on any prohibited ground; whether the treatment was capable of achieving that aim; and whether in the light of all the relevant factors, the measure was proportionate.

Indirect disability discrimination

111. The concept of indirect discrimination is set out at s.19 EA 2010:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

112. As identified in *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160, there is a substantial overlap between indirect discrimination and discrimination arising from disability, and between indirect discrimination and discrimination arising from a failure to make reasonable adjustments. However, a key distinction between indirect discrimination, and claims under s.15 and s.20 EA 2010 is the need to show group disadvantage. It is therefore necessary to show that the PCP causes a disadvantage to persons with C's particular disability, see s.6(3) EA 2010:

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

Harassment related to disability

113. Harassment related to disability is defined by s.26 EqA, which provides, so far as relevant:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

...

disability

...

114. In *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 the EAT held at para 22:

'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to

the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

115. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at para 47 held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'

116. He further held (at para 13):

'When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.'

117. The change in the wording of the statutory prohibition of harassment from 'unwanted conduct on grounds of' the protected characteristic to 'unwanted conduct related to a relevant protected characteristic' must have been intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it (*Unite the Union v Nailard* [2018] IRLR 730).

Submissions

118. Both representatives provided helpful and detailed written closing arguments, for which the Tribunal was grateful. They also made oral submissions, having had an opportunity to read each other's written documents. We have taken into account those submissions in reaching our conclusions below.

Conclusions

Time limits

119. The Claimant notified ACAS on 5 July 2018 of her intention to issue proceedings and the EC certificate was issued on the same day. The ET1 was presented on 6 July 2018. Any act before 6 April 2018 is *prima facie* out of time.
120. The starting point is the Claimant's submission that all her claims amount to conduct extending over a period, culminating in the meeting of 9 April 2018, when the last alleged act of discrimination took place (Ms Bedford refusing to amend her calls per hour target). Because we have already found that act did not occur, that claim must fail and with it the argument that all the claims are brought into time by operation of s.123(3)(a) EqA.
121. We then went on to consider whether any of the earlier acts amounted to conduct extending over a period.

122. Firstly, we find that there was a distinct break in the continuum (or the 'state of affairs' to use the language of *Hendricks*) when the Claimant's line management passed from Mr Ashwell to Ms Westwood on 13 November 2017. With a new manager came a new, more effective approach. Accordingly, we find that the acts of Mr Ashwell do not amount to conduct extending into the period of Ms Westwood's management.
123. We then considered whether it would be just and equitable to extend time in respect of the matters relating to the Ashwell period (before 13 November 2017). We had regard to the following factors.
 - 123.1. We took into account the fact that the complaints in respect of the Ashwell period appeared to have some merit, as is apparent from our findings of fact.
 - 123.2. No explanation was provided as to why the Claimant did not act in time. We infer from all the circumstances that she took a conscious decision not to complain about that period at the time or soon after, whether through an internal process or Tribunal proceedings, but rather to move on under the management of Ms Westwood.
 - 123.3. There is clearly identifiable prejudice to the Respondent in terms of its ability to deal with these matters comprehensively: by the time the Claimant issued proceedings in July 2018, the issues relating to Mr Ashwell's period of management were over six months old; his employment had been terminated; and the documentary records which he left are not always easy to interpret.
 - 123.4. Although the Claimant would suffer prejudice by not being able to pursue these matters, she is, for reasons set out below, still able to pursue complaints in relation to the later matters.
 - 123.5. We consider that the prejudice to the Respondent outweighs the prejudice to the Claimant.
124. Weighing all these factors in the balance, in particular our conclusions as to the balance of prejudice, we consider that it is not just and equitable to extend time in relation to the claims about matters before 13 November 2017.
125. We find that the treatment of the Claimant during the period of Ms Westwood's management does amount to conduct extending over a period, precisely because the consistency of Ms Westwood's approach gave rise to a continuous state of affairs.
126. Consequently, if we consider it just and equitable to extend time in respect of the penultimate act complained of (the initiation by Ms Westwood of a PIP on 12 February 2018), then we accept jurisdiction in relation to all the claims in that period. In considering that issue, we have regard to the following factors.
 - 126.1. The length of the delay (just under two months) was substantial.
 - 126.2. The Claimant's explanation as to the reason for the delay is in one sense unsatisfactory. She was able to lodge a grievance in April 2018. It is apparent from that grievance that she must have taken legal advice by

that point, since she expressly refers to her right to bring Tribunal proceedings in it. If she could issue a grievance, Mr Strelitz argues, she could issue proceedings.

126.3. However, a day later on 10 April 2018, the Claimant had the incident of Bell's palsy. She was signed off work initially for a month, later extended to 4 months. We accept that this provides a compelling explanation for part of the subsequent delay, at least up to the middle of May 2018 when, as Mr Strelitz points out, the Claimant was actively collating evidence to prepare for a forthcoming hearing relating to her immigration difficulties [387-390].

126.4. The Respondent was in no sense responsible for the delay.

126.5. We do not consider that the cogency of the evidence in respect of the Westwood period was affected by the delay. The witnesses' recollection of these events appeared to the Tribunal to be good. The relevant decisions were amply documented in emails and meeting notes. No other prejudice to the Respondent was identified in Mr Strelitz's closing submissions and we find that there was none.

126.6. By contrast the prejudice to the Claimant of these claims not being heard would be substantial. She would be left without any potential remedy.

127. Weighing all these factors in the balance, in particular our conclusions as to the balance of prejudice, we consider that it is just and equitable to extend time in relation to the claims about matters after 13 November 2017.

Disability

128. The Respondent concedes that the Claimant's depression, anxiety and ADHD satisfy the statutory test for disability. It also accepts that it had knowledge of the Claimant's mental impairments from 6 August 2017.

129. Only the Claimant's gastric disorder is in issue. As we have recorded above, the specific impairment relied on was clarified at the beginning of the hearing as 'the surgery that the Claimant had on her stomach, including earlier failed surgeries, and consequent difficulties arising from that in terms of diarrhoea and vomiting every time she ate'. We agree with Mr Strelitz that, having allowed Mr Khanna to clarify the Claimant's case in this way, we must decide the case on the basis of that reframing.

130. It is not in dispute that the Claimant had a number of medical interventions in respect of her stomach over the years, with a variety of consequent symptoms. These were summarised at some length by Mr Khanna in his closing submissions. However, those submissions went far beyond his clarification of the case at the beginning of the hearing. That was not permissible.

131. The first issue for the Tribunal is whether in fact the Claimant did experience diarrhoea and vomiting every time she ate. The Tribunal finds that, on the balance of probabilities, she did not.

132. The Claimant elected not to provide a medical report in respect of this issue. The available medical evidence was limited. There is a letter attached to her

email to Mr Ashwell of 10 May 2017 from a Consultant, Mr Ahmed (dated 3 May 2017), which referred to the fact that she had been admitted to hospital for a period of three days for severe diarrhoea and vomiting. However, that related to the period before she had her corrective surgery in August 2017. In a 'bariatric dietician review' on 25 July 2017 (also before the corrective surgery) it is recorded that 'Khulud does not currently report any vomiting, nausea, heartburn or abdominal pain. Bowels are opened regularly approximately once a day with stools that are soft formed and easy to pass.' There was no reference in the OH report of 6 September 2017 to diarrhoea or vomiting.

133. As for the evidence given by the Claimant herself, in her disability impact statement there was no reference at all to diarrhoea; the Claimant does mention feeling sick sometimes after breakfast; she goes on to explain that she 'often [snacked] on unhealthy foods to keep me going' but makes no mention of experiencing vomiting every time she did so.
134. Ms Westwood's evidence (unchallenged in cross-examination) was that she often sat next to the Claimant at work. She was aware of the Claimant's frequent snacking, but not of her having the reactions described. She accepted that the Claimant needed more comfort breaks than others (which she accommodated), but not that she needed to take a break every time she ate. We accept that evidence on the balance of probabilities. We find support for our finding in a letter of 22 September 2017 [497], about a month after the corrective surgery, which mentions the fact that the Claimant was 'losing weight slowly' but does not refer to any adverse effects of diarrhoea and vomiting.
135. Although it is possible that the Claimant may from time to time in the past have experienced diarrhoea and/or vomiting connected to her gastric surgery, there is no evidence that at any stage those effects had lasted, or were likely to last, 12 months and so the long-term condition was never satisfied.
136. We accept the Respondent's submission that the Claimant has failed to discharge the burden on her to prove that her gastric disorder, as clarified by her representative at the beginning of the hearing, met the statutory test for disability during the material period.

The alleged acts of discrimination

Discrimination arising from disability: s.15 EqA

Issue 4.14 - Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was a disabled person by reason of her mental health conditions?

137. We have already found (para 37 above) that the Respondent had actual knowledge of the Claimant's disability by reason of her mental health conditions from 6 August 2017.

Issues 4.4 to 4.7 - Did the Respondent treat the Claimant unfavourably by: (a) Ms Caroline Bedford refusing to amend her calls per hour target following her grievance on 6 April 2018; (b) commencing disciplinary proceedings by reason of her absence; (c) disciplining the Claimant for her lateness because of something arising in consequence of the Claimant's disability.

138. With regard to (a) the Tribunal has already found (para 85 above) that Ms Bedford did not refuse to amend the Claimant's CPH target following her grievance on 6 April 2018. The possibility of further adjustments was left open pending the receipt of an OH report. Since the alleged treatment did not occur, the claim must fail.
139. With regard to (b), and (c), Ms Westwood did discipline the Claimant in January 2018 and this was unfavourable treatment. However, the Tribunal has already found (para 67 above) that the process was triggered by an absence (for jaw pain) unrelated to the Claimant's mental health conditions. Nor did the other instances of absence or lateness relied on in issuing the written warning arise in consequence of the Claimant's mental health conditions (see above at para 56-57) and the claim must fail.

Reasonable adjustments: s.20 EqA

Issue 4.11 - Did the Respondent apply the PCPs as identified in the indirect discrimination claim?

140. The PCPs contended for by the Claimant, both in respect of the reasonable adjustments and indirect discrimination claim, were as follows:
- (a) a requirement to be punctual;
 - (b) absence criteria; and/or
 - (c) a required level of calls per hour.
141. The Respondent accepts that it imposed (a).
142. With regard to (b), the Respondent accepts that there were absence criteria but not that they were, as the Claimant submits, 'a strict policy [which is] extremely rigid'; rather they were a framework within which managers were entitled, and expected, to exercise their discretion. We accept that. It is consistent with the terms of the absence policy set out above and the evidence we heard as to the way in which it was applied by the managers. However, we conclude that the application of this approach remained a 'practice' which falls within the definition of a PCP.
143. With regard to (c), we find that the Respondent did have a general requirement of 6.5 in respect of CPH, which Mr Ashwell applied to the Claimant. However, we have declined jurisdiction in relation to that period. As for the period of Ms Westwood's line management, we find that no fixed requirement was applied by her until the initiation of the PIP on 12 February 2018. She applied flexible targets which had been agreed in consultation with the Claimant. From 12 February onwards a fixed CPH of 6 was required, although this was itself an adjustment to the usual target.

Issue 4.12 to 4.13 - If so, did the PCPs put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? Did the Respondent know, or ought it reasonably to have known, that the application of the PCPs put the Claimant at a substantial disadvantage? If so, did the Respondent fail to take reasonable steps to avoid such disadvantage? The reasonable adjustments contended for are: (a) reducing the call per hours rate; (b)

changing the Claimant's shift pattern from night shifts to day shifts; (c) disapplying published criteria as to punctuality; and (d) exercising discretion to disregard disability-related absences for the purposes of the Respondent's sickness absence procedures.

144. With regard to PCP (a), we find that there is no evidence that the requirement to be punctual put the Claimant at a substantial (more than minor or trivial) disadvantage in comparison with persons who are not disabled. None of the instances of lateness, in respect of which action was taken, related to her disability and the claim fails at this stage.
145. With regard to PCP (b), we find that the application of the absence criteria did put the Claimant at a substantial disadvantage during the period in respect of which we have accepted jurisdiction, in that she was at greater risk of being subjected to disciplinary action, given her mental health conditions. We find that the Respondent knew, or ought to have known this; it was self-evident. However, we find that the Ms Westwood acted reasonably to remove the disadvantage by disregarding the only absence which was related to the Claimant's mental health conditions, namely the absence of 6 October 2017.
146. With regard to PCP (c), on the evidence we have heard it is unclear whether the CPH target of 6 put the Claimant at a substantial disadvantage as compared with non-disabled persons. On the one hand, the Claimant's average score for January 2018 was 6.11. On the other hand, her score varied markedly from week to week. There was not sufficient evidence before us to show that this variation was connected to her disability. The burden is on the Claimant to prove substantial disadvantage and we find that she has not done so. The claim fails at this stage. However, if we are wrong about this, we go on to consider the remaining issues.
147. As for whether the Respondent knew, or ought reasonably to have known, that a CPH target of 6 would put the Claimant at a disadvantage, Dr Beckett informed the Respondent that the Claimant was struggling to meet her CPH in his letter of 27 July 2017. However, at that time the CPH target was set at 6.5. Once Ms Westwood took over she consistently adjusted it down and it was always less than 6.5. We find that the Respondent did not become aware that a CPH target of 6 might be unrealistic until the Claimant raised her grievance on 6 April 2018. Up to that point, the Claimant had indicated that she could achieve it and was keen to do so. Indeed, she sometimes exceeded it. She did not at any point before 6 April 2018 state that she could not meet it because of her disability. Her claim, therefore, could only succeed from that date forward.
148. We find that it was not reasonable for the Respondent to have to reduce the Claimant's CPH target from 6 to a lower level on after 6 April 2018 without first seeking the advice of OH as to whether this was necessary, having regard to the Claimant's disability. The Claimant agreed at the welfare meeting on 9 April 2018 that this was a reasonable way forward and we have already found (para 85 above) that the Respondent left open the possibility of making further adjustments to the CPH target, if that accorded with medical advice. Unfortunately, the Claimant never returned to work and the OH assessment did not take place.

Indirect disability discrimination: s.19 EqA

Issues 4.8 to 4.10 - Did the Respondent apply the three PCPs set out above under the reasonable adjustments claim, both to disabled and non-disabled persons? If so, did they put disabled persons and the Claimant at a particular disadvantage? If so has the Respondent shown them to be a proportionate means of achieving a legitimate aim?

149. The Respondent applied PCPs (a), a requirement to be punctual, and (b), its absence criteria, equally to disabled and non-disabled people.
150. We have already found (at para 144) that PCP (a) did not put the Claimant at a particular disadvantage and that claim fails at that stage.
151. With regard to PCP (b), we find that the application of the absence criteria did put the Claimant at a substantial disadvantage during the period in respect of which we have accepted jurisdiction, in that she was at greater risk of being subjected to disciplinary action, given her mental health conditions. It follows logically that people who shared her disability would also be put at the same disadvantage by comparison with those who did not. However, we find that the PCP was justified. We reject Mr Khan's submission (para 68 of his closing) that it 'did not serve any purpose except punishment'. We accept the Respondent's contention that it was applied in pursuit of the following aims: maintaining good levels of customer service; ensuring a fair distribution of workload; and maintaining reasonable general absence levels. We find that those aims corresponded to genuine business needs within the context of the Respondent's intensive business model, having regard in particular to Ms Westwood's evidence (in her statement at para 24) as to the impact of absenteeism on the wider team. The practice of applying the absence criteria was an appropriate way of achieving the aims. Balancing the aims against their discriminatory impact, we find that the criteria were proportionate: built into them was a flexibility, which allowed managers to disregard disability-related absence. That is borne out in the Claimant's case by the fact that Ms Westwood disregarded the Claimant's absence on 6 October 2017, which was the only absence related to her mental health disability.
152. With regard to PCP (c) (a required level of CPH) for a claim of indirect discrimination to succeed it must be founded on a PCP applied equally to both disabled and non-disabled people. During the period of Ms Westwood's management, the Respondent applied different CPH targets to the Claimant (6 or less) from the default target applied to non-disabled employees (6.5) and this claim of indirect discrimination fails at this stage.

Harassment related to disability: s.26 EqA

Issues 4.15 to 4.16 - Did the Respondent subject the Claimant to harassment related to disability by (a) giving the Claimant warnings on 19 October 2017 and 15 January 2018; (b) placing the Claimant on a performance improvement plan; (c) disciplinary proceedings for being late/absent/not meeting the calls per hour requirement; and/or (d) delay in implementing day shifts.

153. With regard to (a), as for the warning given by Ms Westwood on 15 January 2018, Mr Khanna's closing submissions (at para 57) impermissibly seek to reframe this allegation in order to rely on remarks by an attendee at the meeting, Martin Carroll. It was not previously advanced on that basis. The Tribunal understood those claims to relate solely to the issuing of the warnings.

We accept that the warning of 15 January 2018 was unwanted conduct, but not that it related to the Claimant's disability, since none of the instances of lateness or absence arose out of the Claimant's mental health conditions. The claim fails at this stage.

154. As for (b) the placing of the Claimant on a PIP was unwanted conduct. However, for the reasons given above (at para 146), the Claimant has not discharged the burden on her to show that the decision was related to her disability and the claim fails at that stage. Even if she had, there was no suggestion (nor could there reasonably be) that Ms Westwood initiated the process with the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. As for the effect on the Claimant, she describes this in her witness statement (at para 27) as leaving her 'feeling on edge and anxious'. In the Tribunal's view that falls far short of the statutory test for harassment and the claim fails.
155. With regard to (c) there were no disciplinary proceedings in relation to the CPH target. As for the proceedings relating to punctuality and sickness absence conducted by Ms Westwood, we have already found (at para 139 above) that these were not related to the Claimant's disability and the claim fails. Alternatively, neither the bringing of the proceedings, nor the sanction which resulted, had the purpose or effect required under the statute. There was never any suggestion, as Mr Khanna suggests in his submissions, that the Claimant would lose her job as a result of these proceedings. If that was her perception, we find that it was not a reasonable one in all the circumstances, especially given her very positive relationship with Ms Westwood.
156. With regard to (d), this occurred during the period of Mr Ashwell's management, in respect of which we have declined jurisdiction.

Summary

157. For the reasons given above, the Claimant's claims do not succeed.

Employment Judge Massarella

Date: 21 August 2019