EMPLOYMENT TRIBUNALS

Claimant: Ms Angela Lal

Respondent: The Royal Wolverhampton NHS Trust

Heard at: Birmingham On: 8-10 July 2019
22 July 2019 (in Chambers - Tribunal alone)

Before: Employment Judge P Gilroy QC
Members: Mrs R A Forrest
Mr C J Ledbury

Representation

Claimant: In person
Respondent: Mr J Boyd (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The Claimant's claim of direct sex discrimination is not well founded and is dismissed.

2. The Claimant's claim of harassment on the grounds of sex is not well founded and is dismissed.

3. The Claimant's claim of victimisation, based on protected acts related to sex, is not well founded and is dismissed.

4. The Claimant's claim of direct disability discrimination is not well founded and is dismissed.

5. The Claimant's claim of discrimination arising from disability is not well founded and is dismissed.

6. The Claimant's claim of discrimination on the grounds of failure to make reasonable adjustments is not well founded and is dismissed.

7. The Claimant's claim of harassment on the grounds of disability is not well founded and is dismissed.

8. The Claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

Background

1. The Claimant presented claims against the Respondent of direct sex discrimination, contrary to s.13 of the Equality Act 2010, "EqA", harassment on the grounds of sex contrary to s.26 of the EqA, victimisation based upon the commission of protected acts related to sex, contrary to s.27 of the EqA, direct disability discrimination, contrary to s.13 of the EqA, discrimination arising from disability, contrary to s.15 of the EqA, failure to make reasonable adjustments, contrary to ss.20/21 of the EqA, harassment on the grounds of disability, contrary to s.26 of the EqA, and unfair dismissal. Having initially asserted a claim of breach of contract, the Claimant subsequently withdrew that claim.

The Issues

2. At a Preliminary Hearing for the purposes of Case Management, conducted on 3 May 2019, it was directed that the issues for the determination of the Tribunal were as follows:

Direct Sex Discrimination

3. Did the Respondent subject the Claimant to the following treatment:

    (i) Giving the Claimant less or no systems and work processes training compared to a male colleague, Daniel Edwards, after a merger with the Respondent's team in 2016 until August 2017.

        (a) For example, Adam Sharratt taking the Claimant off "Batch Prints" work, but leaving a male member of staff doing the work, so depriving the Claimant of the ability to learn and develop.

        (b) For example, in about May 2017, Adam Sharratt asked Daniel Edwards to help him with a piece of work and gave him training when Mr Edwards said he did not know how to do it, whereas the Claimant was not given training in work she was unfamiliar with.

    (ii) Was that treatment "less favourable treatment", ie: did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances ? The Claimant relies on the comparator, Daniel Edwards.

    (iii) If so, was this because of the Claimant's sex and/or because of the protected characteristic of sex more generally ?

Harassment related to sex

4. Did the Respondent engage in conduct as follows:

    (i) In about September 2016, when the Claimant was talking to Mr Sharratt about a piece of work, he said he did not like working with

women and he wanted to work in the Server Team because that team was all men (see footnote 1 below).

(ii) In about May 2017, Mr Sharratt said of the Claimant *"you are so demanding"*, and asked her if she would be doing screenshots for everything she would be doing, stating that she *"was just like Anna"*.

(iii) If so, was that conduct unwanted ?

(iv) If so, did it relate to the protected characteristic of sex ?

(v) Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and was it 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 ?

Victimisation related to protected acts concerning sex

5. Did the Claimant do a protected act ? The Claimant relies upon the following:

(i) On 20 September 2017, the Claimant complained to Simon Parton about the discriminatory treatment she considered she had suffered in respect of training and the sexually discriminatory comments made by Mr Sharratt to her.

(ii) In August 2017, the Claimant complained to Roshan Patel about the lack of training and sex discrimination.

6. The Claimant says that she was victimised for making the above complaints:

(i) by Simon Parton reacting angrily and complaining about her performance on 20 September 2017;

(ii) by Roshan Patel later denying to Amandip Sekhon after September 2017 that he had told the Claimant she did not get a band 5 role she applied for because of her lack of systems knowledge, and

(iii) by Simon Parton not providing payroll with relevant information about the Claimant's last pay so that there was a one month delay in payment. The Claimant should have been paid at the end of August and was not paid until September.

7. Did any of the conduct complained of at paragraph 6 above occur because the Claimant did a protected act and/or because the Respondent believed that the Claimant had done, or might do, a protected act ?

Direct disability discrimination

8. The Respondent has conceded that the Claimant was a disabled person within the meaning of the EqA at all relevant times, the disability being depression.

9. It is not in dispute that the Respondent subjected the Claimant to treatment in the form of dismissal.

10. Was that treatment "less favourable treatment", ie: did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances, the Claimant relies on hypothetical comparators ?

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

Discrimination arising from disability

12. Did the following thing(s) arise in consequence of the Claimant's disability:

    (a) Dismissal ?

13. The Respondent accepts that it dismissed the Claimant and that this was unfavourable treatment.

14. The Respondent dismissed the Claimant because of her incapacity to undertake her duties due to absence which arose from her disability.

15. Has the Respondent shown that the unfavourable treatment of dismissing the Claimant was a proportionate means of achieving a legitimate aim ? The Respondent relies on the aim of ensuring attendance in order for the Claimant's role to be carried out so that the service could be provided affectively.

Failure to make reasonable adjustments

16. The Respondent knew that the Claimant was a disabled person.

17. Did the Respondent apply a provision, criterion or practice, "PCP", to require the Claimant to continue working in the Service Desk group ? The Respondent accepts that it made this requirement of the Claimant. The Claimant asked to be moved in January 2018 and the Respondent replied a couple of days later denying the request.

18. Did any such PCP 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, in that: the Claimant was subjected to what she says was unfavourable treatment by some team members (Adam Sharratt, Anna Walcott) and some management members (Amandip Sekhon, Tracey Dunn-Bartlett, Simon Parton) which contributed to her depression ?

19. If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage ?

20. If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:

    (a) to be moved to a different team in a similar area, or a different area which the Claimant had been closely involved with, the Training Team.

21. If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time ?

Harassment related to disability

22. Did the Respondent engage in conduct as follows:

    (a) three days after the Claimant went off sick, Anna Walcott messaged the Claimant to say that she would not be contacting her and would be blocking her on Facebook.

    (b) Subsequently other team members blocked the Claimant from their Facebook account (Amandip Sekhon and Daniel Edwards).

Time Limits

23. Were all of the Claimant's above complaints presented within the time limits set out in ss.123 (1) (a) and (b) of the EqA ? Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained of occurred; whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures, and whether time should be extended on a "just and equitable" basis.

Unfair dismissal

24. What was the principal reason for dismissal and was it a potentially fair one in accordance with ss.98(1)(2) of the ERA ? The Respondent asserts that the reason was capability.

25. If so, was the dismissal fair or unfair in accordance with s.98(4) of ERA, and, in particular, did the Respondent in all respects act within the so called "band of reasonable responses" ?

26. The Claimant relies on the following aspects of the dismissal so as to render it unfair:

    (a) In June 2018, the Claimant informed the Respondent that she was hoping to return to work in September 2018 and completing counselling, but the Respondent unreasonably failed to take that into account and dismissed her.

    (b) The Respondent did not take into account the OH Report which stated that the Claimant would be returning to work after completing her counselling and undertaking a phased return.

(c) The Claimant's GP sick note stated that the Claimant was hoping to return after her counselling sessions ended and this was not taken into account.

(d) The Respondent would not listen in the appeal meeting to the Claimant saying that she was due to return to work, and dismissed the Claimant's references to her GP records.

Remedy for unfair dismissal

27. If the Claimant was unfairly dismissed, and the remedy is compensation, if the dismissal was procedurally unfair, what adjustment, if any, should be made to that compensation to reflect the possibility that the Claimant would either still have been dismissed had a fair and reasonable procedure been followed, or would have been dismissed in time anyway ? (***Polkey -v- AE Dayton Services Limited [1987] UKHL 8***).

Observations

28. In considering these claims, the Tribunal re-arranged the order in which they were set out in the Case Management Summary. Prudence suggests that it is preferable to consider any claim of unfair dismissal after due consideration has been given to any complaint of unlawful discrimination, on the basis that any dismissal involving unlawful discrimination is likely to be unfair, whereas not every finding of unfair treatment will necessarily result in a finding of unlawful discrimination.

29. In relation to the use of the term "for example" in the context of the above-mentioned complaints of unlawful discrimination, for the avoidance of doubt, that term is not used to suggest that the alleged treatment highlighted is merely illustrative. The matters set out at paragraphs 3 to 27 above form the entire basis of the complaints the Claimant invited the Tribunal to adjudicate upon.

Evidence and Material before the Tribunal

30. The Claimant gave oral evidence. The Respondent called as witnesses Mr Simon Parton (Head of ICT Systems & Application Services), Mr Kevin D'Arcy, (Head of ICT Project Management & Assurance), Ms Tracy Kenny, (Head of Technical Services) and Mr Neil Simmonds, (Head of Procurement). All witnesses who gave oral evidence provided written witness statements which were taken "as read" by the Tribunal and treated as their evidence in chief.

31. On the morning of the first day of the hearing, with the consent of the parties, the Tribunal determined that it would spend that morning reading the witness statements, and in so far as there was sufficient time to do so, reading the documents referred to in the witness statements. The hearing proper began at 1.30 pm.

32. The Tribunal was provided with an agreed bundle of documents [**R1**]. This was supplemented during the course of the hearing with the following: (a) an e-mail sent at 08:55 hours on 8 March 2017 from the Claimant to

Amandip Sekhon (Service Desk Manager), attaching screenshot "guidelines"; (b) Claimant's appraisal dated 20 May 2016, and (c) an undated appraisal believed to be dated 2017. The parties also produced an agreed chronology **[R2]**, and an agreed cast list **[R3]**. During the course of the hearing, Counsel for the Respondent provided a helpful document setting out a summary of the Respondent's position on the "issues" **[R4]**, and at the conclusion of the Hearing, Counsel for the Respondent provided written closing submissions **[R5]**, together with copies of the following authorities: ***BS -v- Dundee City Council [2013] CSIH 91 (Court of Session)***; ***DB Schenker Rail (UK) Ltd -v- Doolan (Unreported: UKEATS/0053/09/BI) [2011])***, and ***O'Brien -v- Bolton St Catherine's Academy [2017 IRLR 547]***. The Claimant also produced a document headed "Schedule of Loss/Statement of Remedy sought" [**C1**].

33. At the end of the second day of the hearing, it was pointed out to the Claimant that she would be permitted to rely on a written summary of her case at the conclusion of the evidence and prior to the Tribunal commencing its deliberations. It was suggested to her that she might find it useful to use Mr Boyd's summary document (**[R4]**) as a reference point in the event that she wished to prepare a written summary of her case. As matters transpired, the Claimant did not produce such a document but made short oral closing submissions in response to the oral submissions of Counsel for the Respondent, who essentially spoke to his closing submissions document.

Findings of Fact

34. The Tribunal made the following Findings of Fact:

The parties

(1) The Claimant was employed by the Respondent as a Service Desk Officer from 1 September 2008 until she was dismissed with effect from 29 June 2018.

(2) In her claim form, the Claimant stated that her job title was that of *"Diagnostic Support Officer"*. In the response form, the Respondent indicated that the Claimant's most recent role was that of *"Service Desk Officer (Band 4)"*. The Claimant's full job title was *"System Support Team Officer ICT Shared Service"*.

(3) The Respondent is an NHS Acute, Primary Care and Community Services Healthcare provider with over 8,000 employees who work at its New Cross, Cannock Chase and West Park Hospitals and numerous community centres in the Wolverhampton area.

The claims

(4) By a claim form presented on 6 October 2018, following a period of early conciliation from 7 August 2018 to 3 September 2018, the Claimant brought the claims referred to at paragraphs 3 to 26 above.

(5) The parties' respective cases were encapsulated in the Case Management Summary compiled after the Preliminary Hearing on 3 May 2019 in these terms:

"The claim is essentially about the Claimant feeling she was subjected to sex discrimination and unfair treatment, which resulted in her developing depression and being absent from work sick, for a prolonged period of time, and for which absence she was dismissed in circumstances which the Claimant considers unfair. In summary, the Respondent's defence is that it fairly dismissed for lack of capacity to undertake her duties and there was no discrimination".

Material events

(6) The Claimant commenced employment with Wolverhampton Primary Care Trust on 1 September 2008 and her employment transferred to the Respondent in 2011.

(7) In April 2016, the Claimant, together with her line manager, Ms Amandip Sekhon and another colleague, Mr Daniel Edwards, moved to the Respondent's New Cross Hospital site by way of a merger with an existing System Support Team at that hospital. Mr Edwards had joined the Respondent in 2014/15. At the material time, the Claimant was on Band 4, as was Mr Edwards. Mr Adam Sharratt was a temporary Band 5 staff member.

(8) The Claimant alleged that in September 2016, Adam Sharratt (Systems Support Team) made an inappropriate comment to her about how he did not like working with women and liked to work in an all male team. It was the Claimant's case that she met with Ms Sekhon to voice her concerns about Mr Sharratt's alleged comments and that she said that she would deal with the matter.

(9) There was no further mention of Mr Sharratt's alleged comments of September 2016 in the Claimant's witness statement.

(10) It was the Claimant's case that during March 2017, she was told by Mr Sharratt to stop contributing to "Batch Prints" work. The Claimant maintained that Daniel Edwards was not asked to stop contributing to this work. It was her case that Mr Edwards had been given more training which enabled him to do Batch Prints, which was essentially Band 5 work. The Claimant questioned Ms Sekhon about this and asked whether there were any problems with her work and she was informed that there were none.

(11) Ms Sekhon informed the Claimant that she could go to Ms Anna Walcott (a Band 5 colleague) and to Mr Edwards and ask to become involved in this type of work if she wished to do so. To the Claimant, this demonstrated that Mr Edwards had been given preferential help and guidance by Mr Sharratt, essentially to do Band 5 work, and that this would be to his advantage for further progression (and conversely her disadvantage). It was her case that she became demoralised and distressed as a result of this.

(12) On 19 April 2017, the Claimant asked to be referred to Occupational Health to whom she reported *"low mood in relation to her perceived breakdown of her working relationship with Daniel Edwards"*.

(13) It was the Claimant's case that in May 2017, she asked Adam Sharratt for help and in response he humiliated her by stating that she was *"demanding when trying to create a protocol"*.

(14) It is also the Claimant's case that in May 2017, Adam Sharratt asked Daniel Edwards to help him with bank holiday lists and provided further training to him. The Claimant had asked Mr Sharratt for some help and as he sat next to her, she brought up a "Word" document on the screen to be able to start on making screenshots for creating protocols for the process she had asked him to show her. As the document was loading, Mr Sharratt was said to have remarked to the Claimant: *"You're so demanding"* and laughed, got up and walked away to his desk. The Claimant said that this was very humiliating, embarrassing and distressing in that the comment had been made in front of the whole team. The Claimant further maintained that Mr Sharratt returned and as the Claimant began to do screenshots of what was happening, he questioned her, asking her whether she was going to do screenshots of everything he showed her. The Claimant alleged that Mr Sharratt said to her that she was *"just like Anna"* (a reference to another member of the team, Anna Walcott). Again, the Claimant found it degrading that Mr Sharratt should have questioned her instead of supporting her in creating protocols for future reference. The Claimant maintained that Mr Sharratt never spoke to or behaved towards Mr Edwards in such a way. The Claimant's case was that she had *"continuous meetings"* with Mr Sekhon to investigate these issues and that nothing was done. The Claimant also maintained that when she met with Ms Sekhon, the latter agreed with her as to Mr Sharratt's unacceptable behaviour, and yet nothing was done about the matter.

(15) In August 2017, the Claimant applied for a Band 5 Senior Service Desk Officer position. She was not appointed to the post. Mr Edwards succeeded in obtaining such a position. The Claimant alleged that this was discrimination. She had started in her post six or seven years before Mr Edwards, and had trained him.

(16) On 21 August 2017, the Claimant sought feedback from Amandip Sekhon in relation to her unsuccessful application for a Band 5 post.

(17) On 22 August 2017, the Claimant had a meeting with Mr Roshan Patel (Service Delivery Manager) to ask why she had not obtained the Band 5 post, amongst other concerns. The Claimant was told that she had been unsuccessful in her application because she did not have enough knowledge on the relevant systems. In the Claimant's view, the reason she lacked this competence was because she had not been given the same training and

opportunities as had been afforded to Mr Edwards. She suggested that she had been treated differently because she was a woman.

(18) Also on 22 August 2017, Anna Walcott sent the Claimant some text messages, essentially expressing support for her in relation to her perceived difficulties at work.

(19) Still on 22 August 2017, the Claimant asked Simon Parton (Head of ICT Systems and Applications Services) for a 1-2-1 meeting for the purpose of addressing a number of concerns and issues. Mr Parton agreed to the Claimant's request.

(20) As set out below, as matters transpired, the Claimant had three meetings with Mr Parton in August and September 2017. At the first meeting, the Claimant alleged that members of her team had deliberately given her wrong instructions and omitted her from training sessions. She raised issues of the inadequate handling of matters she had raised with line management about inappropriate comments made by other members of the team to her. Mr Parton said that he would investigate.

(21) Mr Parton met Mr David Hodgetts (Service Desk Manager) and Ms Sekhon and asked them to commence an informal and discreet investigation. This they duly did. Mr Parton also met with Mr Sharratt and then met again with the management team. Some time after the first meeting with Mr Parton the Claimant came to see him again and raised a further concern about the perceived lack of interview feedback she had had from Roshan Patel following her unsuccessful application in August for a Senior Service Desk Officer Post. Mr Parton asked Mr Patel to discuss matters with her. According to Mr Patel, the Claimant had been very assertive in her request for feedback, putting Mr Patel into a position whereby he had to provide such feedback in a condensed format due to prior commitments meaning that he could not spend as much time as he would have preferred in doing so. According to Mr Patel, the Claimant had declined an offer of further and fuller feedback at a later time.

(22) On 13 September 2017, the Claimant notified Amandip Sekhon and Mr Dave Hodgetts (Service Desk Manager) that from 4 October 2017 she would need Wednesdays off to attend her university course. This was agreed to by the Respondent.

(23) On 15 September 2017, Amandip Sekhon provided the Claimant with a response in relation to the concerns she had raised about Mr Sharratt allegedly excluding her. Three days later, the Claimant informed Ms Sekhon by e-mail that she did not wish to engage in discussions with Adam Sharratt.

(24) The third time Mr Parton met the Claimant was in order to provide her with feedback regarding his informal investigation relating to her concerns. The meeting took place on 20 September 2017. It was the Claimant's case that Mr Parton stated how angry he was at her for bringing things up that had occurred a long time ago. It was the

Claimant's case that Mr Parton then questioned the Claimant's work and what she had been doing in the past year and that he then angrily banged his computer mouse on his desk.

(25) It is the Claimant's case that she was sufficiently upset by this meeting that she went to the toilets and cried and had to leave work early, at 3.00 pm. She then went off sick from the next day because she was distressed and had severe headaches.

(26) Mr Parton's version of the meeting 20 September 2017 was that he explained to the Claimant that he had interviewed all of the individuals she had referred to in their first meeting. He said that he had found no evidence to support the denial of training or that there was any underlying discriminatory reason concerning the provision of training to the Claimant. He observed that the Claimant had had the same opportunity to undertake self-directed training as others and/or to seek support from line management, neither of which she had done. Mr Parton recalled that at the meeting the Claimant was visibly agitated. He denied that he was "angry" when relaying any of the information he provided to her. He denied that he banged his hand on his desk or his computer mouse. Mr Parton had met with Mr Sharratt and talked through the allegation against him. He had also spoken to team members to gain an understanding about Mr Sharratt's general demeanour and approach to both his work and his colleagues. He gained the impression that Mr Sharratt might engage in jestful behaviour at work. When questioned, Mr Sharratt suggested that he may or may not have made a comment in the past, he could not recall, but he certainly would not have made any offensive comments and would have apologised if any offence had been taken. No complaint had been made from any member of the team (including the Claimant) about Mr Sharratt's behaviour at the time of the alleged incident which was said to have occurred 12 months prior to Mr Parton's informal investigation. During that intervening year the Claimant and Mr Sharratt had enjoyed what appeared to be a positive working relationship.

(27) Mr Parton was unable to substantiate the Claimant's allegation that Amandip Sekhon and Daniel Edwards had colluded together to train one another and in doing so to exclude the Claimant. It was Mr Parton's evidence that at the meeting on 20 September 2017 he raised with the Claimant issues concerning her own performance.

(28) During her absence, the Claimant had to take anti-depressants and strong painkillers for her headaches. She also underwent Cognitive Behavioural Therapy and Counselling.

(29) On 21 September 2017, the Claimant called in sick and later that day sent a text message to Amandip Sekhon stating that she would not be coming into work for a few months due to work-related stress and depression. As matters transpired, 20 September 2017 was the last day the Claimant worked for the Respondent.

(30) On 21 September 2017, the Claimant submitted a medical certificate which indicated that she would not be fit to attend work from 21 September to 20 November 2017.

(31) It was Mr Parton's evidence that he met Anna Walcott some time around September 2017. She had received "WhatsApp" and "Facebook" messages from the Claimant asking for her opinions and other information. Mr Parton told the Tribunal that Miss Walcott had raised this with him because she said that she was feeling very uncomfortable as the situation was *"unravelling"* and she did not wish to be involved in it. Mr Parton's evidence was that he simply suggested to Miss Walcott that she should be careful with any social media messages or content and whilst Miss Walcott asked for advice as to the action she should take, he informed her that this was a personal matter outside of the working environment and that she should simply consider carefully how she should proceed.

(32) Soon after the Claimant went off sick, on 24 September 2017, she received a WhatsApp message from Ms Walcott, who stated that she had spoken to Mr Parton and now did not want to support the Claimant and that she was blocking her number and taking her off Facebook. The Claimant's case was that Mr Parton must have influenced Ms Walcott to behave in this manner and the Claimant further stated that she was depressed that Ms Walcott had decided to send her such a message. Shortly after the Claimant received Ms Walcott's messages, other members of the team took the Claimant off Facebook.

(33) Also on 24 September 2017, the Claimant was informed that she had been referred by the Respondent to the Health & Wellbeing service.

(34) On 12 October 2017, Amandip Sekhon wrote to the Claimant in relation to contact arrangements and support during her absence.

(35) On 19 October 2017, the Claimant attended Occupational Health ("OH") and withheld her consent for OH to report back to management in relation to her condition.

(36) On 24 October 2017, the Claimant attended her first management contact meeting with Amandip Sekhon. On 8 November 2017, Amandip Sekhon wrote to the Claimant confirming the issues which had been discussed at the initial contact meeting on 24 October 2017 and setting out an action plan which she said was designed to facilitate the Claimant's return to work.

(37) On 20 November 2017, the Claimant submitted a medical certificate covering the period from that date until 19 January 2018.

(38) On 24 November 2017, Amandip Sekhon wrote to the Claimant to make arrangements for a further contact meeting.

(39) On 13 December 2017, the Claimant attended an OH and Wellbeing appointment and was deemed unfit for work.

(40) On 27 December 2017, Amandip Sekhon wrote to the Claimant to invite her to a first Notice of Concern ("NOC") meeting. The Respondent addresses long term absences by means of NOC meetings, which can be triggered when the employee in question has been absent for a set number of days.

(41) On 4 January 2018, the Claimant attended her first NOC meeting and Amandip Sekhon wrote to her to confirm the outcome the following day.

(42) On 11 January 2018, the Claimant raised concerns about her first NOC outcome action plan and enquired as to whether she could move teams.

(43) On 15 January 2018, the Claimant submitted a medical certificate covering the period from that date until 30 March 2018.

(44) On 18 January 2018, Roshan Patel confirmed receipt of the Claimant's sick note and asked her for confirmation as to whether the Claimant wished to engage in independent mediation.

(45) On 29 January 2018, Amandip Sekhon wrote to the Claimant asking for her attendance action plan to be returned and seeking availability for the next review meeting.

(46) On 7 February 2018, Liz Giddings, HR Advisor to Ms Sekhon, came back to the Claimant on her query about moving teams, pointing out that redeployment could only be initiated once Occupational Health had confirmed that this would help the employee back to work.

(47) On 15 February 2018, the Claimant refused independent mediation.

(48) On 16 February 2018, Amandip Sekhon wrote to the Claimant notifying her that her attendance had reached the escalation trigger for a final NOC meeting.

(49) On 3 March 2018, the Claimant's entitlement to sick pay was reduced to half pay.

(50) On 5 March 2018, the Claimant lodged a formal grievance. The grievance essentially comprised the following:

(a) The comment allegedly made by Mr Sharratt in September 2016 about how he did not like working with women.

(b) The fact that the Claimant had had meetings with Amandip Sekhon voicing concerns about lack of training when compared to Mr Edwards.

(c) Batch prints being allocated to Mr Edwards and not to the Claimant.

(d) The *"you're so demanding"* comment allegedly made by Mr Sharratt in May 2017.

(e) The Claimant's failure to secure a Band 5 position in August 2017.

(f) The third meeting with Mr Parton and his alleged comment that he was angry at the Claimant for bringing matters up that had occurred a long time ago. (It is to be noted that the Claimant made no mention in this part of her grievance document of Mr Parton banging his computer mouse on his desk during this meeting).

(g) Undue pressure from management to make Anna Walcott withdraw her support for the Claimant.

The Claimant stated in the conclusion to her grievance:

"During this time at New Cross I have endured gender discrimination, lack of equality, lack of support due to certain staff members personal views and lack of training. I have been demoralised by the comments and unprofessional behaviour thrown at me and I have been bullied and victimised, which has also occurred whilst I was off sick. My team have taken away my equal employment opportunity right, which has hindered my progression. This has also hindered my personal growth and affected my health".

The Claimant then referred to the fact that she had severe anxiety and depression and made references to the treatment she had received for the same.

(51) On 14 March 2018, Ms Tracy Kenny (Head of Technical Services), wrote to the Claimant inviting her to a meeting for the purposes of discussing her grievance. A meeting was scheduled for 22 March 2018, but this was later rescheduled.

(52) On 23 March 2018, the Claimant submitted a medical certificate covering the period from that date until 3 June 2018.

(53) On 27 March 2018, a further NOC review meeting took place between the Claimant, Amandip Sekhon and Roshan Patel.

(54) On 24 April 2018, the Claimant attended a grievance meeting with Tracy Kenny and Gurdeep Anglin (the HR Manager supporting Ms Kenny in her investigation and handling of the grievance).

(55) On 30 April 2018, the Claimant e-mailed Ms Kenny to confirm again that she did not want to engage in workplace mediation.

(56) On 2 May 2018, the Claimant met Amandip Sekhon and Roshan Patel to discuss her health and ongoing treatment.

(57) On 3 May 2018, Amandip Sekhon sent an e-mail to the Claimant in relation to her proposed referral to the Employee Assistance Programme, "EAP". The Claimant was yet to see her GP.

(58) On 11 May 2018, Ms Kenny wrote to the Claimant in relation to the issues discussed at the grievance meeting. Ms Kenny stated that Ms Sekhon had informed her that there were no issues with her training and Ms Sekhon also had evidence to show that the Claimant had said that she preferred to focus on *"less complex tasks"*, which had therefore impacted her personal development. The Claimant maintained that she had never said any such thing. The Claimant sent Ms Kenny a text message, asking for this evidence, and Ms Kenny e-mailed her on 16 May 2018 to say that there were no reports or proof to show that the training existed. She also said that there was no evidence to support Ms Sekhon's statement that the Claimant had said that she *"preferred less complex tasks"*.

(59) On 14 May 2018, the Respondent sent to the Claimant an invitation to a final NOC hearing which was scheduled to take place on 4 June 2018.

(60) On 16 May 2018, when communicating with the Claimant by text, Ms Kenny asked her again to confirm whether she would engage in mediation.

(61) On 22 May 2018, the Claimant responded to Ms. Kenney to request that her grievance was addressed formally, stating once more that she did not wish to participate in mediation.

(62) On 25 May 2018, the Claimant submitted a medical certificate to cover the period starting with that date and going forward to 22 July 2018.

(63) On 4 June 2018, Amandip Sekhon sent the Claimant an e-mail to arrange a further contact meeting.

(64) On 12 June 2018, the Claimant had a further contact meeting with Amandip Sekhon and Dave Hodgetts.

(65) In June 2018, Mr Kevin D'Arcy, (Head of ICT Project Management & Assurance with responsibility for ICT Project Delivery and Cyber Security), was asked to chair the Claimant's final NOC hearing, and by letter dated 14 June 2018, Mr D'Arcy invited the Claimant to that hearing, which was now scheduled for 29 June 2018.

(66) On 18 June 2018, the Respondent's OH Department requested information about the Claimant's health from her GP's surgery.

(67) By letter dated 20 June 2018, Ms Kenny informed the Claimant that her grievance had not been upheld. In outline, Ms Kenny's conclusions were as follows:

(a) Training issues - Claimant's progression allegedly hindered due to the favouring of another member of staff.

Ms Kenny reported that Ms Sekhon had concluded that the additional training to Mr Edwards had been provided directly related to faults logged via the Service Desk and that if Mr Edwards was resolving/investigating a higher volume of calls or more complex issues this would naturally lead to more trouble shooting queries. It was said that the core statistics supported this conclusion.

(b) Alleged exclusion from batch printing.

This had been a high priority issue which had a significant patient impact. Tasks were allocated as appropriate acknowledging that the Service Desk required reasonable time during this period as the department did not want customers to experience a reduction in the service being offered. Both tasks were valued and there was no detriment to the Claimant covering the Service Desk role which was her primary job role. Ms Kenny was unable to make any correlation between the Claimant not doing batch printing and inequitable training opportunities.

(c) Alleged comments made by Mr Sharratt in relation to training.

Mr Sharratt had confirmed that there had been no intention to be derogatory and that he was extremely apologetic. The Claimant had raised this issue six months after the incident occurred and she had been observed working with Mr Sharratt positively prior to the concern being raised.

(d) No investigations by management *"when disgusting and embarrassing comments were made by a male member of the team"*.

This matter related to the comment allegedly made by Adam Sharratt in September 2016 that he did not like working with women. Ms Kenny was prepared to accept that some sort of incident had taken place because Mr Sharratt was extremely remorseful and had agreed to apologise. However, the matter had not been escalated to Amandip Sekhon until September 2017, a full year later and in the intervening 12 months the relationship between the Claimant and Mr Sharratt had been observed to be positively constructive with no concerns being raised by the Claimant. In the circumstances, Ms Kenny stated that the matter would not be investigated further. She stated that this concern had been raised after the Claimant had failed to be recruited to the Senior Service Desk Officer post and management were satisfied that the concern had been addressed appropriately at the time it was raised.

(e) Roshan Patel's feedback as to why the Claimant did not progress to a Band 5.

Ms Kenny's conclusion was that the Claimant had scored lower than the other candidates in the non-technical aspects of the

interview. Accordingly, her knowledge of systems was not the only reason she was not offered the Band 5 post. The interview had also been focused on customer service and service improvement areas, not just the technical aspects of the Systems Support role. Ms Kenny in summary could not find any evidence that the Claimant had concerns regarding training prior to the interview.

(f) *"Simon Parton instigating a team member against me"*.

This related to the messages sent to the Claimant by Anna Walcott. Ms Kenny regarded this matter as being an issue that related to matters outside of work.

(68) In the circumstances, Ms Kenny did not uphold the Claimant's grievance but stated that she was of the belief that it was appropriate to initiate a method of early resolution in order to re-build relationships. The Claimant had been offered mediation and had refused this. She had made a request to be redeployed which had not been supported by Occupational Health. Ms Kenny reiterated the offer of mediation. The Claimant was also notified that she had the right to appeal against the dismissal of her grievance. The Claimant did not appeal.

(69) The Claimant's final NOC hearing took place under the Respondent's Supporting and Managing Staff Attendance at Work Policy before Mr D'Arcy on 29 June 2018. One of the Claimant's main concerns at this stage was that the panel were informed that her counselling would start very soon and indeed she expected to be able to return to work in early September.

(70) Prior to the hearing, Mr D'Arcy was provided with a Management Investigation Report, and a Statement of Case from the Claimant. Mr D'Arcy was supported at the hearing in an advisory capacity by Jenni Smith, HR Manager. The management case was presented by Amandip Sekhon who was supported by Liz Giddings, (HR Advisor). The Claimant attended in person. She was advised of her right to be accompanied but chose to attend alone. As of the date of the final NOC hearing, the Claimant had been absent for 282 days. The length of the Claimant's absence meant that she had reached the "escalation trigger" which led to the final NOC hearing.

(71) The purpose of the final NOC hearing was to consider the facts and determine an appropriate outcome. Possible outcomes included redeployment, further support and/or adjustments or periods of monitoring, ill-health retirement and termination of employment.

(72) At the hearing it was discussed that during her absence the Claimant had reported that she suffered from anxiety and depression and had been prescribed medication by her GP. She had had access to a variety of forms of support, including weekly cognitive behavioural therapy sessions for a 3 to 4 month period, 5 talking counselling sessions following a recommendation from Occupational Health and Wellbeing, and referral to 1-to-1 counselling, as recommended by her GP from April 2018.

(73) Mr D'Arcy noted that there was some suggestion that at time the Claimant had not fully engaged by not attending a scheduled Occupation Health appointment and responding to letters in accordance with the prescribed policy. At one point she had refused to provide consent to OH to release her reports to management but overall her apparent lack of engagement was not sufficiently serious to warrant disciplinary action. Nevertheless, to Mr D'Arcy it presented a picture of someone who was not fully committed to the process of returning to work.

(74) The Claimant read out a pre-prepared statement and indicated that she would ultimately return to work but that she was unable to give a definite timeframe for this. She said that she wished to receive the full complement of 1-to-1 counselling sessions before considering a return to work. She believed that this could take between 8 and 10 weeks on the assumption that the sessions would take place on a weekly basis. She was unable to give a date for when the counselling sessions would commence.

(75) Mr D'Arcy considered this information in the light of the evidence of the previous 9 months during which she had received two forms of mental health treatment but there was no evidence of a return date. Having considered the Occupational Health Reports and listened to the Claimant's representations Mr D'Arcy did not think that a further period of monitoring was appropriate. The Claimant's ongoing absence was obviously having a negative impact upon her colleagues and upon service delivery. Mr D'Arcy was aware that the Claimant had reported difficulties in the workplace prior to the commencement of her sickness absence but these issues had been addressed by way of the grievance process and she did not raise these matters explicitly as part of her case at the final NOC hearing. Mr D'Arcy was satisfied that both management and the Claimant had confirmed that Occupational Health had not recommended re-deployment on the grounds of ill-health. Mr D'Arcy was satisfied that the question had been asked properly. In any event, there were no identifiable roles that the Claimant could undertake and if she went on the redeployment register and did not find a role there was a risk that her employment would ultimately terminate in any event. An application for ill-health retirement was not appropriate.

(76) In all the circumstances, and having adjourned the hearing to consider his decision, Mr D'Arcy re-convened the hearing and informed the Claimant that having considered all the evidence he was satisfied that the Claimant's attendance and support back into the workplace had been managed properly, a fair process had been adopted, appropriate action had been taken to support her in addressing her areas of concern and given the lack of evidence about when the Claimant would be able to return to the workplace he did not believe that a further period of absence would enable her to return. He therefore decided to terminate her employment, decision which he confirmed by letter dated 3 July 2018. In that letter, the Claimant was informed that she had a right of appeal.

(77) The Claimant's employment was terminated on the basis that she would receive a payment in lieu of notice.

(78) It was the Claimant's case that the decision to terminate her employment seemed to be based on an assumption that counselling would not work.

(79) On 9 July 2018, the Claimant submitted an appeal against the decision to terminate her employment. She started her counselling whilst she was awaiting a date for her appeal hearing.

(80) On 27 July 2018, the Claimant attended counselling with Relate Wolverhampton.

(81) The Claimant's appeal against dismissal was heard on 1 August 2018. During the appeal hearing, the Claimant was able to give an actual date that she would be starting back at work, namely 3 September 2018, rejecting the Respondent's assertion contained in the original dismissal decision letter that *"the current position is that there is no identifiable return to work date"*. The Claimant's case was that there was a definite plan for her to have counselling and then return to work.

(82) The Claimant's appeal against dismissal was heard by Mr Neil Simmonds, (Head of Procurement with responsibility for the delivery of the Procurement & Supply Chain service). Prior to the hearing Mr Simmonds was provided with a file of papers including the Claimant's letter of appeal dated 9 July 2018 and a Management Report Appeal Statement of Case. The hearing of 1 August 2018 was a review of the original final Notice of Concern Hearing and not a re-hearing. At the beginning of the appeal hearing, Mr Simmonds informed the Claimant that he had read her Appeal and Statement of Case and advised her to pick out any of the key points that she wanted to highlight. Her primary ground of appeal was that at the time of her dismissal the Respondent did not have up to date medical information. Mr Simmonds noted that there was an Occupational Health & Wellbeing Report dated 18 June 2018 (11 days before the final NOC hearing). It was Mr Simmonds' position that whilst the Claimant suggested that the decision in her case should have been deferred pending a further report from her GP, neither she nor Mr Simmonds believed that this would have added to the information available - by her own admission at the time of the final NOC Hearing she remained unwell and could give no assurance of when she would be fit to attend work. She had suggested that her counselling sessions would take approximately 8 weeks. She considered that her final NOC hearing should only have taken place once the 1-to-1 counselling sessions had commenced and an assessment of their effectiveness could have been undertaken.

(83) Mr Simmonds considered the transcript of the final NOC hearing. The Claimant had already accessed mental health support via her GP in the form of cognitive behavioural therapy and telephone counselling via Occupational Health. She had presented medical

certificates for anxiety and depression and these were of a duration of 8 weeks at a time. In Mr Simmonds' experience this was unusual in that employees would rarely obtain a note of that duration for anxiety and depression without some form of review from their GP. It appeared to Mr Simmonds that the Claimant had reacted and only sought treatment when she had to, which had prolonged her absence and the management process. He considered that this was relevant as to whether Mr D'Arcy could have been assured that she had a clear return to work date.

(84) During the course of the appeal it emerged that the counselling sessions had already started. Mr Simmonds considered that in the context of the previous 9 months and the Claimant's apparent disengagement at times, and the general lack of progress this cast doubt as to whether her indications at the final NOC hearing and again at the appeal hearing meant that she was going to eventually return to work in a relatively short period, and whether any assurances the Claimant gave could be relied upon. Mr Simmonds was satisfied that the Claimant's grievance did not form part of the absence management process in that it had been dealt with separately and he was aware that the grievance had not been upheld and she had refused the opportunity to engage in mediation. He did not link the two together. He simply noted the grievance by way of background.

(85) Having considered the relevant circumstances and adjourned to consider his decision, Mr Simmonds was satisfied that the decision to dismiss the Claimant was fair and upon re-convening the appeal hearing he stated that he was upholding the original decision. He confirmed his decision by letter dated 3 August 2018.

(86) As the Head of the Claimant's service, Mr Parton was informed that the Claimant had been dismissed but was not part of the decision making process that led to the termination of her employment. He nevertheless was responsible for completing her termination form which he did in the usual way. Some elements of the form are "auto-completed" unless information is written in to over-write the template. The forms are circulated between departments. Each department adds its own information. Mr Parton assumed that payroll would add the information about pay in lieu of notice. He was not aware that he had to do this. The Claimant did not receive her payment in lieu of notice when she was supposed to receive it, and she took the matter up with payroll on 29 August 2018. Mr Parton was then contacted. He confirmed that the Claimant was entitled to 9 weeks payment in lieu of notice. This led to an advance payment on 7 September 2018.

(87) Essentially, the late payment to the Claimant, according to Mr Parton was because of an administrative oversight on his part.

(88) On 4 October 2018, Karen Durkin (Deputy Employee Services Manager) provided the Claimant with an apology and an explanation as to why her final payment had been incorrectly calculated.

(89) The Claimant regarded this episode as an act of victimisation on the part of Mr Parton, by not giving the information that the Claimant should receive nine weeks' pay and only sending instructions to payroll that the Claimant had left her employment on 29 June 2018 with no mention of annual leave or the nine weeks' payment in lieu.

Submissions for the Respondent

35. The Respondent submitted that the parties were constrained by the observations of the Employment Appeal Tribunal in the case of ***Chandhok v Tirkey*** ***[2015] IRLR 195***, to restrict themselves to the issues as defined and agreed in the case and that the parties could not "re-write" the issues. The issues for the Tribunal to determine had been very clearly articulated in the Case Management Summary following the Preliminary Hearing on 3 May 2019.

36. In relation to the claim of unfair dismissal, it was clear that the reason for the Claimant's dismissal was for the potentially fair reason of capability. Dismissal had to be considered adopting a similar test to that which is applied in relation to misconduct dismissals (***BHS v Burchell [1978] IRLR 379***; see ***DB Schenker Rail (UK) Limited v Doolan UK EAT S/0053/09/D***).

37. Mr Boyd relied on this passage from the judgment of Lady Smith in ***Schenker***:

"[33] Although this was a capability dismissal rather than a conduct dismissal the ***Burchell*** *analysis is, nonetheless, relevant because there was an issue as to the sufficiency of the reason for dismissal - a potentially fair reason relating to capability - in this case. Accordingly the tribunal was required to address 3 questions, namely whether the Respondent genuinely believed in their stated reason, whether it was a reason reached after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did. (****East Lindsay District Council v Daubney [1977] IRLR 181****) is often cited as authority for the proposition that an employer is required to ascertain the "true medical position" (Phillips J at para 18) but we consider that that is not to be read as requiring a higher standard of enquiry than is required if the reason for the dismissal is misconduct…….[35]….the issue for the tribunal was whether a reasonable management could find, from the material before them, that the Claimant was not capable of returning to the post of Production Manager. The tribunal was also required to bear in mind that the decision to dismiss is, properly, a managerial one, not a medical one. Whilst medical or other expert reports may assist an employer to make an informed decision on the issue of capability, the decision to allow someone to return to work or to dismiss for reasons relating to capability is, ultimately, one which the employer has to make. It is a not a decision that is to be dictated by the author of a report. Quite apart from considerations of his duty not to dismiss an employee unfairly, an employer owes a common law duty of reasonable care to the employee…".*

38. Mr Boyd submitted that the range of reasonable responses test (see ***Sainsbury's Supermarkets v Hitt [2002] EWCA Civ 1588***) was also relevant and applicable. Mr Boyd submitted that the Claimant's dismissal was, in all the circumstances, fair. She had been absent for a very significant amount of time. The Respondent was in possession of up to date medical evidence. There was nothing credible from the Claimant which suggested that she could return imminently, whether in her Statement of Case presented to the FNOC meeting or her representations at that meeting. The following was contained in the Minutes: *"Q. Do you have a likely return to work date ? A. Not at the moment, no."* A fair and transparent process had been conducted up to the point of dismissal. Notwithstanding the Claimant's protestations to the contrary, the Respondent had reasonably sought to institute an action plan for her return which had initially been referenced in a very supportive letter. The impact upon the service of the Claimant's absence was significant such that it was not reasonable to suggest that the Respondent should have waited any longer. There was no alternative position that the Claimant could have been placed in, and it was not in any event a legal requirement for the Respondent to "create" a job for her. It was not necessary for the Respondent to obtain further evidence from the Claimant's GP. It was in possession of up to date occupational health reports and the GP would not have been able to take matters any further in any event. The issue of prognosis in cases of mental impairment was notoriously precise. At the final NOC hearing, the Claimant was not saying that she had any great confidence in returning, and it was clear from her Statement of Case that there were still outstanding issues as far as she was concerned in relation to the matters which had formed the basis of her grievance. The Respondent could have taken the matter to a final NOC hearing within 20 weeks whereas in fact it had not taken matters to that stage for over double that period.

39. In relation to the claim under s.15 of EqA, namely discrimination arising from disability, the Respondent accepted that the Claimant's absences were *"something arising"* from her disability and further that her dismissal was unfavourable treatment in consequence of those absences. The Respondent relied upon the legitimate aim of ensuring attendance in order for the Claimant's role to be carried out so that the service could be provided effectively. Mr Boyd contended that dismissal was a proportionate means of achieving that aim.

40. Mr Boyd cited ***O'Brien v Bolton St Catherine's Academy [2017] IRLR 547*** as authority for the proposition that fairness in the context of unfair dismissal under s.98(4) of the ERA and the statutory defence in s.15 of the EqA are likely to go hand in hand.

41. In relation to the claim of direct disability discrimination, Mr Boyd submitted that this was a "non-starter" because the Claimant was not alleging that she was dismissed because she was disabled.

42. In relation to the claim of reasonable adjustment pursuant to s.20 of the EqA, Mr Boyd directed the Tribunal's attention to the case of ***Environment Agency v Rowan [2008] IRL 20***, where the following approach was endorsed by the EAT:

"In our opinion, an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section for a duty must identify:

(a) The provision criterion or practice applied by or on behalf of an employer; or

(b) The physical feature of premises occupied by the employer;

(c) The identity of non-disabled comparators (where appropriate); and

(d) The nature and extent of the substantial disadvantage suffered by the Claimant.

…Unless the Employment Tribunal has identified the four maters we set out above, it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision criterion or practice or feature placing the disabled person concerned at a substantial disadvantage".

43. Mr Boyd submitted that the Respondent accepted the PCP, namely to require the Claimant to continue working in the service desk group, and submitted that the main issue revolving around substantial disadvantage. The Claimant accepted that she had merely asked to move teams in January 2018 and there was no evidence to suggest that her not being moved placed her at a substantial disadvantage. The comments she relied upon were effectively "one-off" comments and there was no suggestion they would be repeated.

44. More fundamentally, submitted Mr Boyd, in order for the Claimant to succeed in her claim, the Respondent would need to have actual constructive knowledge, not just of the Claimant's disability but of the substantial disadvantage she was placed at by the PCP (see ***Wilcox v Birmingham CAB Services Limited [2010] EAT 0293/10***). There was no suggestion that the Respondent had that requisite knowledge. It would have to have been aware that the Claimant remaining in the team would inevitably have led to negative comments being made towards her and that those comments would have exacerbated her depression. Given the nature of the comments and the limited occasions on which they were made, the Respondent would not have been so aware.

45. Mr Boyd submitted that the Claimant's claim in this regard was in any event "out of time" and she had presented no evidence as to why time should be extended on a just and equitable basis.

46. In relation to the claim of disability harassment contrary to s.26 of the EqA, Mr Boyd submitted that the test was a mixed subjective and objective one (***Smith v Ideal Shopping Limited UK EAT/0590/12/BA***). He submitted that the proper approach to harassment claims was set out in ***Richmond Pharmacology v Dhaliwal [2009] IRL 336***, namely:

(a) was there unwanted conduct ?

(b) did it have the purpose or effect of violating the Claimant's dignity or creating an adverse environment for her, and

(c) was it on or related to the prohibited ground ?

The alleged unwanted conduct was said to have occurred in September 2017 in the form of Mr Parton allegedly telling Anna Walcott, and possibly others, to effectively cease contact with the Claimant on Facebook. Mr Parton denied such conduct. Mr Boyd submitted that there was no credible evidence other than conjecture on the part of the Claimant to support the assertions she made on this topic and there was nothing to support the proposition that if Mr Parton did so inform Miss Walcott that that had the necessary causative link to the Claimant's disability - indeed the Claimant appeared to state nothing more than by doing what he was alleged to have done, Mr Parton made her disability worse.

47. Again, this was a claim which had been made "out of time" and the Claimant had presented no evidence as to why time should be extended on a just and equitable basis.

48. In relation to direct sex discrimination, there appeared to be three issues the Claimant relied upon but as the evidence demonstrated that there were, in fact, only two, namely the batch prints matter in March 2017 and the bank holiday list matter in May 2017. In both instances, the Claimant's male colleague was said to have been given some form of preferential treatment.

49. Mr Boyd submitted that it was noteworthy that these instances were two minor matters that had taken place on the Claimant's account over the course of a period of 11 months. There was no evidence to suggest that what occurred amounted to unfavourable treatment: in each instance a reasonably low level operational decision was taken that was not to the Claimant's detriment. It was clear from the evidence that the Claimant was involved in batch print work and indeed she wrote a protocol for the same. The Claimant did not appear to contradict Tracey Kenny's live evidence that the batch print matter/bank holiday list matter were statistically insignificant when considered with the quantity of other tasks that made up the Claimant's daily work, and this was the broad conclusion of a grievance report. Mr Boyd submitted that there was no evidence to suggest that what occurred was because the Claimant was a woman.

50. He again submitted that these claims were in any event out of time and the Claimant had presented no evidence as to why time should be extended on a just and equitable basis.

51. In relation to the claim of harassment related to sex, Mr Boyd repeated and adopted the submissions he made regarding the legal basis of the claim of harassment on the grounds of disability as set out at paragraph 46 above. Again, the Claimant relied on two incidents which she referred to as *"disgusting"*, namely a comment by Mr Sharratt in September 2016, that he did not like working with women and liked to work in an all male team, and a further comment in May 2017 that the Claimant was *"so demanding"*, and asking if she would be taking screenshots of everything

he was explaining at the time and that the Claimant was *"just like Anna"*, although certain parts of those alleged comments did not appear in the Claimant's witness statement. Mr Boyd accepted that on the basis of the grievance outcome the Respondent could not present a positive case that the comments were not made by Mr Sharratt. He submitted that even on the Claimant's own evidence the requisite connection to sex did not exist on the facts and in the alternative he relied upon s.26(4) of the EqA, particularly in terms of whether it was reasonable even on the Claimant's case at its highest, for the alleged conduct to have had the requisite effect.

52. He again submitted that these claims were out of time and that the Claimant had presented no evidence as to why time should be extended on a just and equitable basis.

53. In relation to the claim of victimisation related to sex, Mr Boyd observed that there were two alleged protected acts. The suggestion that the Claimant performed a protected act on 20 September 2017 in her dealings with Mr Parton was not borne out on the facts. However, the Respondent could not gainsay the Claimant's assertion that she committed a protected act in a discussion with Roshan Patel in August 2017. Mr Boyd submitted that because there was no protected act regarding Mr Parton, the two instances of unfavourable treatment causatively attributed to him (reacting angrily and complaining about the Claimant's performance on 20 September 2017 and not providing payroll with relevant information about the Claimant's last pay so she suffered a 1 month delay in payment) were unsustainable. Whilst there may be "effect" in those instances there was no "cause". This left one allegation involving Roshan Patel but even following the Claimant's evidence on the point the Respondent could not understand how it is that the Claimant could contend either that she was subjected to unfavourable treatment by Mr Patel or more fundamentally how that could possibly be causatively connected to her alleged protected act.

54. Once again, these claims were out of time and the Claimant had presented no evidence as to why time should be extended on a just and equitable basis.

55. Mr Boyd submitted that if ***Polkey*** was engaged (see paragraph 27 above) there was a very high probability of dismissal whatever procedure had been adopted.

56. In relation to the time limits issues generally, Mr Boyd reminded the Tribunal that the burden was upon the Claimant to establish that it was appropriate for discretion to be exercised in her favour (***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434***) and that it therefore followed that a claimant must lead evidence as to why the discretion should be exercised and that evidence will usually speak to the factors pertaining to the checklist set out at s.33 of the Limitation Act 1980 as modified by the EAT in ***British Coal Corporation v Keeble & Ors [1997] IRLR 336 EAT***.

Submissions for the Claimant

57. The Claimant made very short closing oral submissions. She said that she did not accept that she was not capable of doing her job. She submitted that dismissal was not appropriate. The Claimant made references to the documents in the case and repeated some of their contents. In relation to the claim of reasonable adjustments, she maintained that she should have been moved to a different team. She had wanted to come to work but looking at the exclusion she had suffered at the hands of the team this had caused her a lot of grief. She was a dedicated employee who had followed her GP's instructions. The Respondent could have transferred her to a different team. She had brought copious issues to the attention of management and there was no evidence to show that management had conducted appropriate investigations. In relation to the claim of victimisation at the hands of Mr Parton (the delayed payment in lieu of notice), even if Mr Parton had completed the relevant form correctly the Claimant was still been paid late. The Respondent had failed to discharge its duty of care towards her.

The Tribunal's Conclusions

Relevant legislation

58. The Tribunal had regard to ss.94 and 98 of the ERA, and ss.13, 15, 20, 21, 26, 27 and 136 of the EqA.

General observations

59. At the conclusion of the hearing, the Tribunal stood back and reflected upon the evidence as a whole and the parties' competing submissions. Having considered the evidence with care and having observed the demeanour of the witnesses, the Tribunal was left with the clear view that, amongst other things, the Claimant was not treated less favourably in relation to the allocation of work or training, that there was a perfectly innocent and lawful explanation for her failure to secure a Band 5 appointment, that the Respondent treated her grievance with care and reached an entirely permissible conclusion in relation thereto, and that the Claimant was offered a supportive environment at work together with offers of support to secure her return to the workplace during her long term sickness absence (one example of the support provided being the Respondent's ready agreement to her request for time off for study). All of the above must be seen against the background of the repeated offers to the Claimant of workplace mediation, which offers were repeatedly declined.

60. It occurred to the Tribunal that the main impetus behind the initiation of the Claimant's long term sickness absence and indeed the turning point as to when she started to complain about her position was when she was denied a Band 5 appointment.

61. By the time of her final NOC hearing, the Claimant had been absent from the workplace for a substantial period of time. When considering matters of capability in this context a reasonable employer will always have to conduct a balancing exercising weighing up the needs and interests of both employer and employee.

62. The manner in which the Respondent approached the Claimant's long term absence including the decision made in late June 2018 at the conclusion of the NOC process, namely that her employment should be terminated was, in the Tribunal's view, fair and reasonable in all the circumstances.

Discrimination generally

63. Essentially, if an employee establishes a prima facie case of discrimination, the burden shifts to the employer to explain why there has been a difference in treatment. If the employer fails to provide an adequate explanation, the tribunal can then go on to conclude that the reason for the treatment in question is unlawful discrimination.

64. The correct approach to whether a claimant had been subjected to discrimination generally is to ask "why" the treatment complained of had taken place, and not to ask whether, (to take the claim of direct sex discrimination for example), "but for" being a man, the claimant would have been treated as she was. It was strongly arguable that in respect of various of the discrimination claims in the present case, the Tribunal should look straight away to the Respondent for an explanation of its treatment of the Claimant rather than to apply the two stage ***Igen*** test[1].

Direct Sex Discrimination

65. In relation to both matters relied upon, namely "Batch Prints" work allocation and the provision of training, the Tribunal accepted the Respondent's submission that these were two minor matters occurring over a period of 11 months. The Tribunal also accepted that the Claimant's complaints were in relation to low level operational decisions and indeed the Claimant did become involved in batch print work. There was no evidence to gainsay the Respondent's evidence that the relevant matters were statistically insignificant when considered with the quantity of other tasks that made up the Claimant's daily work.

66. The Tribunal put to one side the question of whether the reversed burden was engaged, and considered whether the Respondent had provided a credible explanation that sex discrimination played no role whatsoever in its material treatment of the Claimant. Stated simply, the Tribunal accepted the Respondent's evidence that gender played no role whatsoever in such matters. Such a conclusion is fatal to the claim of direct sex discrimination, with the consequence that it was not necessary for the Tribunal to resolve the stage one ***Igen*** question.

67. These claims were, in any event, out of time, did not form part of a series of acts or omissions such that they could be described as a continuing act, and the Claimant provided no evidence as to why time should be extended on a just and equitable basis. The Tribunal's conclusion on the substantive merits of the sex discrimination claim was that that claim was not made out, but the claim was dismissed in any event on the basis that it was time barred.

[1] ***Igen v Wong [2005] ICR 337***.

Harassment on the grounds of sex

68. The alleged comment of Mr Sharratt in September 2016 plainly contained a gender element. His alleged comment in May 2017 did not necessarily contain any such element. Assuming for a moment that both comments were made, the Tribunal found that the second alleged comment did not relate to the protected characteristic of sex and as far as both matters were concerned, the Tribunal concluded that the alleged conduct did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for her (taking account of the perception of the Claimant, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect).

69. These claims were, in any event, out of time, did not form part of a series of acts or omissions such that they could be described as a continuing act, and the Claimant provided no evidence as to why time should be extended on a just and equitable basis. The Tribunal's conclusion on the substantive merits of the claim of harassment on the grounds of sex was that that claim was not made out, but the claim was dismissed in any event on the basis that it was time barred.

Victimisation

70. The claim of victimisation related to sex must fail. The Tribunal accepted that the Claimant committed a protected act in her discussion with Roshan Patel in August 2017, but did not accept that she committed a protected act in her dealings with Mr Parton on 20 September 2017. For the avoidance of doubt, however, the Tribunal accepted Mr Parton's evidence (a) that he did not react angrily and/or complain about the Claimant's performance on 20 September 2017, and (b) that the initial failure to make the correct termination payment to the Claimant was the result of administrative oversight. As soon as the relevant error was discovered it was corrected and apologies were duly and appropriately offered.

71. With regard to the one remaining allegation of victimisation, namely the matter concerning Mr Patel, ie his alleged denial to Amandip Sekhon after September 2017 that he had told the Claimant she did not get a Band 5 role she applied for because of her lack of systems knowledge, it is simply not understood how it can be suggested that this amounted to a detriment. The Tribunal could see no connection between the relevant protected act, in the form of the August 2017 conversation with Mr Patel, and the alleged detriment.

72. These claims were, in any event, out of time, did not form part of a series of acts or omissions such that they could be described as a continuing act, and the Claimant provided no evidence as to why time should be extended on a just and equitable basis. The Tribunal's conclusion on the substantive merits of the victimisation claim was that that claim was not made out, but the claim was dismissed in any event on the basis that it was time barred.

Direct Disability Discrimination

73. The Tribunal agreed with the Respondent that this claim did not get off the ground because the Claimant was not alleging that she was dismissed because she was disabled.

74. The Tribunal concluded that the Respondent did not treat the Claimant less favourably than it treated or would have treated others in not materially different circumstances.

Discrimination arising from disability

75. The Respondent conceded that the Claimant's absences were "something arising" from her disability and further that her dismissal was unfavourable treatment in consequence of those absences. The Tribunal accepted that it was a legitimate aim to ensure attendance in order that the Claimant's role could be carried out so that the service could be provided effectively and that the dismissal of the Claimant was a proportionate means of achieving that aim. The s.15 claim is, therefore, not made out.

Failure to make reasonable adjustments

76. It was common ground between the parties that the Respondent applied a PCP in the form of requiring the Claimant to continue working in the Service Desk Group. The Tribunal did not find that the PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at any relevant time. The Tribunal was not satisfied that the Respondent was aware that the Claimant remaining in the team would have led to negative comments being made towards her and that those comments would have exacerbated her condition.

77. These claims were, in any event, out of time, did not form part of a series of acts or omissions such that they could be described as a continuing act, and the Claimant provided no evidence as to why time should be extended on a just and equitable basis. The Tribunal's conclusion on the substantive merits of the reasonable adjustments claim was that that claim was not made out, but the claim was dismissed in any event on the basis that it was time barred.

Harassment on the grounds of disability

78. The Tribunal applied the three stage test in ***Richmond Pharmacology***, namely:

    (a) was there unwanted conduct ?

    (b) did it have the purpose or effect of violating the Claimant's dignity or creating an adverse environment for her, and

    (c) was it on or related to the prohibited ground ?

79. There was no evidential connection between Ms Walcott messaging the Claimant to say that she would not be contacting her and blocking her on Facebook and any action on the part of Mr Parton to instruct, encourage or condone such conduct on the part of Ms Walcott. Precisely the same

observations apply to the alleged blocking of the Claimant by Ms Sekhon and Mr Edwards from their Facebook account. In all the circumstances, the Tribunal concluded that there was no merit in the claim of harassment on the grounds of disability.

80. These claims were, in any event, out of time, did not form part of a series of acts or omissions such that they could be described as a continuing act, and the Claimant provided no evidence as to why time should be extended on a just and equitable basis. The Tribunal's conclusion on the substantive merits of the disability harassment claim was that that claim was not made out, but the claim was dismissed in any event on the basis that it was time barred.

Unfair Dismissal

81. In relation to the claim of unfair dismissal, the Tribunal approached this case with the following four broad propositions in mind.

(a) It was for the Respondent to show the reason (or, if more than one, the principal reason) for dismissal and that such reason (or reasons) was (were) "potentially fair" within the meaning of ss.98(1) and 98(2) ERA, ("capability" being such a reason).

(b) If the Tribunal was satisfied that the dismissal was for a potentially fair reason, it would then consider the reasonableness of the decision to dismiss (s.98(4) ERA).

(c) In the context of its consideration of the reasonableness or otherwise of the decision to dismiss, it is not the function of the Tribunal to substitute its own view for that of the employer, rather the Tribunal has to determine whether the employer's decision fell within the range of reasonable responses (***Iceland Frozen Foods Ltd v Jones (1982) IRLR 439***).

(d) Whenever a Tribunal is minded to find a dismissal unfair because of apparent "procedural unfairness" (as those words have been judicially interpreted) it is open to the employer to show that compliance would, on the balance of probabilities, have made no difference to the outcome (***Polkey)***.

82. The reason for the Claimant's dismissal was clearly that of capability.

83. At the time of her dismissal, the Claimant had been absent for a very significant amount of time. The Respondent was in possession of up to date medical evidence. There was nothing credible from the Claimant which suggested that she could return imminently. A fair and transparent process had been conducted up to the point of dismissal. The Respondent had reasonably sought to institute an action plan for her return. The impact upon the service of the Claimant's absence was significant. It was not reasonable that the Respondent should have waited any longer to see if and/or when the Claimant might return to work. There was no alternative position that the Claimant could have been placed in. At the final NOC hearing, the Claimant was not saying that she had any great confidence in returning, and it was clear from her Statement of Case that there were still

outstanding issues as far as she was concerned in relation to the matters which had formed the basis of her grievance. The Respondent waited way beyond the normal escalation trigger dates before convening a final NOC hearing. Dismissal plainly fell within the range of reasonable responses. In the circumstances, the ***Polkey*** question does not arise.

84. Applying s.98(4) of the ERA, the Tribunal concluded that the Claimant's dismissal was not unfair.

Disposal

85. Adopting the description offered by the Respondent as a summary of its case as expressed at the Preliminary Hearing on 3 May 2019, the Tribunal concluded that the Claimant was fairly dismissed for lack of capacity to undertake her duties, and there was no discrimination.

86. For all of the above reasons, the Tribunal unanimously concluded that the Claimant's claims must be, and are, dismissed.

Employment Judge Gilroy QC

17 September 2019