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# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Ajith  
**Respondent:** Department for Work and Pensions  
**Heard at:** East London Hearing Centre  
**On:** 12 and 13 November 2019  
22 November 2019 (in chambers)  
**Before:** Employment Judge Gardiner  
**Members:** Mrs A Labinjo  
Dr J Ukemenam

## Representation

**Claimant:** Mr U Thiagarajah, union representative  
**Respondent:** Ms H Masood, counsel

# JUDGMENT

**The judgment of the Tribunal is that:-**

**The Claimant's disability discrimination claims fail, and are therefore dismissed.**

# REASONS

1. The Claimant, Mrs She-Geetha Ajith, is employed by the Department of Work and Pensions. She is currently based in the Barking Job Centre, where she is a Band C, Executive Officer. Her complaint relates to three specific events that took place during the period between December 2017 and December 2018. She complains that these events amounted to discrimination arising from disability, contrary to Section 15 of the Equality Act 2010. Her alleged disability, which the Respondent accepts amounts to a disability, is breast cancer, for which she has been receiving treatment since 2013.

2. At this hearing, the Claimant has given evidence in support of her claim. The Respondent has called evidence from three witnesses:

- (1) Karen Comben, who was her line manager until 19 January 2018. She heard Mrs Ajith's grievance at a grievance hearing on 2 August 2018, and wrote to the Claimant on 8 August 2018 dismissing the grievance;
- (2) Mr Muz Misbah, who took over as her line manager from 22 January 2018 onwards;
- (3) Janet Zamornii, who heard the Claimant's grievance appeal at a grievance appeal hearing on 5 October 2018. She rejected the grievance appeal in an outcome letter sent on 9 November 2018.

3. All witnesses had prepared witness statements in advance of the Final Hearing, which had been exchanged. In the Claimant's case, this was a ten paragraph long witness statement extending over four pages, and dated 8 October 2019. Each was cross-examined in relation to their witness statement and in relation to the documents in an agreed bundle. On the first day of the hearing, further documents were added to that bundle by agreement.

4. During the hearing, the Tribunal took breaks after an hour or so of evidence and allowed the Claimant to stand at points in her evidence to relieve her symptoms.

### **The issues**

5. The issues for decision were clarified at a case management hearing conducted by Employment Judge McLaren on 30 July 2019. At that hearing, she rejected the Claimant's application to add a claim of race discrimination and add to the factual issues identified in the Claimant's ET1 Claim Form.

6. Employment Judge McLaren listed the issues as follows:

#### **Jurisdiction**

1. Is the Claimant out of time for bringing a discrimination claim in respect of :
  - a. Her failure, in or around January 2018, to secure the Team Leader role in the Barking Office; and
  - b. The Respondent's decision, taken on or about 24 May 2018, to award her a "good" box 2 performance marking for the year ending 2017-18?
2. If so, would it be just and equitable to extend time ?

The Claimant argues that her claims are not out of time because the alleged instances of discrimination amounted to a continuing act (i.e. conduct extending over a period which was to be treated as done at the end of the

period). Alternatively, it would be just and equitable to extend time. This is because after the Claimant returned to work in May 2018, following a period of sickness absence, she was unable to deal with issues because of the psychological issues in respect of her medical condition and treatment.

**Claim for discrimination arising from disability**

***Issues of fact***

3. What were the reasons and justification for :
  - a. The Respondent's decision to award the Claimant a "good" box 2 performance marking for the year ending 2017-18, when the Claimant received an "outstanding" box 1 marking at the mid-year point; and
  - b. The Respondent's decision not to uphold the Claimant's grievance against this performance marking?
  - c. The Claimant's failure to secure the Team Leader role in the Barking Office?
4. Were the reasons for/cause of these decisions related to the Claimant's sickness absence and/or in relation to her failure to secure the Team Leader role, because the Claimant had informed the Respondent before the date of the decision that she was due to have further surgery as a result of having had cancer?
5. Was the Claimant's grievance against the above decision dealt with properly? In particular, did the Respondent ignore the evidence put forward by the Claimant and/or was the Respondent "dismissive"? If so, was the reason for/cause of this conduct related to the Claimant's sickness absence?

***Issues of law***

6. Did the following constitute unfavourable treatment by the Respondent because of something arising in consequence of the Claimant's disability?
  - a. The failure to secure the Team Leader role in the Barking office;
  - b. The "good" box 2 performance marking given to the Claimant in May 2018 for the year ending 2017-18;
  - c. The Respondent's conduct of the Claimant's grievance in respect of this decision, in particular the claim that the Respondent failed to deal with the grievance properly;
  - d. The grievance outcome.

7. If so, was the said treatment a proportionate means of achieving a legitimate aim ?

7. The Claimant clarified on the first day of the hearing that the criticism in relation to the conduct of the grievance was limited to one respect – that the grievance was conducted by Karen Comben, given that she was not independent. The grievance related to the decision to award the Claimant a grade 2 for her 2017/2018 performance and it was Ms Comben who had taken this decision.

8. The Respondent clarified at the start of the second day of the hearing that it was not advancing a specific legitimate aim. Its case is and always has been that the consequences of the Claimant's cancer had no impact whatsoever on the way in which the Claimant was treated.

### **Factual findings**

9. The Claimant started working for the Department of Work and Pensions on 17 March 2008. Until 17 January 2018 she was based at the Dagenham Job Centre. Her grade was Band C (Executive Officer). She was the line manager for five Band B (Administrative Officer) employees. Her line manager was Karen Comben, who was also a Band C (Executive Officer). Ms Comben had responsibility for both the Dagenham and the Barking Job Centres. When Ms Comben was at the Barking Job Centre, the Claimant deputised for her as Team Leader in Dagenham.

10. The Respondent graded the performance of its staff. This was done twice a year – an indicative grade given midway through the financial year, in about October, and then a final grade given at the end of the financial year, in April or May.

11. Until the end of the 2016/2017 financial year, the Respondent operated a three-point scale, in which performance was graded at either 1, 2, or 3. From the start of the 2017/18 financial year, this was changed to a four-point scale, in which performance was graded at 1, 2, 3, or 4.

12. During the period from 2012 until the end of the 2016/17 financial year, the Claimant's performance both at the interim and at the end of year point was graded as 2, with the exception of her performance for the six months to the end of September 2016 and the full year 2016/2017, which were graded 1.

13. The Performance Management – People Performance 17/18 contains the following guidance in relation to Rating Performance:

Exceptional (1)

Exceeding outcomes, exceeding competency and behaviour standards

No essential development necessary for employee to meet required standards for the role

Good (2)

Satisfactory outcomes; demonstrated competencies and behaviour to satisfactory standard.

Exceeded outcomes; demonstrated competencies and behaviour to satisfactory standard.

Satisfactory outcomes; exceeded competency and behaviour standards.

Exceeded outcomes; competencies and behaviours just achieved

Outcomes just achieved; exceeded competency and behaviour standards

No essential development needed for employee to meet required standards for the role.

14. It can be seen that a rating of 2 applies to a wide range of performance. It includes performance that in some respects exceeds the required standards but where in other respects the performance was satisfactory rather than exceeding the expected performance. To achieve a rating of 1, the employee must exceed each of the designated outcomes, the expected competencies and the required behaviour standards.

15. The guidance stated that there should be regular conversations about performance and development throughout the year. These conversations should be part of normal business and should be open, unbiased and factual, and supported by examples. If feedback has been obtained from others, a manager must inform the employee of the source of the feedback. There is no requirement that notes were kept of such meetings although "depending on what is being discussed it may be useful to record brief notes of the main points of the meeting". However, if there is under performance, then a record should be kept of any conversations regarding under performance issues (paragraph 3.11).

16. An award of a performance rating of 2 would lead to a bonus of £500. An award of a rating of 1 would lead to a higher bonus of £750. About 20% of employees would typically receive a rating of 1, with most employees receiving a rating of 2 and some being awarded a rating of 3.

17. On the new four-point scale effective from April 2017 onwards, Ms Comben awarded the Claimant an indicative grade of 1 for the period to the end September 2017. Her evidence was that she did so because the Claimant had taken on additional responsibility, whilst she covered Ms Comben's role as Team Leader (w/s para 25). There is no written record confirming the reasons for this award at the time. However, by the time of the end of year grading assessment, carried out in May 2018, Ms Comben awarded the Claimant a grade 2 for her performance for the full year.

18. By way of comparison, the Claimant had to grade the five employees that she line managed. She awarded one a grade 1. The remainder were awarded grade 2s.

19. In late 2017, the Respondent went through a restructuring, which was referred to as "Divestment". As part of this restructuring the decision was taken to close various Job Centres, or to transfer staff from certain Job Centres and move them to other Job Centres. Most of the staff based in the Dagenham Job Centre chose to transfer to the Barking Job Centre. This included the Claimant.

20. On 4 September 2017, the Claimant attended occupational health at Ms Comben's instigation. The referral appears to have been prompted by the prospect that the Claimant would be required to move office as a result of the divestment procedure. It was to assess whether the extent of the Claimant's symptoms merited her own car parking space. The occupational health report indicated to Ms Comben that the Claimant

was to undergo major surgery due to being high risk. No date for the surgery had yet been fixed. Ms Comben would have realised on receiving this letter that the Claimant would need to take a significant period of time off work in order to recover from this surgery.

21. At the Barking Job Centre, a decision was taken to appoint a new Team Leader. Selection for this new position was to be carried out through an Expressions of Interest Exercise. The Claimant expressed an interest in this new role by completing an Expressions of Interest Form. She was limited to 250 words and this is what she wrote:

I am a SDC [Service Delivery Coach], leading a team of ASCs. I am passionate about my job and seek opportunities to support my development.

When I took leadership of my team, I was faced with a challenging workforce, who were resistant to change. I turned around the mind-set by engaging with the team – listening and maintaining a solution focused approach, allowing time for group meetings and individual 1-2-1 discussions. I emphasised on our purpose – delivering customer service with care and promoted the customer satisfaction survey. I communicated via Lync, emails, 1-2-1s and reviewed their PDPs. I developed a multi-skilled team, and resulted in positive customer feedback and team received recognition, including Customer Service awards.

I have encouraged through effective coaching on promoting vacancies, provisions and customer survey at FOH. I have arranged for colleagues to visit external partners to gain a better understanding and strengthen engagement. This had led to increased productivity between both partners and jobcentre. I enjoy coaching my team on digital services to improve customer experience and have coached them on delivering PowerPoint presentations on GIS [Group Information System]; I now have ASC and SDCs regularly delivering these, resulting in up-skilled team on digital services and positive customer feedback.

I embrace change and communicate new changes positively during meetings and using digital channels. I created desk aides for assistance to ensure successful implementation within the timescale.

I am confident that I demonstrate effective leadership behaviours in my work.

22. The Claimant did not specify any disability on the form, despite there being a specific box in which to include any disability and “claim a guaranteed interview”. It was counter-signed by her manager, Ms Comben.

23. Four or five expressions of interest were submitted in the new Team Leader role, including one from the Claimant. Each form was anonymised and considered at a selection meeting attended by Ms Comben, but where the decision was taken by Stacey Patis-Stannard, who was Ms Comben’s line manager. Ms Patis-Stannard did so without conducting any interviews, simply on the basis of the Expressions of Interest Forms. Ms Comben was not party to the decision. Along with several other candidates, the Claimant was unsuccessful. Ms Comben informed the Claimant she had been unsuccessful. Contrary to the Claimant’s evidence before the Tribunal, Ms Comben did not refer to her health or potential period of sickness absence when explaining the reason why the Claimant had been unsuccessful. The successful candidate was apparently selected on

the basis that they had been performing the Team Leader role for some time and had greater experience than the other candidates.

24. Some weeks after the successful candidate started as Team Leader, it was appreciated that this person had too many direct reports. As a result, it was decided to appoint a second Team Leader, also based in the Barking Job Centre. Selection for this second position was again carried out by Stacey Patis-Stannard, using the same initial Expressions of Interest. Again, the Claimant was unsuccessful.

25. The Claimant did not complain about the failure to select her for the position of Team Leader at the time. Nor did she subsequently include this issue in her grievance when she lodged this on 14 June 2018. The first indication that the Claimant was dissatisfied with the decision not to appoint her to the role of Team Leader was when these proceedings were issued.

26. On 17 January 2018, the Claimant moved from the Dagenham Job Centre to the Barking Job Centre. She continued to perform the same duties she had undertaken at the Dagenham Job Centre. From about 24 January 2018, she had a new line manager, Mr Muz Misbah. There was a handover meeting between the Claimant, Ms Comben and Mr Misbah in which Ms Comben handed over her responsibilities as line manager. The focus was on the Claimant's impending absence for surgery, rather than reviewing her performance.

27. Mr Misbah had previously worked in the Dagenham Job Centre with the Claimant but had not been her line manager. As he described at paragraph 15 of his witness statement, there had been an incident where three separate clients were behaving inappropriately and aggressively. He considered that the Claimant wrongly focused on who was to blame for the clients' situations, rather than seeking a resolution. He reported the Claimant's behaviour to Ms Comben at the time, as the Claimant's line manager. On the balance of probabilities, Ms Comben did not discuss this feedback with the Claimant at the time or subsequently.

28. In January 2018, Ms Comben moved away from the Barking Job Centre to the Romford Job Centre to carry out other duties. Before doing so, she spoke to the Claimant, complimenting her on the work she had carried out whilst she had been her line manager. She did not have a third quarter review meeting to discuss the Claimant's performance to date. The tribunal infers that this was because of the extent of the changes happening as part of the divestment process in which she would no longer be the Claimant's line manager. As a result, the Claimant did not appreciate that her performance was no longer necessarily on track for a rating of 1 at the end of the year.

29. On 7 February 2018, the Claimant started a period of sickness absence whilst she underwent cancer treatment. By this point, Mr Misbah had only been line managing her for two weeks. Despite not being her line manager, Ms Comben visited the Claimant in hospital whilst she was recuperating from surgery. On 28 March 2018, an attendance absence management meeting was held at the Claimant's home. It was conducted by Muz Misbah, her current line manager. Ms Comben was present as a note taker.

30. The Claimant was referred back to occupational health. On 25 April 2018, Cat Forsyth, an occupational health practitioner assessed her and prepared a report. This stated that a good recovery was anticipated in the coming weeks with ongoing effective

treatment, but full recover could take a few more months yet. Her advice was that the Claimant would be ready to return to work on 7 May 2018 as part of a phased return to work plan. She recommended that there was regular dialogue between her and her line manager to ensure she was progressing at the expected rate.

31. On 7 May 2018, the Claimant returned to work on a phased return to work. By then, the financial year had ended, and the Claimant's performance needed to be assessed for the full financial year so she could be assigned a rating. The Respondent considered that the Claimant's performance should be assessed by Karen Comben, given that the Claimant had hardly worked under Mr Misbah during that year. The Claimant was content with this.

32. The Claimant completed a self-assessment form in which she described her performance over the 2017/18 year. Ms Comben added her comments at the end of the form. Ms Comben's feedback provided was essentially positive. Whilst the Claimant had performed well, she did not consider that the Claimant's performance had been exceptional in all respects. In particular she felt that at times the Claimant did not have good relationships with others, although she did not document this on the form. She was influenced by Mr Misbah's feedback on the specific incident at the Dagenham JobCentre. Her assessment was that the Claimant merited a performance rating of 2, given her view that the Claimant had :

Exceeded outcomes, demonstrated competencies and behaviour to a satisfactory standard.

33. Before notifying the Claimant of her performance rating, she had sent her comments and conclusions to Mr Misbah, adding "if you want to add anything on – please do, I'm not sure if you may think the marking is wrong, but looking at the descriptors of the "Good" (2) marking, I think she fulfils the criteria for "Exceeded outcomes; demonstrated competencies and behaviour to a satisfactory standard"".

34. Mr Misbah did not consider that any changes were required, and the completed document and grading were sent to the Claimant on 25 May 2018. No meeting had taken place before Ms Comben reached her decision in relation to the Claimant's performance assessment.

35. On 14 June 2018, the Claimant lodged a grievance. The focus of her grievance was the decision to award her performance rating of 2 rather than 1. She considered that, there should have been meetings between Ms Comben and herself since her mid-year indicative rating was issued, to discuss her performance, and that the failure to arrange such meetings was contrary to written guidance. She also argued that there should have been a discussion between line manager and employee at the end of the year to discuss the proposed rating. No acceptable reason had been given for a performance rating of 2, rather than 1. The Claimant had been assisted in completing this grievance by her union representative, Mr Thiagarajah, who was the Claimant's representative in these proceedings.

36. The grievance hearing took place on 2 August 2018, and was conducted by Ms Comben. It was attended by both the Claimant and Mr Thiagarajah. During the grievance hearing, in addition to the matters on the grievance form, Mr Thiagarajah argued that it



was unfair that Ms Comben was conducting the hearing because she was the same grade as the Claimant. It should, in his view, have been conducted by Mr Misbah, who was one grade higher. After the end of the meeting, Ms Comben checked the point with HR, who advised that it was appropriate for her to proceed and to issue a grievance outcome.

37. Ms Comben sent the Claimant the grievance outcome letter on 8 August 2018. The essential reasoning was worded as follows:

The basis for the decision is there was a review meeting in January 2018 between us but this focussed on promotion preparation. I have looked again at the end of year self-assessment including the additional information that was provided to me after the grievance meeting, my evidence is that the evidence demonstrates that outcomes have been exceeded; the area I believe hasn't been exceeded comes under behaviour standards. Active planning and action was taken by yourself to develop in your career, however more work is needed to demonstrate that you have built effective relationships with other colleagues and to be recognised as a role model by others. I feel that this is a key behavioural indicator and as this area needs to be further developed, this cannot be considered as "exceeded behaviour standards" under the performance rating of "Exceptional", for that reason, therefore I find that the box Marking Good (2) – Exceeded outcomes, demonstrated competencies and behaviour to satisfactory standard to be an accurate marking.

38. Ms Comben did not deal with the certain specific criticisms made in the course of the grievance, namely that the Guidance required there should have been a meeting between the Claimant and her line manager to discuss the Claimant's rating at the end of the financial year, nor did she deal with the contention that the reasoning was not adequate to explain why the performance rating should be two rather than one. She also did not explain why it was still appropriate for her to conduct the grievance even though she was at the same pay grade as the Claimant.

39. The grievance outcome letter advised the Claimant of her right to appeal. An appeal was lodged on 11 September 2018. It referred by number to the following paragraphs of the "Performance Management – People Performance 17/18" document that the appeal form argued had not been followed – namely paragraphs 3, 7, and 9. These were not quoted on the appeal form, but are worded as follows, so far as is relevant to the points that the Claimant was making:

3.1 Reviewing performance should not be seen as an annual process. The manager and employee are jointly responsible for having regular conversations about performance and development throughout the year.

3.3 .... Where a manager has obtained feedback from others they must inform the employee of the source.

3.4 Depending on what is being discussed it may be useful to record brief notes of the main points of the meeting.

3.11 It is recommended that a record be kept of any conversations regarding underperformance issues and that this is shared with the employee to ensure that there is a common understanding of actions agreed and to inform future discussions.

7.1 The quarter 3 check-in should take place in January and ... should also include:

- Progress throughout the last quarter, including progress made since mid-year;
- Current performance position and
- What needs to be done before the end-year review

40. Paragraph 9 was headed “light touch sense checking”. It set out a process of moderation of the ratings to ensure that employees do not get different ratings for similar performance across peer groups of employees.

41. Paragraph 10.1 is also pertinent to the issues raised by the Claimant. It states that “regular performance discussions throughout the year allow the employee and manager to discuss issues informally as they occur. The final end-of-year assessment should not come as a surprise to the employee”.

42. The Claimant’s appeal also referred to Annex 1 – Special Circumstances 3. This dealt with the situation, which also applied to the Claimant, where there is a change of line manager during the year. It stated that “the previous LM should hold a performance discussion with the employee .... to summarise the performance to date and to hand over to the new LM before leaving”.

43. Special Circumstances 16 is also relevant. It provides that the manager will need to write the end-of-year performance report taking into account the period of attendance rather than the period of absence.

44. Finally, the Claimant’s appeal document stated that Grievance procedure 7.11 had not been followed. This was worded as follows:

Other grievances – in all other grievance cases the line manager will investigate and be the Decision Maker. If, exceptionally, the line manager cannot undertake the investigation (eg because they cannot current devote the time or as explained at paragraph 7.9), another independent manager of an equivalent or higher grade will be appointed to investigate and be the Decision Maker.

45. In short, albeit drafted in very summary form, the Claimant’s appeal was raising substantial criticisms about the process that had been followed in the Claimant’s case when deciding on her grading, and about the procedure that had applied so far in addressing the Claimant’s grievance.

46. The appeal was referred to Janet Zamornii. She was a Senior Executive Officer (SEO), and therefore a grade higher than Mr Misbah. She conducted a grievance appeal hearing on 5 October 2018. Following the hearing she put written questions to both Mr Misbah and to Ms Comben. She also consulted HR on whether it was appropriate for Ms Comben to conduct the grievance hearing. She issued an appeal outcome letter which was sent to the Claimant by email on 2 November 2018. This set out five bullet point reasons why her appeal was dismissed.

47. It addressed why it was, in her view, appropriate for Karen Comben to assess the Claimant's grading even though, as an Executive Officer, she was at the same grade as the Claimant. She considered that Karen Comben was "best placed" to evaluate the Claimant's performance and Mr Misbah would have little to add to the report given the very limited time he had been the Claimant's line manager. It covered the Claimant's complaints about the lack of regular meetings. It concluded that Ms Comben was "best placed" to conduct the grievance, because she had been the one who had assessed the Claimant's performance. Although not stated in the grievance appeal outcome letter, her evidence to the Tribunal, which we accept, was that it was standard practice where a grievance complained about the grading awarded for that complaint to be considered first by the line manager who had conducted the grading. It referred to the sense checking process that had taken place. Finally, the outcome letter explained that on the basis of the evidence provided by the Claimant, Ms Zamornii was unable to change the grading. The grading awarded meant the Claimant had achieved what was expected of her, but there was insufficient evidence that her performance had been exceptional so as to change that grading.

48. Thereafter, Mr Thiagarajah attempted to discuss Ms Zamornii's conclusions with her in further email exchanges. Ms Zamornii provided him with the advice she had been given by HR that it was appropriate for Karen Comben to conduct the grievance as to her grading, and issued a further written response to the further matters raised.

### **Delay in issuing proceedings**

49. These Employment Tribunal proceedings were issued on 8 January 2019, following a period of Early Conciliation between 21 November 2018 and 28 November 2018. As a result, her complaint that she had not been appointed in relation to the Team Leader role was brought almost a year after the event to which it related, and potentially about eight or nine months outside the statutory time limit. Her complaint about her grading during the 2017/18 year, awarded in May 2018, was brought about four months after the last date provided in the Equality Act 2010 if this matter was not part of a conduct extending over a period.

50. In her evidence, the Claimant clarified the reasons why she had delayed in bringing proceedings in relation to these complaints. Essentially there were three reasons. Firstly, she considered that it was important to try to resolve her complaint about her grading through the grievance process, if it could be resolved in that way. Secondly, she was fearful about issuing employment tribunal proceedings, given she was still working for the Respondent. Thirdly, she referred to her health over the relevant period. She noted that she had been absent from work for three months from 7 February 2018 until 7 May

2018 for major treatment in relation to her cancer, and had had a prolonged period of recuperation. Even after she had returned to work from 7 May 2018 she still experienced physical and mental symptoms. She relied on a letter dated 20 August 2019 from her GP Dr Sidhu. Dr Sidhu noted that she had suffered low mood, depression symptoms (although he did not specifically diagnose depression), anxiety symptoms, and what he described as “fear of uncertainty”. In his view, this may have caused her to delay in submitting her tribunal application.

### **Consequences of disability**

51. The letter from Dr Sidhu was the only medical evidence provided to the Tribunal detailing the Claimant’s symptoms, and their effect. It does not directly address the extent to which her symptoms of breast cancer impacted on her ability to perform the requirements of her role, other than referring to her feeling less confident, requiring time off and needing to keep clinical appointments.

52. It is clear from the remainder of the evidence that the Claimant needed three months off work from 7 February 2018 until 7 March 2018, and returned thereafter on a phased return to work.

53. In closing submissions, it was accepted on behalf of the Claimant that the only consequence of the disability relied upon by the Claimant was the period of sickness absence, and (in relation to events occurring before it started), uncertainty as to its potential length. It was accepted that the choice of grievance manager, namely Ms Comben, was not influenced by the extent of the Claimant’s sickness absence.

### **Legal principles**

#### ***Time Limits***

54. A claim under Section 15 of the Equality Act 2010 must be presented to the Employment Tribunal within three months starting with the date of the act to which the complaint relates or within such other period as the Tribunal considers just and equitable : Section 123(1) Equality Act 2010.

55. In relation to the three month time limit, time does not continue to run whilst the parties are engaged in early conciliation: Section 140B(3) Equality Act 2010. During this period, the three month time limit is paused. If the time limit would otherwise expire during early conciliation, it is further extended by a period of a month: Section 140B(4) Equality Act 2010; *Luton Borough Council v Haque* [2018] ICR 1388. However, this further one month extension does not apply if the three month time limit has already expired by the time early conciliation has started : *Pearce v Bank of America Merrill Lynch* EAT 0067/19.

56. Conduct extending over a period is to be treated as done at the end of the period: Section 123(3) Equality Act 2010. In *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530, the Court of Appeal gave guidance as to what amounts to “an act extending over a period”, which was the corresponding wording in earlier legislation, but which is to be interpreted in the same way. At paragraph 48, Mummery LJ stated that the focus should be on whether a number of alleged incidents of discrimination are linked to

one another and that they are evidence of a continuing discriminatory state of affairs. He contrasted such a position with isolated and unconnected acts of less favourable treatment by different people in different places over a long period, when time would run in respect of each act from the date of that act. In *Hale v Brighton & Sussex Hospitals NHS University Trust EAT 0342/16*, the EAT held that there was a continuing state of affairs from the point at which disciplinary action was instigated to the claimant's subsequent dismissal.

57. If proceedings were issued outside the primary time limit of three months, then it is for the Tribunal to determine whether the period from the date of the act to the date on which proceedings were issued is such that it would be just and equitable to allow the claim to proceed. In *Robertson v Bexley Community Centre* [2003] IRLR 434, the Court of Appeal stated that time limits are exercised strictly in employment cases. It is for the Claimant to establish that an extension should be granted. An extension to the normal time limit is the exception not the rule. A Tribunal will need to consider all the circumstances, balancing the prejudice to the Claimant if the claim cannot proceed with the prejudice to the Respondent in facing a claim issued outside the normal time limit.

**s15 EqA 2010 : Discrimination arising from disability**

58. Section 15 of the Equality Act 2010 is worded as follows :

- (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.

59. Section 136(2) and (3) of the Equality Act 2010 provide :

- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

60. Guidance on the application of a claim brought under Section 15 Equality Act 2010 was given by Simler J in the Employment Appeal Tribunal in *Pnaiser v NHS England UK* [2016] IRLR 170 at paragraph 31 :

- (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
- (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the

conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

- (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any *prima facie* case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).
- (d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in *Hal*), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
- (e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
- (f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
- (g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.
- (h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.
- (i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

61. In *Homer v Chief Constable of West Yorkshire* [2012] ICR 704, the Supreme Court considered the basis on which unfavourable treatment can be justified as a proportionate means of achieving a legitimate aim. At paragraph 20, Baroness Hale, referring to the Court of Appeal case of *Hardys & Hanson v Lax* [2005] ICR 1565 at para 31, said it was not enough that a reasonable employer might think that a proposed course of action was justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

62. In relation to the burden of proof, in order for the burden of proof to shift to the Respondent, it is not sufficient for the Claimant to show merely that there was unfavourable treatment and that there were consequences arising from her disability. The Claimant must identify a prima facie case that the unfavourable treatment was, at least in part, as a result of the consequence of her disability. She must prove facts from which the Tribunal could infer, in the absence of a non-discriminatory explanation, that the consequences of the disability were a significant (ie more than trivial) cause of the unfavourable treatment. If this is established, the burden of proof shifts to the Respondent. It is then for the Respondent to show that the consequences of the disability formed no part of the unfavourable treatment.

63. It is also open to the Tribunal to ask the reason why unfavourable treatment occurred, effectively assuming that the Claimant has established a prima facie case and asking if the Respondent has proved that the consequences of the disability formed no part of the reason for the unfavourable treatment.

## Conclusions

### *Time limits*

#### **(1) *Were proceedings issued within the primary three month time limit ?***

64. These proceedings were issued on 8 January 2019. Early conciliation took place between 21 November 2018 and 28 November 2018. This period of early conciliation had the effect of pausing the three-month time limit by a period of seven days. Therefore, unless the time limit would otherwise expire between those dates, a claim relating to events before 1 October 2018 is outside the primary limitation period.

65. Thus, unless part of conduct extending over a period to a date after 1 October 2018, the failure to appoint the Claimant to the role of Team Leader in the Barking office, either in January or in February 2018, is out of time by seven or eight months.

66. Unless part of conduct extending over a period to a date after 1 October 2018, the Claimant's performance rating of 2 issued on 25 May 2018 is out of time by over four months.

67. Unless part of conduct extending over a period to a date after 1 October 2018, criticisms about the conduct of the grievance and the outcome to the original grievance sent to the Claimant on 8 August 2018 is out of time by around two to three months.

68. The grievance appeal letter was sent to the Claimant on 2 November 2018. It was issued within time. Therefore, the Claimant's complaint about the outcome to the grievance appeal is within time, and needs to be determined on its merits.

69. The Tribunal does not consider that (1) the appointment decision in relation to the role of Team Leader at Barking in January and February 2018 and (2) the decision to award the Claimant a performance rating for the 2017/2018 year made in May 2018 form part of a continuing discriminatory state of affairs. These acts were discrete events carried out by different individuals: Stacey Patis-Stannard in the former case, and Karen Comben in the latter case.

70. However, in the Tribunal's view, the Claimant has established that the decision to award her a performance rating of 2 is part of a continuing state of affairs in relation to the subsequent grievance process, outcome and grievance appeal. The common theme is the Claimant's performance rating, and the way in which it was reached. The grievance was issued within about three weeks of receiving notification of the performance rating. It was heard by Ms Comben who had decided on the performance rating. Her role as the grievance officer was challenged for that very reason. The grievance appeal concerned both the performance rating and the conduct of the original grievance.

71. As a result, all of the Claimant's complaints apart from the failure to appoint her as Team Leader have been brought inside the statutory time limit of three months, as adjusted by the early conciliation provisions.

**(2) *Would it be just and equitable to extend time ?***

72. In relation to the complaint about the failure to appoint the Claimant to the Team Leader position at Barking, the Tribunal's conclusion is that it would be just and equitable to extend time so that the complaint can be determined on its merits. The relevant circumstances in favour of exercising the Tribunal's discretion to extend time are as follows:

- a. The Tribunal needs to consider the performance rating decision and the subsequent grievance in any event, which form part of a series of events that started in May 2018;
- b. The Claimant has provided some explanation and supporting evidence for why she did not bring this complaint at an earlier stage, namely that she was off sick for three months between 7 February 2018 and 7 May 2018, was not fully better when she returned to work in May 2018, and then her psychological health was affected by her disappointment at receiving a performance rating of 2 rather than 1. Whilst she was able to attend work, her focus from June 2018 onwards was on her internal grievance, albeit that this grievance did not refer to the Team Leader appointment process;
- c. The Respondent has not identified any particular prejudice that it would suffer if that claim along with the other claims is determined on its merits, other than that the memories of witnesses will have dimmed with the passage of time, since her decision not to appoint the Claimant to the Team Leader role. There is no evidence that Ms Patis-Stannard was unable to



attend the Tribunal Final Hearing to give evidence, as a result of the passage of time. However, the Respondent has called Ms Comben to give evidence was present when candidates were discussed and a decision taken.

**Discrimination arising in consequence of the Claimant's disability**

**(1) Failure to appoint the Claimant to the role of Team Leader at Barking**

73. By reference to the relevant parts of the guidance in *Pnaiser*:

- a. There was unfavourable treatment in failing to appoint the Claimant to the role of Team Leader, both when the initial selection was made in around January 2018, and when a further Team Leader was appointed in around February 2018. These decisions were taken by Stacey Patis-Stannard.
- b. Although, at the time of the decision, Ms Comben knew she would need to take an extended period of sick leave, there is no direct evidence suggesting that Ms Patis-Stannard knew this. Further, there is no direct evidence she was influenced in her thinking by the Claimant's potential absence. The Expressions of Interest Forms were anonymised, and therefore the identity of the candidates was not clear to Ms Patis-Stannard.
- c. Nor is there evidence from which the Tribunal could infer the Claimant's potential absence was more than a trivial influence on the selection decision. In the absence of the Expressions of Interest forms submitted by all the candidates – which have never been requested by or on behalf of the Claimant - the Tribunal cannot conclude that the Claimant was, on paper, one of the two strongest candidates. Had the Claimant established this, this could have been a basis for inferring that factors apart from the respective merits of the candidates, including potentially the Claimant's forthcoming absence, could have influenced the selection decision, in the absence of a satisfactory explanation.

74. The burden of proof has therefore not shifted to the Respondent to provide a non-discriminatory explanation. Even if it had, the Tribunal accepts the evidence of Ms Comben, who was at the meeting at which the initial selection was made, that there were stronger candidates than the Claimant, and this was why she was not selected.

75. Therefore, the Claimant's claim that the failure to appoint her to the role of Team Leader was discrimination because of something arising in consequence of the Claimant's disability fails.

**(2) Performance grading for 2017/18**

76. Again by reference to the relevant parts of the guidance given in *Pnaiser*:

- a. There was potentially unfavourable treatment in relation to the performance grading for 2017/18, in that the Claimant was awarded a grading of 2 rather than a grading of 1. This decision was taken by Ms Comben.

- b. In relation to the reason for a performance grading of 2, the evidence indicates that this was the grading awarded to many employees who had exceeded the expected standard in some respects, but not in all respects. The Claimant has not produced any or any sufficient evidence to show that her performance exceeded the expected performance in all respects during the months she was at work, so as to raise the potential inference that other factors such as the Claimant's two-month absence influenced the grading decision. There was evidence, which the Tribunal accept, that negative feedback had been given by Mr Misbah, and that this influenced the performance rating decision.
- c. At the time that Ms Comben carried out the Claimant's performance grading, she was no longer the Claimant's line manager. She had ceased to be her line manager before the Claimant took three months off work for breast cancer treatment. There is no evidence that she had been inconvenienced by the Claimant's absence, such that she might be influenced by this inconvenience in awarding the Claimant a lower performance rating.
- d. It is true that Ms Comben did not meet with the Claimant to discuss her performance as regularly or as thoroughly as was required by the Performance Management Procedure. She did not discuss issues informally during the year as they occurred, nor did she carry out a Quarter 3 check-in in January 2018 as required by paragraph 7.1. She had received feedback from Mr Misbah, but did not discuss this feedback with the Claimant nor identify the source of the feedback as Mr Misbah, as required by paragraph 3.3. Before the performance rating was announced by Ms Comben, she did not hold a review meeting with the Claimant. These failures may well have prompted the Claimant to feel aggrieved and led to Claimant to consider she had a case of disability discrimination. There is no evidence that Ms Comben complied with all aspects of the procedure in respect of other staff who were not absent or about to be absent. These failures are an insufficient basis for inferring that they were potentially the result of the Claimant's potential or actual absence for breast cancer treatment, in the absence of a non-discriminatory explanation.
- e. As a result, considering the issue of causation, there is no objective evidence suggesting a prima facie link between Ms Comben's reasons for awarding her a performance grading of 2 and the Claimant's disability related absence.
- f. In any event, even if the burden of proof shifts to the Respondent, the Tribunal accepts the Respondent's non-discriminatory explanation for the Claimant's performance grading, namely that, notwithstanding her indicative grading of 1 at the mid-year point, this was the grading that most accurately reflected her performance for that proportion of the entire 2017/18 year for which she was at work. It was the grading generally given to staff who were performing well but were not exceptional in all respects. In the Claimant's case she had been the subject of specific criticism in feedback provided by Mr Misbah.

77. For these reasons, the decision to award the Claimant a performance grading of 2 was not discrimination arising from disability, contrary to Section 15 of the Equality Act 2010.

**(3) Grievance procedure**

78. In relation to the grievance procedure, applying the guidance given in *Pnaiser* :

- a. The alleged unfavourable treatment in terms of the grievance procedure is the fact that the grievance was conducted by Ms Comben, who was the same substantive grade as the Claimant. An allegation that the Respondent failed to deal with the grievance properly in other respects is more appropriately regarded as a criticism of points that were not addressed, and therefore of the grievance outcome;
- b. Mr Comben's role as the grievance officer was not unfavourable treatment to the Claimant in circumstances where:
  - i. Ms Comben had been acting up into the role of Higher Executive Officer for much of the relevant period and had been her line manager;
  - ii. It was normal practice for line managers to carry out the performance grading assessment; and
  - iii. It was normal practice for dissatisfied employees to have their criticisms considered by line managers in the first instance, even though this was not recorded in writing.
- c. As already indicated, in the Claimant's closing submissions, it was accepted that the choice of grievance manager was not influenced by the extent of the Claimant's sickness absence. Therefore, even if there had been unfavourable treatment in relation to the grievance procedure, the Claimant accepts that this treatment did not arise because of something arising in consequence of the Claimant's disability.

79. Therefore, there was no discrimination under Section 15 of the Equality Act 2010 in relation to the grievance procedure.

**(4) Grievance outcome and grievance appeal**

80. Again applying the guidance in *Pnaiser* so far as is relevant :

- a. The grievance and grievance appeal were dismissed. To that extent there was unfavourable treatment by Ms Comben in relation to the grievance and by Ms Zamornii in relation to the grievance appeal.
- b. However, there is no evidence from which the Tribunal could infer, in the absence of a non-discriminatory explanation, that it was the Claimant's three-month long sickness absence and her subsequent return on a phased

return to work which impacted on the outcome or her grievance and on the outcome of her grievance appeal. The period of absence was not referred to in the notes of the grievance meeting or the grievance appeal meeting, still less in the grievance outcome letter or the grievance appeal outcome letter.

- c. As already explained, Ms Comben's failure to deal with all the Claimant's points in her grievance outcome letter does not raise a prima facie case that her grievance outcome was influenced by the extent of the period of sick leave.
- d. Neither Ms Comben who heard the grievance nor Ms Zamornii who heard the grievance appeal had been inconvenienced by the Claimant's sickness absence, such that this might have consciously or sub-consciously influenced their decision making. In Ms Comben's case, she had taken the time to visit the Claimant in hospital during that sickness absence, even though she was no longer line managing the Claimant by this stage.
- e. In the Tribunal's view, Ms Comben dismissed the Claimant's grievance because she continued to believe that a performance grading of 2 was appropriate in the Claimant's case, based on the evidence of the Claimant's performance. She continued to hear the grievance notwithstanding the Claimant's objection, because HR advised her that this was appropriate. Insofar as she failed to deal with criticisms about the extent of her performance reviews and the failure to hold a meeting to discuss the performance rating, this was on balance of probabilities an oversight on the part of Ms Comben. On the balance of probabilities it was not because of the extent of the Claimant's disability related sickness absence.
- f. Ms Zamornii did not identify any errors in the rationale behind the performance rating awarded. She also checked the position with HR about who should conduct the grievance and was reassured that it was appropriate for Ms Comben to conduct the Claimant's grievance given that it was standard practice for the line manager who had carried out the performance grading assessment to reconsider their own assessment if it was challenged by way of grievance. She dealt with the criticisms made by the Claimant about the process in her grievance appeal outcome letter.
- g. In fact, in closing submissions on behalf of the Claimant, Mr Thiagarajah said he did not think that Ms Zamornii knew of the Claimant's disability.

81. The Tribunal therefore accepts the Respondent's non-discriminatory explanations for why her grievance and her grievance appeal were unsuccessful.

**(5) Justification**

82. In circumstances where Section 15(1)(a) Equality Act 2010 has not been established, it is not necessary for the Tribunal to decide whether the treatment was a proportionate means of achieving a legitimate aim.

**Conclusion**

83. The Claimant's disability discrimination claims therefore fail and are dismissed.

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Employment Judge Gardiner  
Dated: 6 December 2019