Case Nos: 2206746/2017 & 2204869/2018

EMPLOYMENT TRIBUNALS

Claimant: Ms D Rohm

Respondent: Merrill Corporation Ltd

Heard at: London Central **On:** 5, 6, 9, 10, 11 & 12 December 2019

Before: Employment Judge H Grewal
Ms S Samek & Mr S Soskin

Representation

Claimant: Mr A Morgan, Counsel

Respondent: Ms S Chan, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 It considers it just and equitable to consider the complaints of disability discrimination that were not presented in time;

2 The complaints of disability discrimination are not well-founded; and

3 The complaint of unfair dismissal is not well-founded.

REASONS

1 In the first claim, presented to the Tribunal on 23 July 2017, the Claimant complained of disability discrimination. Early Conciliation ("EC") notification was given on 18 April 2017 and the EC certificate was granted on 1 June 2017. In the second claim presented on 3 June 2018 the Claimant complained of disability discrimination and unfair dismissal.

The Issues

2 An agreed list of issues was drawn up between the parties at the preliminary hearing on 4 October 2017. At a preliminary hearing on 8 April 2018 Employment Judge Snelson pointed out that the agreed list of issues needed to be revised to correspond with the legal framework. He made it clear that the review should not be used to add to the allegations but to clarify the legal basis of the claims. The Claimant subsequently submitted a new list of issues which added new claims. The Respondent objected to that. We decided at the outset that we would use the original agreed list of issues notwithstanding the lack of clarity on some of the legal issues.

Disability Discrimination

3 It was not in dispute that the Claimant was disabled at the material time because of a diagnosis of cancer and that the Respondent had knowledge of it from 1 February 2016.

Discrimination arising from disability (section 15 Equality Act 2010)

4 Whether the Respondent treated the Claimant unfavourably because of something arising in consequence of her disability by:

(a) Extending her probation period by 6 months in a letter dated 11 May 2016;

(b) Telling her that company sick pay was being paid to her on a discretionary rather than contractual basis as she did not have six months' service;

(c) Not giving her a pay rise as pay rises were allegedly reserved for top performers and where market adjustments were required, but the Claimant was not able to perform at the top in Q1 and Q2 as she was receiving treatment for breast cancer;

(d) Having refused to allow the Claimant to work from home, not assigning any projects to her without prior consultation with her because she only worked 3 days a week;

(e) Stating in January 2017 that if she was assessed against the Project Manager role she would be rated as "needs improvement" in every category, she would not be assessed against the Project manager role and that she had not been carrying out that role due to her duties having been adjusted.

(f) Saying to her on 19 December 2016 "Maybe you should be on top of everything" and that they needed to ensure that the client did not suffer when the

Claimant missed incoming LiveChats due to her having forgotten to switch on her computer volume just after she returned to work after sick leave;

(g) Requesting that the Claimant send a sick note to her manager although she had already sent it to HR;

(h) Making negative comments about her performance in her one-to-one on 24 January 2017;

(i) Informing her on 18 May 2018 that if she did not attend an Occupational Health appointment the Respondent would not be able to approve an additional working from home day and that disciplinary action might be take if she did not attend the office on that day.

5. If it did any of the above, whether such treatment was a proportionate means of achieving a legitimate aim.

<u>Failure to make reasonable adjustments (section 21 Equality Act 2010)</u>

6 Whether the Respondent applied any of the following provisions, criteria or practices:

(a) Expected the Claimant to work towards goal and targets while she was undergoing treatment for breast cancer and during the recovery period;

(b) Measuring the Claimant's performance based on performance targets applied to colleagues who are not disabled. The adjustment suggested for (a) and (b) is adjusting the Claimant's targets.

(c) Requiring the Claimant to work in the office while undergoing treatment for cancer and during the recovery period (Spring 2016 to January2017);

(d) Requiring the Claimant work in the office 4 days a week after the first assessment by the OH Adviser;

(e) Treating the request to work from home permanently as a flexible working request instead of a request for a reasonable adjustment under the Equality Act 2010;

(f) Failing to respond to the Claimant's request to reduce her working hours to 4 days a week (three from home and one in the office);

(g) Failure to implement a return to work plan designed in consultation with the Claimant;

(h) Not consulting with the Claimant over reasonable adjustments;

(i) Not acknowledging the need for reasonable adjustments;

(j) Requiring the Claimant to work on a 12 inch laptop;

(k) Providing her with a laptop which did not have the relevant encryption of the hard-drive installed;

(l) Suggesting that the Claimant use her own private computer at home;

(m) Requiring the Claimant to do LiveChat although she suffered from cognitive problems following cancer treatment;

(n) Requiring the Claimant to work in the office 5 days a week, going on business travel and working overtime with no compensation.

7 If it did, whether the PCP put the Claimant at a substantial disadvantage in comparison with persons who were not disabled;

8 if it did, whether the Respondent failed to take such steps as it was reasonable to have to take to avoid the disadvantage.

Harassment (section 26 Equality Act 2010)

9 Whether the Respondent harassed the Claimant by:

(a) Contacting her to assign her tasks by email while she was on sick leave, asking her to do training on her first day back at work after intensive chemotherapy in August 2016 and contacting her in an intrusive manner in October 2016 (paragraphs 6, 7, 8 ET1);

(b) Saying to her on 19 December 2016 that she should be on top of everything when she missed incoming LiveChats and that they needed to ensure that clients did not suffer (paragraph 10 ET1);

(c) Writing to the Claimant on 13 January 2017 that working from home would cease week commencing 20 February 2017 (paragraphs 14, 18 ET1);

(d) Divulging to OH that the Claimant had raised a grievance (paragraph 26 ET1);

(e) Informing the Claimant on 18 May 2018 that if she did not attend the OH appointment, the Respondent would not be able to approve an additional day working from home and that disciplinary action might be taken if she did not attend office that day.

Jurisdiction

10 Whether the Tribunal has jurisdiction to consider complaints of disability discrimination about any acts or failures to act that occurred before 10 March 2017.

Constructive Dismissal

11 Whether the Respondent breached the implied term of trust and confidence by:

(a) Treating the Claimant as alleged at paragraphs 4 to 9 (above);

(b) Not providing the Claimant with support following her return to work in January 2018 by failing to provide her with training on DataSiteOne and a suitably set up laptop on which to work from home.

(c) Informing the Claimant on 18 May 2018 that if she did not attend the OH appointment, her proposed additional working from home day would be withdrawn and that disciplinary action might be taken if she did not attend work on the additional day.

12 Whether the Claimant waived any breach by delaying in acting on it.

13 Whether the Claimant resigned in response to any breach.

14 If there was a dismissal, whether it was an act of disability discrimination and/or fair.

The Law

15 Section 15(1) of the Equality Act 2010 provides that a person (A) discriminates a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

16 A duty to make reasonable adjustments is imposed on a person (A) where a provision, criterion or practice ("PCP") of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. If the duty arises A is required to take such steps as it is reasonable to have to take to avoid the disadvantage (section 20(3) Equality Act 2010); A is not subject to the duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at the disadvantage referred to in Section 20 (paragraph 20 in Schedule 8 Equality Act 2010).

17 In **Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664** the EAT held that there is no separate and distinct duty of reasonable adjustments on an employer to consult the disabled employee about what adjustment might be made. The only question is, objectively, whether the employer has complied with his obligations or not.

18 Section 26(1) Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to disability and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has had that effect account must be taken of B's perception, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect (section 26(3)).

19 Section 136(2) of the Equality Act 2010 provides that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred unless A shows that he did not contravene the provision. We had regard to the guidance given in **Igen Ltd and Others v Wong [2005] ICR 931** and other cases as to the application of the reversal of the burden of proof.

20 Section 123(1) of the Equality Act 2010 provides that a complaint of disability discrimination may not be brought after the end of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal considers just and equitable. Conduct extending over a period is to be treated as done at the end of the period (section 123(3)(a)) and failure to do something is to be treated as occurring when the person in question decided on it (section 123(3)(b)). In the absence of evidence to the contrary, a person (A) is to be taken to decide on failure to do something when A does an act inconsistent with it or, if A does no inconsistent act, on the expiry of the period in which A might reasonably have been expected to do it (section 123(4)). The burden of persuading the Tribunal to exercise its discretion to extend time is on the claimant and the granting of an extension is the exception rather than the rule.

21 In **Matuszowicz v Kingston Upon Hull City Council [2009] IRLR 288** the Court of Appeal held that a failure to make reasonable adjustments was an omission and not an act under paragraph 3 of Schedule 3 of the Disability Discrimination Act 1995. Therefore, the date on which it occurs and from which times begins to run is when the person in question decides on it. If there is no evidence of a decision not to make an adjustment, then the decision will be taken to have been made when the person does something inconsistent with making that adjustment or on the expiry of the period in which he might reasonably have made that adjustment.

22 Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed if the employee terminates his contract of employment in circumstances in which he is entitled to do so without notice because of the employer's conduct. The basis propositions of law to be derived from the case law are as follows. An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of contract (**Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27**. It is an implied term of any contract of an employment that an employer shall not without reasonable or proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term only arises if the conduct of the employer objectively viewed is such that it is likely to cause damage to the employer/employee relationship (**Malik v BCCI [1997] IRLR 462**. The breach of the implied term of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term although each individual incident may not do so. The "final straw" need not itself be a breach of contract but must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term.

The Evidence

23 The Claimant gave evidence in support of her claim. The following witnesses gave evidence on behalf of the Respondent (their job titles at the time are given in brackets) – Slava Sokolov (Project Management Supervisor), Victoria Savage (HR Business Partner), Demina Poli (HR Director), Hoda Mohtadi (Senior Operations Manager), Fiona Gavigan (Head of Inside Sales, EMEA) and Hilary London (Acting General Manager, EMEA). Ms Savage gave evidence vis Skype. The documentary

evidence comprised about 800 pages. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of Fact

24 Between 3 August 2015 and 15 November 2015 the Claimant was employed by City Recruitment Ltd and was assigned by them as an agency worker to work as a Project Manager for the Respondent.

25 On 16 November 2015 the Claimant commenced employment with the Respondent as a Datasite Project Manager. Datasite is one of the Respondent's central products and consists of a secure online repository where clients can store and access confidential electronic files. The role of the Project Manager was to provide customer service and technical support to the Respondent's Datasite clients. The product was sold to clients on the basis that they would have dedicated support from Project Managers who were assigned to their accounts (projects). They were provided with a direct line of communication to a particular Project Manager working on each shift. In order to be assigned projects a Project Manager had to work five days a week. Project Managers also answered calls made to colleagues who were absent or unavailable. They constantly asked each other for assistance, to double check their emails, work orders, media and shipments and discussed methods and solutions.

26 The Claimant's contract of employment contained the following provisions:

> "*Your employment with the Company will commence on 16 November 2015. Your period of continuous employment with the Company will begin on 16 November 2015."*
>
> *"Your normal place of work is 17 Dominion Street, London EC2M or such other place within London as we may reasonably require to meet the requirements of the business."*
>
> *"Your employment will be subject to a six month probationary period which will begin on your commencement date and which may be extended at the Company's discretion… At the end of your probationary period your employment will be confirmed if your performance has been satisfactory. Until such notification, your probationary period will be deemed to have been extended."*
>
> *"You will be eligible to participate in the following schemes (further details of which are available from Human Resources):*
> - *Private Medical and Dental Insurance – eligible upon successful completion of your probation period*
> - *Permanent Health Insurance (Also known as Long Term Disability) immediate eligibility*
> - *Life assurance – immediate availability."*
>
> *"Provided that you comply with these rules, you will be entitled to receive Statutory Sick Pay (SSP)…*

We may decide at our absolute discretion to continue to pay you your normal salary for up to a maximum of 24 days in any rolling 12 month period. Any such pay will include any SSP due to you.

You agree to consent to medical examination (at the Company's expense) by a doctor nominated by the Company should the Company so require."

27 In respect of sick pay, the Respondent's Employee Handbook states,

"*Full time employees who have successfully completed their probation period will receive basic salary and contractual benefits in full during the first 25 days (whether or not consecutive) of incapacity in any 12 month period. For the next 65 days of incapacity (whether or not consecutive) in any 12 month period, the individual will be paid half his/her basic salary and provided with contractual benefits in full. Any further payment of salary or provision of benefit will be entirely at Merrill's absolute discretion."*

28 The Respondent has a training plan which it puts in place for all new Project Managers to complete before they can pass probation. The training, consisting of three accreditations, is designed to ensure that all new Project Managers are competent in the tasks that they have to perform in order to manage Datasite projects independently. Project Managers have to complete all three accreditations in order to pass their probation. Most do so within four to six months of the start of their employment.

29 Mr Solokov was the Claimant's line manager and he had monthly one-to-one meetings with her. At the meeting on 17 Nov 2015 it was noted that the Claimant had already passed her planning call accreditation. She had passed that while she was an agency worker. The goals that she was set were to complete the site manager accreditation and to pick up three calls per day and to aim for a higher number. The goals at the one-to-one meeting on 8 December 2015 were to complete the site manager accreditation that month and to aim to pick up five calls a day.

30 At the one-to-one meeting on 13 January 2016 it was noted that the Claimant had still not completed the site manager accreditation and that it had to be completed by the end of that month. It was also noted that she needed to "*raise her game in picking up the incoming calls"* and that she should aim to pick up five calls per day in the following month.

31 On 1 February 2016 the Claimant informed Mr Solokov by email that on 28 January she had been diagnosed with breast cancer and was due to attend hospital on 4 February when a plan for treatment and surgery would be put in place. She said that she was in shock and mentally agitated and asked to take annual leave that week. Mr Solokov sympathised with her and acceded to her request for leave and said that if she felt like coming into the office during the week to take her mind off things to let him know. He also apprised Ms Savage in HR of the situation and asked her whether there was anything he or the Respondent could do to support the Claimant.

32 On 9 February the Claimant informed Mr Solokov of the treatment plan. She said that she was due to start chemotherapy in two weeks' time and that there would be eight sessions of chemotherapy at three weekly intervals. That would be followed by

surgery and then radiotherapy. It was anticipated that there would be one week's recovery time following surgery. Mr Solokov passed that information to HR.

33 At the one-to-one meeting on 12 February Mr Solokov and the Claimant discussed her personal circumstances and the ways in which the Respondent could support her. Mr Solokov said that he would ask HR how the Claimant's absence should be regarded. As far as work was concerned, it was noted that the main focus had to be passing the site manager and Q&A accreditations because they were an essential part of the Project Manager role that needed to be completed sooner rather than later.

34 The Respondent classified the Claimant's absences for treatment as "ongoing treatment" rather than as sickness absence. The result of that was that those days were not taken into account for the purpose of applying the Respondent's sickness absence and attendance management procedures.

35 In February 2016 the Claimant had seven days' absence for ongoing treatment and one day's sickness absence.

36 In March 2016 the Claimant was absent from work on thirteen days. Some of the absence was for treatment and some of it was sickness absence.

37 At the one-to-one meeting on 18 March the Claimant asked for her working hours to be reduced by two working days each month. Mr Sokolov sought advice from HR and it was approved for six months when it would be reviewed.

38 In her appraisal in April 2016 the Claimant was given a rating of "2" which denoted "meets expectations". By that time she had passed the site manager accreditation. In April 2016 79% of employees did not receive a pay increase. The pool was greatly diminished due to poor financial performance across the company. Pay increases were reserved on that occasion for the company's top performers or where market forces dictated an upward adjustment. The Claimant was new to her role and she did not merit a pay increase on either of those grounds. The Claimant, along with the vast majority of employees, was not awarded a pay rise.

39 In April the Claimant was absent on 13 days (for treatment and sickness) and in May on 16 days.

40 On 11 May 2016 Ms Savage in HR wrote to the Claimant that, as she had had more than 25 days' paid sick leave in a 12 month period, from 6 April 2016 in accordance with the Respondent's policy she would receive half pay. She also said,

> "*I can also confirm that following your request to your manager, Slava Sokolov, on 12 April 2016 to take two unpaid days per month on the first and third Monday, this has been approved as a temporary measure to help support you. This change to your working pattern is effective 1 June 2016 and will be reviewed in six months' time, alongside your probation period, which has been extended while you are unwell."*

41 At that stage the Claimant had still not completed the Q&A accreditation. Her probationary period was due to expire on 16 May 2016. Instead of terminating the Claimant's employment for not having successfully completed the probation period,

Mr Sokolov took into account her circumstances and decided to extend it to give her additional time to obtain the final accreditation.

42 On 12 May 2016 the Claimant wrote to Mr Sokolov and Ms Savage about the extension of her probation period. She said that she had been verbally told that it was being extended because she had not completed the Q&A accreditation and because she did not have as many projects assigned as other Project Managers. She said that the reason for both was that she had had to have time off for treatment for cancer. She said that it was discriminatory and unlawful under the Equality Act 2010. She also said that she had never been informed that passing the Q&A accreditation was a condition for passing probation. She asked for the extension to be reviewed and removed.

43 On the same day she informed Mr Sokolov that for the next twelve weeks she would be having chemotherapy once a week.

44 Mr Solokov took some time to consider the Claimant's request, sought guidance from HR and he decided, as an exception, to confirm that the Claimant had passed her probation in order to support her during what was a difficult time for her. He wrote to her on 1 June 2016. He said that the decision to extend her probation was based solely on the progress that she had made in her role and that that had been impacted by her absence levels due to her illness. Following receipt of her letter he had reconsidered that decision and had decided not to extend her probation. He continued,

> "*Whist you are currently not at the level we would normally expect of a Project Manager in order to enable us to confirm a permanent position, I appreciate the difficult circumstances that have contributed towards the outcome."*

He also addressed other issues raised in her letter. He pointed out that her employment had commenced on 16 November 2015 and that, although the Respondent had not been contractually bound to pay her anything above SSP in the first six months of her employment, it had exercised its discretion to pay her full pay for her sickness absence. The Claimant had recently made an informal inquiry regarding working from home. He said that they were unable to grant working from home because the requirements of the Project manager role meant that employees needed to be in the office.

45 The Claimant thanked him for reconsidering the decision to extend her probation and said that she was very happy with the outcome.

46 The Claimant was absent sick because of the side-effects of the chemotherapy from 13 May to 12 August 2016.

47 On 8 June 2016 Ms Savage wrote to the Claimant to confirm that she had successfully completed her probation period. On 12 June the Claimant queried whether she had disability cover and Ms Savage responded that she had Income Protection Insurance which would provide her with 50% of her basic salary if she was off for an extended period of time and met the eligibility criteria. She asked the Claimant whether she wanted her to begin the claims process for her. On 16 June Ms Savage sent her a copy of the form for her to complete certain parts.

48 On 5 August Ms Savage informed the Claimant that her insurance claim had been accepted. The Claimant would receive half pay from the Respondent until 10 August and for any period of sickness absence after that she would receive half pay from the insurance.

49 The Claimant took 15 August as one of her two non-working days and took annual leave from 16 to 19 August. She was due to return to work on 22 August after an absence of three months from the workplace.

50 On 16 August Mr Sokolov sent the Claimant an email as he was going to be away when she returned to work. He said that Scott Friar would conduct the return to work interview with her and he (Mr Sokolov) would have a meeting with her when he returned to work on 30 August. He told her briefly what had happened in her absence and the arrangements that he had made to gently ease her back to work. This included a quick training process to make sure that she was up to date with all the enhancements. The Claimant responded that she would like to come in for half a day on the Monday and to discuss a phased return to work with Mr Friar. Mr Sokolov agreed that she could do that and asked her whether she would be able to do any training on Monday. The Claimant responded that she would be able to do the training for the enhancements on Monday.

51 At the return to work meeting on 22 August 2016 the Claimant informed Mr Friar that she was due to have surgery in three weeks' time and that she required a phased return to work that would continue after the surgery.

52 Between 22 August and 12 September the Claimant worked two days a week. She was paid in full for those two days and half pay for the other three days.

53 Mr Sokolov had a one-to-one meeting with the Claimant on 9 September. She informed him that she was to have surgery the following week and that recovery might take up to six weeks. She said that she would keep him posted on her progress and return date.

54 On 12 September the Claimant informed HR that she would be off for approximately six weeks after her surgery.

55 The Claimant had her surgery on 13 September. Mr Sokolov sent her a text message to inquire how it had gone and said that he hoped that she was doing well.

56 On 1 October the Claimant sent Mr Sokolov a certificate from her doctor certifying her as unfit to work for 91 days because of "*stress related problem".* The Claimant said that she did not think that she would need so long to recover and would, therefore, request to be signed fit to work as soon as she had recovered. She said that she estimated the six weeks that she had initially discussed would suffice. Mr Sokolov sent that to HR and said that, on the basis of that, it was likely that the Claimant would be back on about 24 October (six weeks after the surgery). He said that she had booked holiday for 24 to 31 October and he envisaged that she would return to work on 1 November 2016.

57 On 4 October the Claimant informed Mr Sokolov that she wanted to cancel her holiday request for 24 – 31 October. Mr Sokolov asked her whether she would

require a phased return to work and the Claimant confirmed that she would but would only be able to confirm nearer the time how many days a week she could work.

58 On 17 October Mr Sokolov informed the Claimant that HR had advised that they could not allow her to return to work as long as she had a certificate that she was unfit to work for 91 days unless she obtained another certificate to say that she was fit to return to work. If she wished to return to work the following week she would need to get a certificate to confirm that she was fit to work. The Claimant responded on 19 October that she would not be able to return to work the following week and that she thought that she would need an additional 1-2 weeks for recovery.

59 On 30 October the Claimant informed Mr Sokolov that she was seeing her GP on 7 November and would ask him for a certificate to say that she fit to work. In the first week she would work two days a week followed by three days a week. On 31 October she said that she was planning to return to work on 9 November (Wednesday) and would also work on the Friday that week. After that she would like to work on Tuesdays, Wednesdays and Fridays.

60 On 7 November the Claimant's GP provided her with a certificate that she was fit to return to work on condition that she had a phased return to work which would involve her working two days in the first week and three days a week thereafter until the end of December 2016.

61 At a return to work meeting on 9 November it was agreed that the Claimant would have a phased return to work and that she would work three days a week until 31 December 2016. On her return to work the Claimant was not allocated any new projects as she was out of the office two days a week and needed to refresh her product knowledge having been away from the workplace for such a long period. She was asked to help other Project Managers with calls and to do LiveChat duties along with the Project Management Associates. At that stage the number of calls that she answered and the number of cases that she logged would not be recorded.

62 On 15 November Ms Savage wrote to the Claimant and said that the Respondent wanted to understand what they needed to do to ensure the Claimant's wellbeing at work and whether they needed to make any reasonable adjustments to ensure that. She sought the Claimant's consent for the Respondent to contact her GP about her medical condition. She said that if the Claimant was not comfortable doing that they could consider other options such as a referral to Occupational Health. The Claimant responded on 29 November that she would prefer a referral to Occupational Health.

63 On 25 November Mr Sokolov had a one-to-one meeting with the Claimant. It was agreed that she would log the days that she was not in the office as "ongoing treatment". The Claimant was working the early shift (7 am to 3 pm) and she said that that helped her to avoid the rush hour and to reduce stress levels. Mr Sokolov told her that from the following month he would be counting her calls and cases but would deduct the number of hours spent on LiveChat from the days in the office. He also asked the Claimant to set up a date for the Q&A accreditation with the Training team and to work towards that goal.

64 The Claimant was absent sick from 2 to 16 December 2016 because she developed cellulitis. On 14 December Ms Savage asked the Claimant whether she had a medical certificate because the income protection insurance needed it and the

Claimant also needed to provide one to the Respondent. The Claimant sent it to her on 15 December.

65 The Claimant returned to work on 19 December 2016. Mr Sokolov, who was not aware that the Claimant had sent a medical certificate to Ms Savage, asked her to provide a medical certificate. The usual company procedure was that medical certificates were sent to the line manager. The Claimant said that she had already sent it to Ms Savage. He asked her to send him a copy of it.

66 On 19 December the Respondent received notifications that a few chats had been missed. The Claimant said that that was due to her having forgotten to put on the sound on her headphones. Mr Sokolov said something to the effect of that they needed to "*try to stay on top of it"* to ensure that the client did not suffer.

67 The Claimant was referred to Occupational Health ("OH") and was seen by the OH Doctor on 20 December. In a report dated 22 December 2016 the OH Doctor said,

> "*As well as the physical symptoms of tiredness and hormonal lack, she is also experiencing some problems with cognitive function. At present she is able to work more effectively if she remains on one particular aspect of her job for a relatively extended period of time, and this needs to be taken into account when constructing a helpful return to work plan…*
>
> *Whilst she is able at present to work the full hours of her normal job on a three day per week basis, I would recommend discussions as above with regard to the nature of the job, together with consideration being given for the time being, to allowing her to work one day per week from home, providing this is acceptable from a business perspective…*
>
> *I would advise that she remain on this current working regimen for at least the next six weeks and would suggest an occupational health review to assess her progress in early February 2017"*

68 The Claimant sent the OH report to Mr Sokolov on 4 January 2017. On the following day Mr Sokolov informed the Respondent's HR Director that he was looking to accommodate her request to work from home one day a week for six weeks and sought her approval for the Claimant to be provided with a company laptop to use at home. Having got the approval, he wrote to the Claimant on 13 January that they had agreed to allow the Claimant to work from home on Wednesdays for the next six weeks. He said that the arrangement would be effective on 9 January 2017 and would cease the week commencing 20 February 2017. He continued,

> "*An arrangement to work from home is not one we are usually able to accommodate due to the requirements of the Project Manager role. However, we have made an exception due to your circumstances in order to help assist you in the recovery process from your illness, and with a view to support your return to work to a full-time Project Manager."*

69 At a one-to-one meeting with the Claimant on 24 January 2017 it was noted that she was happy with the new set up, was feeling better and was getting comfortable with the internal processes and procedures. While working from home the Claimant

was performing LiveChat (four hours a day), monitoring the inbox and sending hosting reminders to clients. The Claimant said that she would like a laptop with a wider screen at home because she was having difficulty doing LiveChat on the one that they had provided her. Mr Sokolov said that he would look into that. Mr Sokolov said that the LiveChat statistics provided to him showed that the client waiting time for the Claimant was higher than the average waiting time for the group that handled LiveChat. It was agreed that she would start booking one hour at the training pod regularly and would run several sessions in preparation for the Q&A accreditation. He said that when writing his review of the Claimant's performance for the past year in her appraisal he would make the point that she had not been in a position to perform the Project Manager role due to her illness and the ongoing recovery process.

70 On 1 February Mr Sokolov informed the Claimant that she would not be doing LiveChats from home due to the small size of the screen. IT would install a wide screen on her desk at work and she would continue working on LiveChat in the office because it would help her transition back to the Project Manager role.

71 On 2 February Mr Sokolov sent the Claimant a message in which he apologised for the trouble but asked her to bring her laptop to the office on the following day as IT needed to encrypt it. She asked whether she could bring it in later as she was feeling physically drained at the time and although it was a small laptop she found it weighty with her physical levels. He agreed to that.

72 The OH Doctor saw the Claimant again on 7 February. In his report of 8 February he said,

> "*Although she is just about managing this particular protocol, it is quite clear that her ongoing symptoms and, in particular, her lack of stamina, mean that she will need to be extremely careful that she does not try to do too much too soon.*
> …
> *In view of the above, I would not recommend any further increase in her working hours above the current three day regimen until I see her again in eight weeks' time. It would also be helpful to provide her with work of a structured and linear nature, as she is likely in the short to medium term to perform better on tasks of this nature that when attempting to undertake multiple tasks of a much shorter time frame."*

73 On 10 February the Claimant sent Mr Sokolov an email attached to which was a Macmillan guide for employers on supporting employees with cancer and her latest OH report. She said that under the Equality Act 2010 an employer was obliged to make reasonable adjustments and that that included working from home and adjustments of performance targets. She complained that in his letter of 13 January 2017 he had said that her working from home would cease on 20 February 2017 when she was due to see the OH Doctor again before that date. She said that comparing her performance with that of her colleagues in her appraisal was discriminatory as was his telling her that her response time on LiveChat was slower than that of others who did it.

74 Mr Sokolov forwarded her email to Ms Savage. He attached to it a document setting out why Project Managers could not carry out their role from home. He said that the tasks performed by the Claimant at that time while she was in the office were

equivalent to those of a Project Manager Associate ("PMA"). He also attached to his email job descriptions of the both the Project Manager and the PMA roles.

75 On 23 February Mr Sokolov wrote to the Claimant. He said that in line with the recommendation made by the OH doctor the Respondent would continue the adjustment of the Claimant working three days a week (one of which was from home) for the time being. He also pointed out that the Respondent had made a number of adjustments both to her working hours and her duties and responsibilities in order to ensure that she was not disadvantaged because of her health issues and that it would continue to do so based on advice from OH and consultation with her.

76 On 7 March Mr Sokolov and Ms Savage met with the Claimant and advised her that given her adjusted duties over the previous year they had decided that it was better not to conduct an annual review for her. They assured her that that would not affect the pay review process. The Claimant said that she was fine with that as long as it did not impact on her pay review. On the following day the Claimant informed Mr Sokolov that on second thoughts she would like to have an appraisal as otherwise there would be no record of her performance. She also asked about when she would receive a bigger screen and computer mouse to work from home. Mr Sokolov sought advice from HR on the appraisal. On 9 March he informed the Claimant that he had arranged for delivery of a computer monitor, keyboard and mouse to her home, and that the agreement to work from home one day a week would be continued at least for the next seven weeks. The IT equipment was not delivered as the Claimant was absent sick for a long period after that date.

77 On 9 March the Claimant sent Mr Sokolov a text message that she would not be able to attend work the following day. She said,

> "*I am feeling very unwell due to work stress as I feel I have to battle for everything at work since my return.*"

The next day she supplied a medical certificate that she was unfit to work from 10 to 23 March because of *"stress related problem and work stress."*

78 Prior to 29 March the Claimant had sent Mr Sokolov an annual review with her entries on it. On 29 March he sent her a draft with his comments and rating on it. The Claimant had said on the form that she expected a pay rise which was higher than the usual 3% because she had met expectations and had not had pay rise the previous year. Mr Sokolov gave her an overall rating of "2" which denoted "Meets Expectations". He said,

> "*Dagmar's duties over the last year have been substantially adjusted to take account of her health problems, such that she has not been carrying out a project management role. Dagmar has also been working reduced hours during the week and has not been assigned dedicated projects and client accounts. Dagmar has been assessed on the basis of these adjusted duties.*
>
> *Taking into account her illness and related absences, Dagmar has demonstrated good performance on her adjusted duties and has met expectations.*"

79 On 29 March 2017 the Claimant sent Mr Sokolov and Ms Savage a letter headed "Discrimination Compensation Claim Dagmar Rohm". The letter also contained the heading "Without Prejudice". In the letter the Claimant said that after she had informed Mr Sokolov of her diagnosis of breast cancer on 1 February 2016 she had been subjected to a pattern of discrimination. She set out in over five single-spaced typed pages the acts of disability discrimination to which she claimed she had been subjected. She said that she had raised the matter informally and formally under the Respondent's grievance procedure but that they had not dealt with it. She said that she was claiming compensation under the Equality Act 2010 and set out the sums that she was claiming under various heads.

80 Ms Savage treated the letter as the Claimant raising a formal grievance. The Claimant had made serious allegations of disability discrimination going back to early 2016. The Claimant had not raised a grievance about the majority of those matters before. The Respondent rightly took the view that they were serious allegations and they needed to be investigated.

81 On 29 March the Claimant was assessed by the OH doctor. In a report dated 30 March 2017 the doctor said that her overall health had deteriorated since he had last seen her. After a long discussion with her he believed that her psychological health was considerably worse than previously suspected with what he would term to be a severe form of adjustment reaction or possibly Post-Traumatic Stress Disorder. He believed that her GP had not been made fully aware of the depth of her problems and he urged her to discuss her symptoms with her GP. He said that at that time she was not fit for work in any capacity and the prognosis for recovery to the point where a return to work could be anticipated was at that time guarded.

82 The Claimant was certified by her GP as unfit to work because of "*stress related problem"* from 30 March to 30 June 2017.

83 On 13 April HR informed the Claimant that they were taking the concerns raised in her letter of 29 March very seriously and had commenced an investigation in line with the Respondent's Grievance Procedure. She was informed that Fiona Gavigan, who was completely independent of the situation, had been appointed Grievance Manager. The Claimant was given three options – she could attend a meeting to discuss her concerns while she was off sick, she could wait to attend a meeting until she felt better or they could conclude the investigation and respond to her in writing. The Claimant responded that due to time limits she would prefer them to conclude the investigation and to respond to her in writing.

84 On 18 April the Claimant commenced Early Conciliation with ACAS. The certificate was granted on 1 June 2017.

85 On 21 April Fiona Gavigan wrote to the Claimant. She sought her consent to access the Claimant's OH reports and asked her whether she wanted her to interview any other employees in support of her grievance. As part of her investigation Ms Gavigan interviewed Mr Sokolov and someone from IT and sought further information from HR.

86 Ms Gavigan sent the Claimant the outcome of her investigation on 2 May 2017. She did not uphold any of her grievances. She explained in some detail the investigation that she had conducted and why she had reached the conclusions that

she had on the Claimant's various complaints. She advised the Claimant of her right to appeal.

87 The Claimant appealed on 10 May. The appeal comprised over eleven typed pages.

88 In a report dated 18 May 2017 the OH Doctor advised that the fundamental issues affecting the Claimant's health were the psychological effects of her treatment of breast cancer in 2016 and that those had not been resolved. She had not made much headway in respect of that with her GP or a local counselling service. His opinion was that she remained unfit for any consideration of a return to work in the near future.

89 Hilary London, Acting General Manager EMEA, dealt with the Claimant's grievance appeal. She sent the Claimant her decision on 9 June 2017. She partially upheld only one of the complaints. That was the complaint about the initial decision to extend her probation in light of her illness. Ms London stated that she believed that the probation should not have been extended following the Claimant's diagnosis despite there having been performance concerns. However, she only partially upheld that complaint because the probation was passed as soon as the Claimant raised concerns about it and her main concern with the extension had been her misunderstanding that she would not be entitled to Group Income Protection insurance unless she had passed probation. She did not uphold any of her other complaints. She also said that, in light of the Claimant's feelings about her relationship with Mr Sokolov, she did not believe that an ongoing working relationship was possible and, in order to support her return to work, she had suggested that the Claimant's line manager be changed. That suggestion had been accepted and her new line manager was Hoda Mohtadi. She asked the Claimant to express any views that she had on the change by 19 June. She said that she had also recommended that on the Claimant's return to work, there should be a discussion with her about the tasks to be assigned to her.

90 The Claimant responded on 20 June 2017. She said that she agreed to Ms Mohtadi being her new manager. She said that she wanted the issue of compensation to be addressed as she had suffered severe damages due to discrimination. She also said,

> "*As part of the reasonable adjustments Merrill should make since the role allows, I would want to work from home henceforth, in light of my limited strength and to remove the strain and physical drain of commuting, given my medical condition. I also have a dependant child, aged 9 to tend requiring me to have strength left over after the working day.*"

91 Ms London responded that she had forwarded her new request to work permanently from home to HR and had asked them to treat is as a formal flexible working request by her.

92 The Claimant was seen again by the OH Doctor on 27 June. In the referral HR had advised the OH doctor that the Claimant had raised a grievance, but did not give him any details of the grievance. In a report dated 30 June the doctor said that there had been a general improvement in her state of health and he advised that he believed that she was ready to begin a graduated return to work when her sick note

expired at the end of June. Having discussed the situation at length with her, his recommendation was that she should return to work in week beginning 3 July and should initially work two days a week, working her normal hours and working one of those days from home. She should plan to add a further day per week every two weeks, with the amount of time worked from home to be subsequently negotiated with regard to what was acceptable from an employment perspective. The Claimant added her comments to that report and said that she did not agree with the advice that she return to work on 3 July and to increase that to full-time working over a period of two months and that she had not agreed to that in the consultation with the OH doctor.

93 On 30 June the Claimant sent Ms Savage a medical certificate that she was unfit to work for 91 days because of "*stress related problem.*"

94 On 10 July the Respondent informed the Claimant that her salary had been increased and sent her a copy of her contract with the new salary figure and asked her to sign it and return it. All the other terms of the contract remained unchanged from her original contract. The Claimant responded on 16 July and queried why she was being asked to sign a new contract. She said that if it was a new contract she wanted to propose a reduction in her working hours to 4 days a week.

95 Having obtained the Claimant's consent, on 1 September Ms Savage wrote to her GP and asked him to advise on the following matters – the exact nature of the condition from which she was suffering, how long she had suffered from it and how long he expected it to last; what treatment she was receiving and how effective he thought that was likely to be; what was the likely effect of her condition on her ability to do her work; whether there was any support the Respondent could provide to facilitate a return to work or anything they could do to manager her employment.

96 The Claimant's GP responded on 14 September 2017 that she had had breast cancer and bilateral mastectomy and had been treated with chemotherapy. She still felt tired and exhausted. She might be fit for work after 27 September when her medical certificate expired. She could then maybe start work for a few days (possibly 2 days) a month. She should have a reduced workload.

97 The Claimant did not return to work in September as she had gynaecological surgery on 25 September. She was certified unfit to work from 26 September to the start of January 2018.

98 On 4 January 2018 the Claimant sent Ms savage a medical certificate dated 3 January that she was fit for a phased return to work. The advice on the certificate was that she work two days a week for the next three months starting from 9 January 2018. The Claimant said in her email that she would like to work one of those two days from home. She also asked whether she could arrive in the office at 8 a.m. or 10 a.m. rather than 9 a.m. to avoid travelling during the rush hour.

99 Ms Savage responded on 5 January. She said that the Claimant could come in at 8 a.m. She continued,

> "*Your request to work one day from home, and the pattern you have requested is approved from our end, subject to review. I would like you to visit an occupational health GP (a different GP from the one you had previously*

visited) so they can assess if such an extended period of time working the pattern of two days per week will be required for the full 3months, or if we could look to gradually increase this with a view to you returning to full time work. They can also advise if there are any other reasonable adjustments we can make to ensure that your needs are being met in the workplace and while you are working from home."

The Claimant responded that she did not need to attend OH as her GP had already made a recommendation in her medical certificate of 3 January.

100 Ms Mohtadi had a return-to-work interview with Claimant on 9 January. It was agreed that for the first week she would work from home on the Tuesday and in the office on Friday, and that that would be reviewed at the end of the week. That arrangement continued after the first week. Ms Mohtadi had a one-to-one meeting with the Claimant on 26 January. They discussed what she could and could not do in terms of work and the training that she required. At that time the Respondent was training new joiners on Datasite and existing employees on a new product called DatasiteOne ("DS1"). As the Claimant was only going to be in the office once a week, it was decided that she should start by working through on Litmos modules. It was also recorded that she had received the IT hardware to work at home.

101 There were further one-to-one meetings in February and March 2018. On 13 February it was recorded that the Claimant would receive DS1 training but that it was fairly intensive (two hours a day for two weeks) and they would have to see how it could fit around the Claimant's working hours. There were problems with VPN access to the laptop and the Claimant had to bring that to work to resolve the issues. At the next one-to-one meeting it was recorded that all being well the Claimant could start DS1 on 2 May after she had completed other training.

102 After the one-to-one meeting on 23 March 2018 Ms Mohtadi sent a long email to HR setting out what had been discussed. Ms Mohtadi advised the Claimant that the medical certificate of 3 January was due to expire soon and she would need to get a revised one if she was not fit to work full-time. The Claimant said that she would be suggesting to her GP that she increase it to three days a week and she would work two days a week from home (Tuesdays and Wednesdays) and one day in the office (Fridays). Ms Mohtadi asked her to consider working two days from the office (Tuesdays and Fridays) and the Claimant responded that, although she was getting her strength back, pressure was "poison" for her. She said that pressure to increase days in the office and to work to the Project Manager role had led to her having a breakdown. She also suggested that the Respondent start assigning projects to her. There was a discussion about how that could work if she was working only three days a week, and two of those from home, when she would not be able to answer phone calls. The Claimant was due to go on annual leave after that, and it was agreed that she could provide the medical certificate from her GP on 17 April.

103 On 17 April the Claimant provided a medical certificate which said that she was fit to return to work for three says a week for the next three months.

104 At a one-to-one meeting on 20 April the Claimant said that from the following week (week commencing 23 April) she aimed to increase her working hours to three days a week (Tuesdays and Wednesdays from home and Fridays in the office). Ms Mohtadi said that she thought that that would be alright but she would confirm with

HR and get back to her if there any queries. She also asked the Claimant whether she would be happy to attend an OH assessment as that would help her to be aware of any adjustments that the Claimant might need. The Claimant felt that that was not necessary and did not want to be assessed by OH because of the problems that she had previously had with the doctor. Ms Mohtadi suggested that he could see a different doctor, but the Claimant was adamant that it was not necessary. Ms Mohtadi informed HR of these discussions.

105 On 25 April 2018 Ms Savage in HR wrote to the Claimant. She explained to the Claimant again why it was difficult to carry out the Project Manager away from the office. She said that the Claimant's GP's note had not specified that she should work two out of the three days from home. She was unaware as to the reasons why the Claimant would not work a second day from the office or of any difficulties that had arisen on the days when the Claimant had worked in the office. She said that a result she would like to refer the Claimant to an occupational health specialist. The request from the company to attend such an appointment was reasonable. It would provide the Respondent with information as to why she could not work from the office, and would provide important information on her condition generally which would enable the Respondent to ensure that it was making the right work adjustments for her. She said that she would be arranging an appointment with OH. If the Claimant did not attend it, the Respondent might not be able to accept the arrangement that she had proposed and the additional home-working day would, therefore, be unauthorised.

106 The Claimant responded on 30 April. She said that she had made it clear that an OH assessment was not necessary and if the Respondent needed any additional information it should ask her directly because she was the one who was disabled. She could not work an extra day from the office because of the commute and her physical energy levels. If home working was not authorised, the Respondent should her pay her in full for the additional day.

107 Ms Savage responded to that on 2 May. She said that the Claimant had been seriously ill and her condition and its secondary effects were complex. They were not medically trained and needed specialist medical advice on the symptoms, the potential causes of those symptoms, how her condition might need to be managed, what limitations there were on what she could be expected to do and when she could be expect to return to full operational capacity. She said that it was neither standard practice nor appropriate in the circumstances for the Respondent to get that information from her. She also pointed out to the Claimant that her contract of employment required her to consent to a medical examination if the Respondent requested it. She said that they would continue to arrange an OH appointment and urged the Claimant to attend.

108 The Claimant's response on 7 May was,

> "*I still maintain that a visit is not necessary. This is my final position.*"

109 The Claimant was on holiday from 1 to 9 May 2018. On 15 May (which was a Tuesday and she worked form home) she sent Ms savage an email at 8.14 a.m. and asked her to let her know by 3p.m. that day whether additional working day from home on Wednesdays had been authorised. Demina Poli (Interim HR Director) replied to that email and told the Claimant that she would like to have a face to face chat about it and asked her to let her know when it would be convenient to do so.

The Claimant said that she would get back to her later in respect of the chat but she wanted to know urgently whether working from home the following day had been authorised. Ms Poli responded that until they had had a discussion about it, it was not authorsied.

110 The Claimant did not attend work on 16 May 2018.

111 On 18 May Ms Poli wrote to the Claimant. She said that her invitation to have a discussion about the Claimant's request to work two days from home remained open. She said that she had discussed the Claimant's phased return to work with Ms Mohtadi and there were quite a number of limitations on what she could do from home because of the nature of her role. She outlined those limitations. She continued,

> "*We have considered what adjustments we would be able to make in order to allow you to do those duties form home and to minimize the impact of home working on your job, but the dynamics of the role mean that it is difficult. Of course, the alternative is for us to consider whether you can simply do more of the tasks you are currently doing from home on a second (2nd) home-working day. That would mean that the business incurs additional costs as you would effectively not be able to do the full range of duties for which you are being paid. We would be prepared to do that for a period, though, as a reasonable adjustment if your condition required it. However, before we do so, the business needs to be sure that it is necessary and, in order to be sure, it needs a detailed up-to-date report from a doctor on your condition. That is why it is so important for you to attend an OH appointment."*

112 She said that they would arrange an OH appointment within the next three weeks. As a precautionary measure she could work the third day from home for the next three weeks on the condition that she would attend an OH appointment within that time. She said that if the Claimant refused to attend the appointment, they would terminate the arrangement immediately and the Claimant's refusal to attend the appointment and the office on the third day would have to be dealt with in accordance with the Respondent's disciplinary procedure. She urged the Claimant to co-operate and reiterated that she was willing to talk to the Claimant about it personally.

113 On 21 May 2018 the Claimant resigned with immediate effect "*on the basis of constructive dismissal"*. In her email to the Respondent she said,

> "*Even mentioning disciplinary procedure is disproportionate and unacceptable. As you state, there is absolutely no need (nor justification) for this to be dealt with as a disciplinary issue, so there is no need to threaten it either, especially while at the same time, asking for a friendly chat. This is a breach of the implied term of trust and confidence, as also is continued discriminatory conduct, namely harassment from Merrill, by insisting that I attend another unnecessary OH appointment.*

114 The Respondent accepted her resignation and responded to the points that she had made in her resignation letter. It did not accept that it had acted in breach of the contract of employment.

Conclusions

115 Before dealing with the specific complaints made by the Claimant, we thought that it would be helpful to stand back and look at the bigger picture. The Claimant was diagnosed with breast cancer in January 2016, about two months after she started to work for the Respondent. The diagnosis was a shock to her and the next two years were traumatic and very difficult, and no one underestimates the toll that that took on her. She had numerous sessions of chemotherapy between February and September 2016, a double mastectomy in September 2016, severe mental health issues as a reaction to those events between March and June 2017 and further surgery in September 2017.

116 The effect of that was that between 1 February 2016 and 31 December 2016 the Claimant was at work for 60 days and absent sick because of the cancer and the treatment for 172 days. In 2017 she was only at work on 28 days and absent sick for over 200 days. When the Claimant was at work, she worked two or three days a week. Her attendance pattern meant that she was not able from about April 2016 to perform the role to which she was recruited. In stating these facts, we are not in any way criticising the Claimant. Those are the facts.

117 The Respondent did not throughout that very long period take any steps to terminate the Claimant's employment or to monitor or manage her attendance. It made adjustments by reducing her working hours, by permitting her to work on some days from home, by providing her with the equipment to do so, by providing her with alternative work. It exercised its discretion to pay her full pay for a number of weeks when she was not contractually entitled to it and supported her under its Group Insurance Income policy to receive half pay throughout the period when she has been off sick. Those are the actions of a sympathetic and supportive employer.

Jurisdiction (time limits)

118 In respect of the first claim, any complaints about any acts that occurred before 11 March 2017 will be out of time unless they form part of a continuing act that continued after that date. Almost all of the matters of which the Claimant complains in that claim form occurred before that date. We considered whether it would be just and equitable to consider those claims (if they are not part of a continuing act) although the claim form was not presented until 23 July 2017. The vast majority of the complaints relate to acts that occurred between April 2016 and January 2017. That means that the oldest complaints are over a year out of time, the latest one about two months' out of time. In considering whether it would be just and equitable to extend time we took into account the following facts - the Claimant's medical condition in 2016 and early 2017; the fact that she was aware of the Equality Act 2010 and disability discrimination, and she complained about the extension of her probation period in May 2016. Thereafter, the Claimant had a long absence from work. She returned to work on 9 November and that continued until 9 March with her working three days a week, two from home and one in the office. Thereafter, while she was off sick on 29 March 2017 she wrote the Respondent a long letter in which she set out various acts of disability discrimination and sought compensation under various heads. She commenced Early Conciliation on 18 April 2017 and appealed against the grievance outcome on 10 May 2017. That was a long document. Having received the EC certificate on 1 June, she waited another seven weeks before

presenting her claim. The Respondent had been able to adduce evidence to deal with all the matters that occurred before 11 March 2017.

119 Although the Claimant was aware of the Equality Act 2010 and disability discrimination and was able to set out her complaints in detail on 29 March 2017 and 10 May 2017, starting legal proceedings is a very different matter. It is a big step to take and requires well-being and strength (both mental and physical) to embark on that long process. The Claimant was recovering from an illness that had physically debilitated her and by March 2017 had led to her having a severe psychological reaction to the trauma of the previous year. We were satisfied that she needed to recover her physical and mental health before she felt strong enough to start a claim in the Tribunal. The OH doctor's view was that by 30 June 2017 there had been a general improvement in her health. The Claimant presented her claim soon after that. We concluded that it would be just and equitable to consider all the complaints in the first claim.

<u>Extending probation (11 May 2016)</u> (section 15 claim)

120 In order for a Project Manager's employment to be confirmed at the end of the probationary period, he or she had to have completed three specific accreditations. The Claimant was at an advantage because she had already completed one of those accreditations while she was employed as an agency worker. At the start of her employment she was set the goal of completing the second accreditation by the end of December 2016. She had still not done so by the middle of January 2017, when she was first referred for medical tests that led to the diagnosis of cancer. The delay in completing that is not attributable to her disability. Notwithstanding the diagnosis of cancer, the Claimant completed the second accreditation by April 2016. She had not completed the third one by 16 May 2017, the end of her six-month probationary period. The Respondent extended the probation period because she had not completed all three accreditations.

121 The Respondent submitted that the Claimant's failure to complete the three accreditations did not arise from her disability but from her failure to complete the second one within the first two months of her employment when she was not disabled. Had she completed that one in time, she could, notwithstanding her disability, have completed the third one before 16 May 2017. We can see the logic of that argument, but the fact remains that if the Claimant had not had the disability it is very likely that she would have completed the remaining two accreditations in the four months between the middle of January and the middle of May. We concluded that her failure to complete the three accreditations arose in consequence of her disability.

122 We were, however, not satisfied that the extension of her probation period, in circumstances when she had not achieved what she needed to achieve in order to do so, amounted to "unfavourable" treatment. An employer has two options when an employee does not achieve what is required to pass probation – dismiss the employee or extend the probation. Where the employer recognises that there are good reasons why the employee did not achieve what was required to pass probation and extends the probationary period in order to enable him or her to do so, that, in our view cannot amount to unfavourable treatment. Dismissal would be unfavourable treatment. The extension of the probationary period did not disadvantage the Claimant in any way. In arguing that she should have passed probation, even though

she had not achieved what was required to do so, the Claimant is in essence saying that she should have been accorded preferential treatment. She should have been given an advantage that non-disabled employees do not get. In effect, that is what she obtained as a result of complaining about it. On 1 June her employment was confirmed although she was not at the level the Respondent normally expected of a Project Manager.

123 If we are wrong in that conclusion, and the extension of the probation period (a decision that was reversed a little over two weeks later) amounted to unfavourable treatment, we were satisfied that it was a proportionate means of achieving a legitimate aim. The aim was to ensure that Project Managers were competent in the tasks that they had to perform and able to provide the customers the service they had been promised. That was a legitimate aim. Giving the Claimant more time to achieve the necessary accreditations, in circumstance where she had not been able to do so because of her reasons connected with her disability, was a proportionate means of achieving that aim.

<u>Telling the Claimant that she had paid full sick pay on a discretionary basis</u> (section 15 claim)

124 The Respondent did not treat the Claimant unfavourably by giving her the information contained in the letters of 11 May and 1 June 2016. It simply informed her what sick pay she had been paid, the basis on which it had been paid and what she would be paid in the future. It was a fact that the Claimant had not been contractually entitled to full sick pay for the first twenty-five days of her sickness absence but that the Respondent had exercised its discretion to pay her that. Giving an employee factual information is not unfavourable treatment.

<u>Not giving the Claimant a pay rise in April 2016</u> (section 15 claim)

125 There was no evidence from which we could conclude that, had the Claimant not been disabled, she would have been ranked a “top performer” and would have been one of the 20% of employees who received a pay rise. She was still in her probationary period and completing the accreditations she needed in order to pass probation. The evidence that we had about the Claimant’s performance in the two months before she was diagnosed with cancer showed that she was not meeting the goals she was set in respect of completing the site manager accreditation and picking up calls. All the evidence indicates that even without the disability she would not have been ranked as a “top performer”.

<u>Contacting the Claimant while off sick in August and October 2016</u> (harassment)

126 Mr Sokolov contact the Claimant on 16 August 2016 when she was on annual leave after a long period of sickness absence. He did so because he was not going to be at work when she returned to work after a three-month absence. He told her briefly of developments in her absence and of the arrangements that he had made to ease her back into work, including training to ensure update her on changes. He asked her whether she could do that training. That was done to support her. It could not reasonably be viewed as conduct that had had the effect of violating the Claimant’s dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her (“the proscribed effect”). Mr Sokolov did contact the Claimant in October 2016. That was because she had indicated that she would be

able to return to work in October. He was simply inquiring whether she would be returning and what adjustments would be required when she returned to work. That could not reasonably be viewed as conduct having the proscribed effect.

Not allowing the Claimant to work from home and not assigning her projects when she worked three days a week

127 The Claimant's informal request to work from home was refused by Mr Sokolov on 1 June 2016 because the requirements of the Project Manager role meant that they needed to be in the office. The Respondent did not allow any Project Manager to work from home. The Respondent refused her request because it believed that the role of the project manager could not be carried out effectively by someone working from home. That was the reasons for the refusal. The reason for refusing her request did not arise in consequence of the Claimant's disability.

128 The Claimant returned to work three days a week on 9 November 2016. She worked two of those days from the office and one from home. By that stage the Claimant had been absent sick from work for about six months (she had returned to work two days a week for three weeks in the middle of that period). She was not assigned projects because she needed to refresh her product knowledge after her long absence, she needed to work towards the Q & A accreditation and she could not provide dedicated support to clients because she only worked three days a week. At no stage did the Claimant say to Mr Sokolov in any of her one-to-one meetings that she was unhappy with the arrangement. On the contrary, she said that she was happy with the set up, feeling better and getting comfortable with the internal processes and procedures. In those circumstances, the Respondent did not treat her unfavourably by not assigning projects to her at that stage. The Claimant did not regard it as unfavouable treatment at the time. If we are wrong in that conclusion, we would have concluded that not assigning the Claimant projects at that time was a proportionate means of achieving a legitimate aim. The legitimate aim was to provide its clients with the service that it had agreed to provide them. Assigning projects to Project Managers who were up to date with the training and knowledge to provide the clients with advice and technical support and able to be dedicated to those projects five days a week was a proportionate means of achieving the legitimate aim. The Respondent was supporting the Claimant to get to a stage where she could do that. She retained the title and pay of a Project Manager.

Comments on 19 December 2016 (section 15 claim and harassment)

129 The Claimant missed a few chats (communication from clients) on LiveChat because she had forgotten to turn her headphones on. There was no evidence that forgetting to turn the headphones on was in any way connected with the Claimant's disability. Mr Sokolov made the observation that they (all of them) needed to "*try to stay on top of it"* to ensure that the client did not suffer. It was a reasonable comment for a manager to make to ensure that his team delivered the service that had been sold to the clients. He did not reprimand the Claimant or take any action against her. It did not amount to unfavourable treatment and the reason for the comment did not arise in consequence of the Claimant's disability. It was not conduct that could reasonably be said to have had the "proscribed effect".

Medical certificate (section 15 claim)

130 On 19 December Mr Sokolov asked the Claimant for a medical certificate because he had not received it. The Claimant said that she had sent one to Ms Savage and Mr Sokolov asked her to send him a copy. It was not unfavourable treatment and he did not do it for a reason connected with her disability. He asked her because as her line manager he needed to have a copy of it.

Letter of 13 January 2017 about working from home (harassment)

131 The OH doctor had advised in December that the Claimant was able to work three days a week and had recommended that consideration be given to allowing her to work one of those three days from home. He had advised that she remain on that working regimen for at least the next six weeks and that the matter be reviewed by OH then. Although the Respondent's view was that the Project Manager role could not be performed away from the office, Mr Sokolov followed the recommendation and exceptionally permitted the Claimant to work from home one day a week for the next six weeks. He gave the dates of when the arrangement would start and when it would stop. He did not say expressly in his letter that there would be a further referral to OH and the matter would be reviewed. It might have been better if he had. Telling the Claimant the period for which the arrangement was being put in place could not reasonably have had the proscribed effect upon her.

Comments about the Claimant's performance and PDR on 24 January 2017 (section 15 claim)

132 A purpose of the one-to-one meetings was to discuss performance, which included identifying aspects that could be improved. In January the Claimant was dealing with queries on LiveChat. That was something that was normally done by employees at a lower level than that of the Claimant. In discussing her performance Mr Sokolov advised the Claimant that the client waiting time for her was higher than the average waiting time for the group that did that work. Providing feedback on areas where improvement is required is not unfavourable treatment. Furthermore, there was no evidence that the higher waiting time for the Claimant had anything to do with her disability. The Claimant had complained at that meeting that she was having difficulty doing LiveChat on a laptop with a small screen. She did not say that it had anything to do with her disability.

133 Since April 2016 the Claimant had worked a few days in April and May, two days a week between 22 August and 12 September 2016, three days a week from 9 November to 1 December and from 19 December 2016 onwards. A central part of the Project Manager's role was to be the dedicated point of contact for specific clients five days a week. The Claimant had not been able to do that since May 2016. It is also clear from her very limited attendance at work since April 2016 that she had not been able to carry out many of the other duties of a Project Manager. If she was assessed against the expectations of the Project Manager role, she would not meet them. Mr Sokolov told her at the one-to-one on 24 January that when doing her appraisal for the past year he would explain that she had not been in a position to perform the Project Manager role due to her illness and the ongoing recovery process. It is a fact that the Claimant had not been able to perform her role. Stating that as a fact and providing the explanation for it is not unfavourable treatment.

Telling OH that the Claimant had raised a grievance (harassment)

134 It is not in dispute that HR told OH that the Claimant had raised a grievance. It is not reasonable for that to have had the proscribed effect on the Claimant, if it did.

Failure to make reasonable adjustments

Setting goals and targets

135 The Claimant was set a limited number of goals and targets between February 2016 and the end of March 2017 (while she was having treatment and during the recovery period). They were not the same goals and targets that were set for other Project Managers but related to the adjusted duties that the Claimant was performing. The purpose of the monthly one-to-one meetings was to sets goals and targets against which performance could be assessed on an ongoing basis. On 12 February 2016 the Claimant was told that the main focus had to be to pass the Q&A and site manager accreditations (the Claimant managed to pass the former before the end of her probation period). In the first month after the Claimant returned to work on 9 November 2016 the number of calls she answered and the cases she logged were not recorded. On 25 November 2016 she was told to work towards getting the Q&A accreditation. On 24 January 2017 the Claimant was told that on LiveChat the client waiting time for her was higher than the average waiting time for the group. Setting the Claimant those limited targets and goals did not substantially disadvantage her as a disabled person. If it did, the Respondent did not know and could not reasonably have been expected to know that they put her at a substantial disadvantage.

Measuring the Claimant's performance on the basis of targets applied to her colleagues

136 The Claimant's performance was not assessed on the basis of targets that applied to Project Managers. The Respondent recognised that because of her illness and treatment the Claimant had not been able between April 2016 and March 2017 to perform the Project Manager role and had been at work for a limited amount of time. It decided that in the circumstances the best thing would be not to conduct a PDR for the Claimant for 2017-2017 and assured her that it would not impact on her pay review. The Claimant initially agreed to that but then changed her mind and said that she wanted a review. In the review it was made clear that the Claimant's performance had not been assessed in relation to the Project Manager role because she had not been able to carry out that role because of her health problems. She had been assessed on the basis of the adjusted duties that she had carried. She was given an overall rating of "meets expectations". The Respondent did not apply the provision, criterion or practice of which the Claimant complained.

Requiring the Claimant to work in the office (Spring 2016 to January 2017)

137 The Respondent applied a practice whereby Project Managers worked in the office. Between spring 2016 and January 2017 the Claimant was absent sick for very long periods when she was not able to work. Her sickness absence was recorded as "ongoing treatment" and did not trigger any action under its attendance management policy. Other than making an informal request in May 2016 to work from home (which was refused on 1 June 2016) the Claimant did not at any time say that working in the

office was putting her at a substantial disadvantage or provide any medical evidence to show that it was. Between March and December 2016 the Claimant worked about forty days in the office. In December 2016 the OH doctor said that the Claimant was able at that time "*to work the full hours of her normal job on a three day per week basis*". Those days would be worked in the office. He recommended that consideration be given to "*allowing her to work one per week from home, providing this is acceptable from a business perspective".* He did not say that the working in the office would put the Claimant at a substantial disadvantage, and that the Respondent should make an adjustment to allow her to work from home all three days. There was no evidence before us that the Respondent's practice put the Claimant at a substantial disadvantage. If it did, the Respondent did not know and could not reasonably have been expected to know that it did.

<u>Requiring the Claimant work four days in the office after December 2016</u>

138 The Claimant was not required to work four days in the office after December 2018. Between December 2016 and 31 March 2017 she worked two days a week in the office and one day a week from home. That was in accordance with the OH advice. There was no medical evidence that working two days a week in the office put the Claimant at a substantial disadvantage. Between 4 January and 17 April 2018 the Claimant worked two days a week because that is what her GP said that she could do. Although he did not advise that she should be allowed to work one of those two days from home, the Respondent allowed her to do so. Hence, she only worked one day a week in the office. From 17 April 2018 that was increased to three days and the Claimant was permitted for a short while to work two of those three days from home. The Respondent did not apply the provision, criterion or practice of which the Claimant complains.

<u>Treating the Claimant's application to work from home permanently as a flexible working request</u>

139 The Claimant has not identified the PCP on which she relies in respect of this complaint. There was no evidence that working up to two days a week in the office (which is what the Claimant worked after December 2016) put her at a substantial disadvantage. The medical advice from her GP and the OH doctor was that she could work those days in the office. The Respondent made reasonable adjustments in respect of that in accordance with the medical advice. In those circumtsances, the request to work from permanently five days a week in June 2017, was treated as a request for flexible working. In doing that the Respondent did not apply a PCP which put the Claimant at a substantial disadvantage.

<u>Failing to respond to the Claimant's request to reduce her working hours to four days a week</u>

140 When the Respondent sent the Claimant an amended contract with her new salary in it in July 2017, she said that if it was a new contract she wanted to reduced her working hours. It was not a new contract. The Respondent did not respond to it. By not doing so, it did not apply to the claimant a PCP that put her at a substantial disadvantage.

Not consulting with the Claimant about adjustments and a return to work plan and not acknowledging the needs for adjustments

141 Failure to consult an employee about reasonable adjustments does not equate to a failure to make reasonable adjustments. The issue is whether the employer applied a PCP which put the employee at a substantial disadvantage, the employer knew or could reasonably have been expected to know that and failed to take such steps as were reasonable to alleviate that disadvantage. In any event, in the present case the Respondent did consult with the Claimant. There were regular discussions at her one-to-one meetings and return to work meetings from February 2017 about her medical condition and what the Respondent could do to support her, the number of days she could work and the kind of work that she could do. The Respondent made a large number of adjustments – it did not treat the Claimant's absences as sickness absence, her working hours were reduced by two days a month from 1 June 2016, she was paid full sick pay when she was contractually not entitled to it, she worked between two and three days a week, she was allowed to work one day a week form home, she was given adjusted tasks to perform.

IT equipment for home working

142 The Claimant was originally given a 12 inch laptop to use when working from home in January 2017. She told Mr Sokolov on 24 January that she was having difficulty doing LiveChat on that because of the small size of the screen. On 1 February he told her to stop doing LiveChat from home because of the difficulties with the small screen. He arranged for IT to install a wide screen for her at work so that she could continue working on LiveChat in the office. Mr Sokolov did not realise that the laptop which the Claimant had been given needed to be encrypted. When he realised that it did, he asked the Claimant to bring it into work to have it encrypted. He apologised to her. The Respondent did not apply a PCP which put the Claimant at a substantial disadvantage. It attempted to facilitate the Claimant's working for home and dealt with IT issues as and when they arose.

Requiring the Claimant to do LiveChat

143 The Claimant was doing LiveChat from January to March 2017. The Claimant discussed it with Mr Sokolov at the one-to-one meeting on 24 January 2017. She said that she was having difficulty doing it because of the small screen on the laptop. She did not say that she was finding it difficult because of problems with her cognitive function. The Respondent dealt with the issue that she had raised. It said that she did not have to do it at home and provided her with a wider screen at work to do it. There was no evidence that requiring the Claimant to do LiveChat put her at a substantial disadvantage because of her disability. If it did, the Respondent did not know that it did and could not reasonable have been expected to know that it did.

Requiring the Claimant to work in the office five days a week

144 The Respondent did not require the Claimant to work in the office five days a week (see paragraphs 137-138 above)

The Dismissal

143 The Claimant's case is that informing her on 18 May 2018 that if she did not attend an OH appointment the Respondent would not be able to approve an additional working day from home day and that disciplinary action might be taken against her if she did not attend work on that day was disability discrimination under section 15, disability-related harassment and contributed to a breach of the implied term of trust and confidence.

144 The letter of 18 May 2018 has to be seen in the following context. The Claimant returned to work on 9 January 2018 after a sickness absence of nine months. She had been seriously ill over the previous two years and her condition and its secondary effects were complex. She had last been assessed by the OH doctor on 27 June 2017. Her GP said on 3 January 2018 that she was fit to work two days a week for a period of three months. There was no medical evidence that she was not able to work in the office or that she should be allowed to work on of those two days a week from home. The Claimant said that she would like to work one of those two days from her home and, although there was no medical evidence to support such a request, the Respondent permitted it. On 17 April the Claimant's GP said that she was fit to work three days a week for the next three months. He did not say anything about two of those three days having to be worked from home. The Claimant wanted to work two of those days from home. There was no medical evidence that the Claimant could not work three days in the office. The Respondent had told the Claimant on a number of occasions that they wanted her to attend an appointment with OH to understand what adjustments they needed to make. They had done so on 5 January 2018, 20 April 2018, 25 April 2018 and 2 May 2018. The request to attend an OH appointment was perfectly reasonable. It was a term of her contract that she agreed to consent to a medical examination by a doctor nominated by the company if the company so required. The Claimant refused to do so. Having regard to that background, the Respondent telling the Claimant on 18 May that it could not approve an additional day of working from home if she did not attend an OH appointment and her failure to attend work on that day might lead to disciplinary action being taken against her was not unfavourable treatment and it was not reasonable for it to have the "proscribed effect" on the Claimant and was not a breach of the implied term of trust and confidence.

145 The Claimant's case was that the Respondent had acted in breach of the implied term of trust and confidence by doing all the acts of which she complained in her first claim form, not providing her with training on DatasiteOne and a suitably set up laptop for homeworking when she returned to work in January 2018 and by sending her the letter of 18 May 2018. We do not consider that the maters of which the Claimant complained in the first claim form, either individually or cumulatively, amounted to a breach of the implied term of trust and confidence. We have found that the Respondent was sympathetic and supportive during what was a very difficult time for the Claimant. The Respondent did supply the Claimant with the IT equipment she needed to work from home in January 2018. There were problems with VPN access to the laptop and the Claimant was told to bring it into work for those issues to be resolved. The Respondent delayed providing the Claimant with training on DatasiteOne because initially she was only in the office one day a week and the training was fairly intensive (two hours a day for two weeks). She also needed training on other matters having been away from the workplace for so long. In the March one-to-one meeting, it was noted that all being well the Claimant could start

DatasiteOne training on 2 May 2018 after she had completed other training. We concluded that there was no breach of the implied term of trust and confidence by the Respondent.

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Employment Judge Grewal

Date 11th March 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

12/03/2020

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FOR THE TRIBUNAL OFFICE