Case Numbers: 2601807/2017
+ 2600145/2019

EMPLOYMENT TRIBUNALS

Claimant: Ms P Pankhania

Respondent Leicester City Council

HELD AT: Leicester **ON:** 20 – 24 January 2020
28 + 29 January 2020 (in chambers)

BEFORE: Employment Judge Batten
Members: Mr K Rose
Mr A Wood

REPRESENTATION:

For the Claimant: Ms A Pitt, Counsel
For the Respondent: Mr A Line, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

The complaints of race discrimination and disability discrimination fail and are dismissed.

REASONS

1. At the final hearing, the claimant pursued complaints of direct race discrimination, and disability discrimination in terms of allegations of failure to make reasonable adjustments. After a first reading day, the hearing of the evidence took place over the next 4 days. The evidence of the parties was completed only at the very end of the fifth hearing day. Accordingly,

the Tribunal reserved its Judgment and met in chambers for a further 2 days to deliberate.

Background

2. The claimant presented her first claim on 31 October 2017, which comprised of claims of race discrimination, disability discrimination, age discrimination and discrimination because of being a part-time worker. The respondent presented its response on 9 January 2018.

3. The claimant presented her second claim on 14 January 2019, which comprised of a claim of unfair dismissal together with claims of race discrimination, disability discrimination, age discrimination and discrimination because of being a part-time worker. In addition, the claimant complained of victimisation for bringing her first claim to the Tribunal. The respondent presented its response to the second claim on 22 March 2019.

History of preliminary hearings

4. On 6 February 2018, an initial preliminary hearing for case management took place in respect of the first claim. Regional Employment Judge Swann reviewed the first claim and the response and made an order for the claimant to produce further and better particulars of her claim. As a result, and after extensions of time, the claimant filed and served 87 pages of particulars of incidents and events going back to the beginning of her employment with the respondent in 1991, consisting of approximately 95 separate allegations and including a potential claim of breach of contract. The respondent then served amended grounds of resistance.

5. At the next case management preliminary hearing, on 26 June 2018, Employment Judge Hutchinson considered the claimant's further particulars. The respondent argued that the claimant was seeking to expand her claim and pointed out that there was no application to amend the claim to include new matters. Counsel for the claimant asked for time to take instructions and formulate such an application. The respondent raised the issue of wasted costs. All matters were therefore listed to be considered at the next preliminary hearing.

6. At an open preliminary hearing on 19 October 2018, Employment Judge Ahmed heard and refused the claimant's application to amend her claim. In addition, he struck out the complaints of disability discrimination in their entirety along with allegations that, from 1997 until July 2016, the claimant's manager had subjected the claimant to race discrimination, age discrimination and less favourable treatment by reason of being a part-time worker.

7. At a telephone case management preliminary hearing on 14 November 2018, Employment Judge Ahmed listed the first claim for an 8-day final hearing in September 2019. An amended list of issues was agreed and the respondent's costs application was deferred to the conclusion of the final hearing. At that hearing, although the claimant had by then been dismissed, Counsel for the claimant was without instructions as to whether or not a second claim would be issued.

8. On 14 January 2019, the claimant presented her second claim, following her dismissal. Regional Employment Judge Swann consolidated the second claim with the first claim. The respondent presented its response to the second claim on 22 March 2019.

9. The (joined) claims were listed for a telephone case management preliminary hearing on 13 June 2019, before Employment Judge Heap. The respondent requested further and better particulars of the second claim and also contended that a number of matters set out in the second claim had previously been pursued in the first claim and struck out. It was decided that a final hearing could not take place until the second claim had been particularised and clarified, and until the respondent had an opportunity to respond to such. The listed final hearing was therefore postponed and re-listed for 10 days whilst the original listing was converted to a preliminary hearing for case management once the further particulars had been served and responded to.

10. In 2 September 2019, Employment Judge Clark conducted a preliminary hearing at which the claimant withdrew all her complaints of age discrimination, disability discrimination, discrimination because of being a part-time worker, victimisation, breach of contract, unauthorised deductions from wages and unfair dismissal. These complaints were dismissed upon withdrawal. Therefore only 2 complaints remained, which were defined as:

    10.1 race discrimination, confined to an allegation of detrimental treatment in the period up to March 2017 by the claimant's line manager, Alison Saxby, in response to an email of 26 November 2015 sent by the claimant who had copied in the Black Workers' Network; and

    10.2 an allegation of a failure to make reasonable adjustments in respect of the claimant's disability of anxiety and depression in the period after 9 August 2018 – the respondent at that stage disputed that the claimant was disabled, although disability has since been conceded.

11. Counsel for each party, who appeared at the preliminary hearing on 2 September 2019 worked together to produce a joint agreed list of issues for the final hearing covering the remaining allegations and issues.

12. A further telephone preliminary hearing was conducted by Employment Judge M Butler on 16 December 2019 to resolve outstanding issues over disclosure. The claimant was also given guidance on the purpose of a chronology and skeleton argument.

Evidence for the final hearing

13. An agreed bundle consisting of 2 files of documents was presented at the commencement of the hearing in accordance with the case management Orders. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

14. The claimant gave evidence and she called her sister, Ms R Pankhania Sarda, to give evidence in support. Both witnesses tendered written witness statements and were subject to cross-examination.

15. The respondent called 9 witnesses: Ms A Saxby - the respondent's Electoral Services Manager and the claimant's line manager; Mr S Hayden - Deputy Manager of Electoral Services; Mr A Shilliam - Head of the City Mayor's office; Mr B Stefanov - Electoral Services Senior Officer; Mr A Mehta - Electoral Services Officer; Ms D Patel - Electoral Services Officer; Ms J Webster - Electoral Services Officer; Ms L Emery - Electoral Services Officer; and Ms J Barai - HR Adviser. Each of the respondent's witnesses gave evidence from a written witness statement and were subject to cross examination. In the case of Ms Saxby and Ms Barai, the respondent also tendered supplemental witness statements.

Issues to be determined

16. An agreed list of issues to be determined by the Tribunal was drawn up by the parties' representatives at the preliminary hearing on 21 September 2019. The issue of disability – point 16.5 below – was later conceded by the respondent in the week prior to the final hearing. The issues which were identified as being relevant to the complaints to be heard were:

First Claim

Direct race discrimination

16.1 Did Alison Saxby of the respondent reprimand, isolate, ignore, bully or harass (by being given menial tasks and being excluded from tasks) the claimant for "copying in" the Black Workers Support

Group to an email dated 26 November 2015? The claimant makes the following allegations:

16.1.1 Alison Saxby called the claimant into a meeting in the week commencing 14 December 2015 to discuss the email of 26 November 2015;

16.1.2 Alison Saxby severely reprimanded the claimant in this meeting;

16.1.3 Alison Saxby treated the claimant like a child in this meeting;

16.1.4 Alison Saxby intimidated the claimant in this meeting;

16.1.5 From this meeting to and including June 2016, Alison Saxby isolated the claimant by not speaking to her or acknowledging her and completely ignored her;

16.1.6 In June 2016, during the Brexit referendum election, the claimant was given menial tasks upon the instruction of Alison Saxby;

16.1.7 In September 2016, during a Stress Action Plan meeting, Alison Saxby criticised the claimant for mistakes which had not previously been mentioned plus she did not support her during the meeting; and

16.1.8 In March 2017, Alison Saxby sent the claimant an inappropriate letter relating to her long-term sickness absence which in particular intimated dismissal.

16.2 If so, was the claimant so treated because of the claimant's race (Indian) such that she has been subject to direct race discrimination contrary to section 13 of the Equality Act 2010 ("EqA")?

16.3 The claimant does not rely on any actual comparators.

16.4 The claimant asserts that a hypothetical white female comparator who had emailed her manager and copied in a trade union or support group would not have been so treated.

Second claim

Disability

16.5 Was the claimant disabled, within the meaning of section 6 and schedule 1 of the EqA, at the relevant times by virtue of anxiety and

depression? – NB: In the week prior to the final hearing, disability was conceded by the respondent for the period from 14 June 2017 such that the respondent accepted that the claimant was a disabled person at the material time, being the period from 9 August 2018 onwards, in relation to the allegations below.

Failure to make reasonable adjustments

16.6 Did the respondent apply the following provision, criterion or practice (PCP) to the claimant within the meaning of section 20(3) EqA: a requirement to maintain a consistent attendance at work failing which the employee would be subject to disciplinary sanctions up to and including dismissal?

16.7 If so, did the PCP put the claimant at a substantial disadvantage (i.e. being subject to disciplinary action if a certain level of attendance is not maintained) in comparison to persons who are non-disabled as per section 20(3) EqA?

16.8 If so, should the respondent have undertaken the following steps by way of reasonable adjustments from 9 August 2018 during the ill health redeployment process?

16.8.1 Not recommencing a prescribed period of mediation;

16.8.2 Following the claimant's Occupational Health adviser's recommendation to relocate the claimant to an alternative team post 16 July 2017;

16.8.3 Make its internal process more flexible by holding a role open for the claimant for up to 18 months while she recovered; or

16.8.4 Moving the claimant directly into another open role without applying "HE policies and procedures" and/or the ill-health redeployment procedure.

16.9 If so, did the respondent have knowledge as per Schedule 8, Part 3, paragraph 20 in the EqA?

Jurisdiction

16.10 Have the First and Second Claims been lodged within the applicable time limits?

Remedy

16.11 If the Claimant was subject to discrimination under the EqA:

16.11.1 What level of compensation is appropriate?

16.11.2 In particular, did the claimant's colleagues mirror Alison Saxby's allegedly poor conduct as set out in 16.1 above?

16.11.3 If so, how far does this impact on the Claimant's injury to feelings award?

Findings of fact

17. The Tribunal made the following findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact. The Tribunal have not simply considered each particular allegation, but have also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

18. The findings of fact relevant to the issues which have been determined are as follows.

19. The claimant is of Indian Hindu origin. She commenced employment with the respondent on 7 January 1991, on the lowest job grade, as an Electoral Services assistant, working part-time, 18.5 hours per week. When the claimant started working for the respondent, she was the only Asian employee in the Electoral Services department.

20. The claimant relies on anxiety and depression as her disability although, from time to time, she suffered from several other health conditions during her employment with the respondent. The respondent has conceded that the claimant is a disabled person because of anxiety and depression. The respondent had knowledge of the claimant's disability from 14 June 2017 when the position was confirmed in an occupational health report which it accepted.

21. The respondent has a number of policies/procedures in relation to its employees.

22. There is an Absence Management policy and procedure in the bundle at page 224 onwards. This includes a procedure for reviewing long-term absence which is defined as continuous absence of 4 weeks or more. The respondent's manager should meet with the employee at appropriate points and refer to occupational health for advice before discussing with an absent employee and agreeing a way forward. The length of absence may reach a point where the manager considers the employee's job can no longer be held open. If a point is reached where continuous absence is likely to lead to termination of employment, this should be made clear to the employee concerned. A meeting should be held to that effect so that the employee can make representations regarding the proposal to terminate, before any decision is made. The employee also has a right of appeal.

23. There is also a Redeployment procedure in the bundle at pages 235A-F. This provides that the procedure applies in cases of ill-health where a medical expert has recommended that redeployment should be considered.

24. In 1997, Alison Saxby was appointed as overall manager of the respondent's Electoral Services department. At the material times, the department consisted of 14 employees. Steve Hayden was the deputy manager and Boby Stefanov was the senior officer who had day to day responsibility for allocating work. The rest of the team comprised of Electoral Services Officers and Assistants, the latter including the claimant. It is a diverse team with a number of other Asian employees and at least one other Asian Hindu employee. There was a practice of employing extra staff on a temporary or fixed term contract basis to cope with the demands of the elections at certain times of the year.

25. From 7 December 2006, the claimant secured an additional post with the respondent, working in the respondent's Fostering department as a receptionist. However, capability proceedings led to the redeployment of the claimant into the respondent's Finance department from 17 December 2007, as a clerical assistant, following an application, test and interview process.

26. On 9 August 2015, as part of an organisational review, the clerical posts in the Finance department were deleted. This resulted in the claimant being made redundant from her post in the Finance department. The claimant remained an employee in Electoral Services working 18.5 hours per week. The claimant had therefore been working for the respondent for the equivalent of full-time hours, over 2 separate roles for almost 9 years.

27. During the course of her employment prior to 2015, the claimant had raised a number of complaints and grievances alleging discrimination, chiefly about not getting additional hours of work in Electoral Services and

about being given what she considered to be menial tasks. In particular, in 2002, the claimant raised a grievance alleging harassment and discrimination by several members of the Electoral Services team and also complained about not getting additional hours' work. The grievance was not upheld. On 8 March 2013, the claimant raised a grievance complaining of race discrimination, because she had not been appointed to a full-time vacancy in Electoral Services. The grievance was turned down and the claimant's appeal against the grievance outcome was unsuccessful.

28. In early November 2015, the claimant had been working under a temporary increase in hours but that was about to end. She asked Mr Hayden about the possibility of further extra hours of work. On 26 November 2015, having not heard back from Mr Hayden, the claimant emailed Ms Saxby about a temporary job, mentioning that 2 temporary employees had recently been offered extensions to their contracts. One of the employees who had been offered an extension was an Indian Hindu. On 1 December 2015, after the claimant chased a response, Ms Saxby acknowledged the claimant's email, pointing out that the team were just publishing the Electoral Register for the year and doing checks. Ms Saxby said that she would respond later.

29. On 7 December 2015, the claimant chased Ms Saxby again. The claimant then forwarded her email of 26 November 2015 to the Black Workers support group within the Council. Having done so, the claimant forwarded that email to Ms Saxby so that Ms Saxby could see that the Black Workers support group had been sent the claimant's email string about extra hours.

30. On a day in the week commencing 14 December 2015, Mr Hayden called the claimant into a meeting with him and Ms Saxby to discuss the claimant's email of 26 November 2015. The meeting was convened hastily, in response to the claimant having forwarded the email string about extra hours to the Black Workers support group. It was a difficult meeting. The claimant was not offered the right to be accompanied and she felt intimidated. The meeting opened with the claimant being asked why she had sent her email to the Black Workers support group and she was effectively told off for escalating matters. The claimant was also told that there were no extra hours available until the new year. However, the claimant was not shouted at nor pointed at, and she did not break down in tears. The claimant did not raise a grievance about the meeting at that time.

31. In April/May 2016, the claimant suffered a flare up of psoriasis and was later diagnosed with lock-jaw.

32. On 25 July 2016, the claimant was signed off work, sick, with work-related stress. She never returned to work for the respondent.

33. During that day, 25 July 2016, the claimant sent an email to Ms Saxby, which is in the Bundle at page 246, complaining about her treatment whilst working during the European Referendum election period. In the email, the claimant asked, "why is my manager discriminating against me?" and alleged that she had been treated like a standby member of staff, that temporary staff were doing her job on overtime hours whilst she had been sent home. The email is lacking in details and dates and it was sent just over a month after the Referendum. Ms Saxby was unclear as to whom the claimant was referring when she said, "my manager".

34. In response to the claimant's absence from work due to stress, she was asked to complete a 'Stress Action Plan'. On 1 September 2016, a meeting was convened to discuss the Plan which the claimant had completed as far as she could. In the Plan, the claimant wrote that she felt discriminated against but did not give any details of what she meant by this. In the course of the meeting, the claimant clarified that the manager to whom she referred in her email of 25 July 2016 was in fact Ms Saxby and the claimant said that she believed that others in the team followed Ms Saxby's instructions. Despite this confirmation, Ms Saxby continued to chair the meeting. After discussion of a number of matters, it was decided that the claimant needed to give the respondent more information by completing the Stress Action Plan in more detail.

35. On 15 September 2016, the claimant submitted a formal grievance about her manager, Ms Saxby. The grievance was presented in a brief email without providing any details of the conduct complained of except to say that "My relationship with Alison Saxby has irretrievably broken down and I cannot trust or work with her anymore". There is no mention of discrimination. Ms Rebecca Oakley, a manager at the respondent who worked outside of Electoral Services, was appointed to handle the claimant's grievance.

36. On 10 November 2016, Ms Oakley met with the claimant. In the course of the meeting, the claimant outlined what she saw as difficulties with Ms Saxby going back over 20 years. The claimant said that she could not work with Ms Saxby and could not stay in the Electoral Services team. The claimant also made an allegation that, "I think all the English people don't get treated like me". Ms Oakley investigated matters and spoke to Ms Saxby, amongst others, about the claimant's grievance.

37. On 20 November 2016, Ms Oakley wrote to the claimant with the outcome of the grievance process, turning down the claimant's complaints. Ms Oakley wrote that she was unable to recommend that the claimant be moved from the Electoral Services team because she was in a role that was not generic and therefore not able to be transferred. The letter also suggested that Ms Saxby would be happy to welcome the claimant back

to the team and recommended mediation between the claimant and Ms Saxby.

38. On 5 January 2017, the claimant appealed the grievance outcome because she did not consider that her concerns had been addressed. An appeal meeting was held on 3 February 2017, with Alison Greenhill, Director of Finance. The claimant's appeal was unsuccessful. However, Ms Greenhill recorded her concerns about the relationship between the claimant and Ms Saxby in the grievance appeal outcome letter and recommended mediation to see if the relationship could be repaired.

39. On 28 February 2017, an occupational health report recommended that the claimant might be transferred to another team if operationally feasible and recommended a change in the claimant's working environment, without explaining what that meant.

40. On 14 March 2017, Ms Saxby sent the claimant a letter entitled "Long Term Absence – Ill Health Redeployment" using a template supplied by HR. The claimant had by this time been absent due to ill-health for approximately 9 months. The letter is in the bundle at page 326 and invited the claimant to a meeting to discuss her continued employment with the respondent in light of her long period of sickness absence. The letter includes a statement to the effect that one possible outcome of the meeting could be to place the claimant on ill-health redeployment and also that notice of dismissal could be served at the meeting.

41. On 10 April 2017, the claimant's trade union representative complained about Ms Saxby's involvement in the ill-health absence process in light of the claimant's grievances about Ms Saxby's management and treatment of the claimant. This led, on 26 April 2017, to the respondent's decision to appoint Andrew Shilliam to manage the ill-health absence process. Mr Shilliam is a senior employee of the respondent based in another department and had no prior knowledge or experience of the claimant. Mr Shilliam received support and advice from the respondent's HR department, principally from Jagruti Barai, an HR Adviser.

42. On 12 May 2017, Mr Shilliam met with the claimant for an informal meeting, to discuss the claimant's situation. In the course of the meeting, the claimant and her trade union representative confirmed that the claimant did not feel able to return to work in Electoral Services. The claimant said that she knew of other employees who had been transferred. The HR adviser asked for names and details which the claimant was to check after the meeting.

43. Following the meeting, a friend of the claimant wrote to Mr Shilliam to inform him that the claimant's ill-health had deteriorated and to request

that she be referred again to occupational health. This request was progressed by the respondent and a referral was made.

44. On 14 June 2017, the respondent received a further occupational health report on the claimant. This report expressed a view that the claimant was likely to be a disabled person under the Equality Act 2010 because of her physical and psychological difficulties. The report also stated that the claimant was unfit to return to work and it recorded that the claimant felt that she was unable at that time to engage with the redeployment process.

45. On 13 July 2017, Mr Shilliam wrote to the claimant to invite her to a further meeting to discuss a number of options for the claimant's future with the respondent including the possibility of terminating her employment because of her ill-health.

46. On 17 July 2017, the claimant submitted a grievance to Miranda Cannon, who is Ms Saxby's manager, about Ms Saxby's treatment of her including allegations of victimisation and discrimination due to her race, age, disability and part-time status. The grievance lacked detail and referred to matters that the claimant had complained about previously.

47. On 22 August 2017, the claimant met with Ms Oakley to discuss her grievance.

48. On 23 August 2017, the claimant met with Mr Shilliam to discuss the occupational health report of 14 June 2017 and the possibility of placing the claimant on ill-health redeployment. In the course of the meeting, the claimant stated that she did not feel able to participate in the redeployment process and that, instead, she wanted to return to her job in the Electoral Services team. The respondent was surprised to hear this given the claimant's previously stated view that she could not return to the team. Nevertheless, Mr Shilliam spent time discussing with the claimant the possibility of mediation taking place in preparation for such a return to work and the claimant agreed to this. Mr Shilliam impressed upon the claimant the importance of her accepting that her complaints and grievances had been addressed under the respondent's procedures and of looking forward constructively.

49. On 26 September 2017, Ms Oakley sent the claimant a grievance outcome letter which did not uphold the claimant's grievance of 17 July 2017.

50. On 2 October 2017, the claimant appealed the grievance outcome. She also contacted HR about when the mediation could start and when she could return to work. In her email, at page 402E of the bundle, the claimant told the respondent's HR that she was on holiday at that time and not in fact sick.

51. On 12 October 2017, Mr Shilliam wrote to the claimant about what had transpired at their meeting on 23 August 2017, including the potential for a return to work in Electoral Services with mediation to be arranged and subject to a further assessment of the claimant by occupational health as the respondent had understood that the claimant remained off work, sick.

52. On 16 October 2017, occupational health reported that the claimant was unfit for work at that time including undergoing processes appertaining to "medical redeployment".

53. A mediation session had been arranged for 31 October 2017 but this was postponed at the claimant's request. During this period, the respondent made a number of efforts to arrange a grievance appeal hearing with the claimant including on 7 November 2017 and 9 January 2018. The grievance appeal hearing eventually took place on 17 January 2018. On 22 January 2018, Mr Adatia, the respondent's Head of Standards, wrote to the claimant turning down her appeal.

54. On 20 February 2018, the claimant and Ms Saxby attended for a mediation which was unsuccessful.

55. On 16 May 2018, Mr Shilliam wrote to the claimant to invite her to a further meeting about her ill-health absence and options, including consideration of termination of the claimant's employment. The meeting was scheduled for 24 May 2018. However, on 21 May 2018, the claimant replied to suggest that their meeting should be delayed until after a preliminary hearing in her first claim to the Employment Tribunal. Mr Shilliam wrote back to suggest that the Tribunal process was not relevant to his conducting a review of the claimant's ill-health absence. In reply, on 22 May 2018, the claimant emailed Mr Shilliam to say that she would not attend the meeting because she thought it should take place after the Tribunal's preliminary hearing.

56. On 16 July 2018, a further occupational health report concluded that the claimant was fit to participate in a process for relocation to an alternative team and it suggested that HR should meet with the claimant to explore her wishes for a return to work. In addition, the occupational health report emphasises that the claimant's issues were largely to do with interpersonal conflict.

57. On 25 July 2018, Mr Shilliam wrote to the claimant to invite her to a meeting on 8 August 2018 to discuss the occupational health report and options, including the issue of termination of the claimant's employment because of continued ill-health. Due to the unavailability of the claimant's trade union representative, the meeting was re-arranged to 9 August

2018. However, the claimant then sought a postponement of the meeting and, when that was refused, the claimant did not attend the meeting.

58. On 9 August 2018, in light of the claimant's non-attendance at the meeting, Mr Shilliam sent a letter to the claimant outlining the history of the claimant's ill-health absence and attempts to resolve a number of matters. Mr Shilliam confirmed that his decision was to place the claimant on ill-health redeployment and he gave the claimant notice of dismissal on ill-health grounds with effect from 10 August 2018. The claimant's contractual notice period was 12 weeks. The claimant was advised of her right to appeal the decision to dismiss her, but she did not pursue an appeal.

59. Narinder Kaur from HR was appointed to assist the claimant with the redeployment process during her notice period. Ms Kaur made a number of efforts to contact the claimant and to work with her during the following 12 weeks including arranging training sessions and sending the claimant details of vacancies at the respondent from time to time. In response, the claimant sent Ms Kaur a detailed statement of what she described as "Ongoing discrimination from Alison Saxby" covering the previous 20 years and her past complaints, and also a report from a psychiatrist, Dr Latif, dated 10 June 2018, which her trade union had obtained with a view to pursuing a claim for personal injury against the respondent.

60. On 18 October 2018, Mr Shilliam wrote to the claimant to invite her to a meeting to discuss the progress of the redeployment process and, in doing so, he pointed out that the claimant's redeployment period would end on 2 November 2018.

61. On 30 October 2018, Mr Shilliam met with the claimant and her trade union representative to discuss the claimant's future and redeployment. The claimant confirmed that she remained ill and she asked the respondent to hold a post open for her whilst she recovered her health. Mr Shilliam pointed out that the claimant's psychiatrist, Mr Latif, had reported that the claimant was likely to be unwell for at least another 12 to 18 months from the commencement of therapy, which had not yet begun. The claimant's trade union representative added that this period could be longer.

62. On 30 October 2018, Mr Shilliam wrote to the claimant following their meeting, about her request for the respondent to hold open a post while she recovered. Mr Shilliam declined to accept that the respondent should hold open a job for the claimant indefinitely. Mr Shilliam also confirmed that the claimant could not be moved into a position elsewhere in the respondent's organisation without having gone through the respondent's procedures for such.

63. On 2 November 2018, the claimant's employment with the respondent was terminated for capability when the ill-health redeployment period ended.

The Law

64. A concise statement of the applicable law is as follows.

Direct race discrimination

65. Direct discrimination is contained in section 13 EqA which provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The relevant protected characteristics include race.

66. Section 23 provides that on a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case. The provisions protecting those in employment are contained in section 39 EqA.

The duty to make reasonable adjustments.

67. An employer's duty to make reasonable adjustments is contained in sections 20 to 21 EqA. Section 20(3) provides:

"*the first requirement is, where a provision, criterion or practice 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, to take such steps as it is reasonable to have to take to avoid the disadvantage*".

68. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in *Environment Agency –v- Rowan [2008] IRLR 20*.

69. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Equality and Human Rights Commission Code of Practice on Employment ("the Code"), paragraph 6.10, says the phrase is not defined by EqA but "*should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions*".

70. As to whether a disadvantage resulting from a PCP is substantial, section 212(1) EqA defines substantial as being "*more than minor or trivial*".

71. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is considered in the Equality and Human Rights

Commission Code of Practice in Employment ("the Code"). A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case.

72. An adjustment cannot be a reasonable adjustment unless it alleviates the substantial disadvantage resulting from the PCP. In *Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664* the EAT held that a failure to consult an employee about adjustments did not in itself amount to a failure to make a reasonable adjustment. Nor was the extension of a rehabilitation programme which offered no prospect of restoring the claimant to full duties: *Romec Ltd v Rudham EAT 0069/07*. The question is one of reasonableness.

EqA Burden of proof provisions

73. Section 136 EqA contains the burden of proof provisions namely that if there are facts from which a Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the Tribunal must hold that the contravention occurred.

74. In *Igen Ltd V Wong [2005] EWCA Civ 142*, the Court of Appeal considered and amended the guidance contained in *Barton v Henderson Crosthwaite Securities Ltd [2003] IRLR 332* on how to apply the previous similar provisions concerning the burden of proof:

(1) It is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful. These are referred to as "such facts".

(2) If the claimant does not prove such facts the claim fails.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

(4) In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inference it is proper to draw from the primary facts found by the Tribunal.

(5) It is important to notice the word "could". At this stage the Tribunal does not have to reach a definitive determination that such facts

would lead it to the conclusion that there was an act of unlawful discrimination. At this stage the Tribunal is looking at the primary facts proved by the claimant to see what inferences of secondary fact could be drawn from them and must assume that there is no adequate explanation for those facts. It is also necessary for the Tribunal at this stage to consider not simply each particular allegation but also to stand back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

(6) Where the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on the proscribed ground, then the burden of proof shifts to the respondent and it is for the respondent then to prove that it did not commit or, as the case may be, is not to be treated as having committed that act.

(7) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities that the treatment was in so sense whatsoever on the proscribed ground. This requires a Tribunal to assess not merely whether the respondent has proved an explanation for such facts but, further, that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not a ground for the treatment in question.

(8) Since the facts necessary to prove an explanation will normally be in the possession of the respondent, a Tribunal will normally expect cogent evidence to discharge that burden of proof.

75. The Tribunal has applied the guidance offered by the Employment Appeal Tribunal in *Laing v Manchester City Council [2006] IRLR 748* and *Network Rail Infrastructure v Griffiths-Henry [2006] IRLR865.* The reasoning in the former decision has been approved by the Court of Appeal in *Madarassy v Nomura [2007] IRLR 246 CA*.

Time limits

76. The claimant's discrimination complaints were brought under EqA. The time limit for such complaints is found in section 123 EqA as follows: -

"(1) Subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable."

(2) ....

(3) For the purposes of this section –

(a) conduct extending over a period of time is to be treated as done at the end of that period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

77. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question.

78. The Tribunal has a discretion as to whether to extend the limitation period. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434* the Court of Appeal considered the extent of the discretion. The Employment Tribunal has a "wide ambit". At paragraph 25 of the Judgment Auld LJ said: -

"it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

79. Other factors may be relevant too. In *Department of Constitutional Affairs –v- Jones [2008] IRLR 128*, at paragraph 50, Hill LJ said: - *"The factors which have to be taken into account depend on the facts, and the self-directions which need to be given must be tailored to the facts of the case as found".*

80. In the course of submissions, the Tribunal was referred to a number of cases by the parties' Counsel, as follows:

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285
Archibald v Fife Council [2004] 4 All ER 303
Southampton City College v Randall [2006] IRLR 18
Aylott v Stockton-on-Tees Borough Council [2010] EWCA Civ 910
Wade v Sheffield Hallam University [2013] UKEAT/0194/12
Newham Sixth Form College v Sanders [2014] EWCA Civ 734
Wolfe v North Middlesex University Hospitals NHS Trust [2015] ICR 960
Efobi v Royal Mail Group UKEAT/0203/16
Talbot v Costain Oil, Gas & Process Ltd UKEAT/0283/16
Ayodele v Citylink Ltd [2018] IRLR 114

The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Submissions

81. Counsel for the claimant made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that:- it was obvious that the meeting in the week commencing 14 December 2015 was convened in response to the email copying in the Black Workers support group and that Ms Saxby's subsequent conduct should be viewed in light of her reaction to the email and that is led to her raising the claimant's mistakes in future meetings; that a number of adjustments were reasonable but were not considered by the respondent, including progressing mediation, adjustments to the redeployment policy, holding a role open for the claimant for up to 18 months and being flexible in its approach to the claimant. It was also submitted that the last act in a course of conduct of direct race discrimination was the letter of 17 March 2017 which was in time; alternatively, it would be just and equitable to extend time because the claimant had been following the respondent's procedures in an effort to resolve matters. The last act of disability discrimination was said to be the decision of Mr Shilliam to confirm the claimant's dismissal for capability and so in time; alternatively, it would be just and equitable to extend time in view of the claimant's ill-health and because at the time of the redeployment, the claimant had been hospitalised.

82. Counsel for the respondent also made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence, it was asserted that: - the direct discrimination claim is out of time by a considerable margin and there is no basis to extend time; alternatively, that this claim should be rejected for lack of evidence to support the individual allegations of less favourable treatment, which were not matters the claimant complained about at the time, and which are based upon the claimant's perception alone and refuted by the

respondent's witnesses. In respect of the reasonable adjustments claim, it was submitted for the respondent that the claimant's case was analogous to a request for the respondent to create a post for her and on her terms or to make adjustments which were unreasonable in the circumstances of the case. In addition, it was submitted that the adjustments contended for would not have removed the disadvantage caused by any requirement to maintain consistent attendance when, at termination of her employment, the claimant remained unfit to work and there was no prospect of her returning to work in a reasonable period of time.

Conclusions (including where appropriate any additional findings of fact)

83. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way. In doing so, the Tribunal has considered carefully and in detail the evidence of the parties and their witnesses. The Tribunal considered that the claimant's evidence was, at times, contradictory, confused and often at odds with the contents of contemporaneous documents, including those which had formed the basis of her case. The Tribunal found the claimant's recollection of events to be unreliable and, where a conflict of evidence arose, the Tribunal preferred the evidence of the respondent's witnesses.

Direct race discrimination

84. The first issue to be considered was whether Alison Saxby of the Respondent reprimanded, isolated, ignored, bullied or harassed (by being given menial tasks and being excluded from tasks) the claimant for "copying in" the Black Workers Support Group to an email dated 26 November 2015. The Tribunal considered each of the allegations made by the claimant in turn.

85. The Tribunal has found as a fact that Ms Saxby called the claimant into a meeting in the week commencing 14 December 2015 to discuss the claimant's email of 26 November 2015 which she had copied to the Black Workers' support group. The Tribunal found that it was a difficult meeting and accepted that a meeting called by 2 managers, without notice and without the offer of a witness would be an intimidating experience for the claimant as a junior employee. The Tribunal has also found that Ms Saxby effectively reprimanded the claimant in this meeting. However, there was no evidence to support the allegation that Ms Saxby treated the Claimant like a child in the meeting and the Tribunal rejected suggestions that the claimant was shouted at, pointed at, or that she broke down in tears. In her witness statement the claimant stated that a colleague had asked her after the meeting why she was so upset. In the course of the hearing, it became apparent that this was a reference to Ms Patel. Under cross-examination, Ms Patel denied that she had ever seen the claimant upset and the Tribunal preferred the evidence of Ms Patel on the point, noting

that the claimant had not raised a grievance about the meeting at that time despite the way she has sought to portray it at this hearing.

86. The claimant then alleges that, in the period from the meeting in December 2015, up to and including June 2016, Ms Saxby isolated the claimant by not speaking to her or acknowledging her and completely ignored her. The Tribunal found no evidence to support this allegation. A number of the respondent's witnesses consistently refuted the claimant's allegation. The Tribunal accepted that evidence.

87. In June 2016, during the Brexit referendum election, the claimant alleges that she was given menial tasks upon the instruction of Ms Saxby. The Tribunal considered that the claimant was employed on the lowest job grade in the respondent's Electoral Services department and her job description, unsurprisingly, includes a number of duties and tasks which might well be considered to be menial tasks. In that event, allocating such tasks as within the claimant's job remit was not unreasonable. However, the Tribunal noted that the claimant performed a variety of tasks. The claimant's evidence was that she handled external telephone enquiries. These required experience, and an in-depth knowledge of Electoral Services. The Tribunal considered that such tasks could not be described as menial and it was apparent from the claimant's own evidence that she performed a variety of tasks many of which were not menial, and which she liked doing.

88. In September 2016, during a Stress Action Plan meeting, the claimant alleges that Ms Saxby criticised her for mistakes which had not previously been mentioned and did not support the claimant during the meeting. The Tribunal noted that the claimant had been asked to complete a form for the meeting. Her first handwritten effort appears in the bundle at page 248 and is significantly lacking in detail. The meeting was arranged to discuss that document. However, the Tribunal considered the meeting in question to be ineffective as the claimant had failed to particularise matters in the form beyond recording that she felt discriminated against. It was only during the meeting, that the claimant disclosed that her issues were with Ms Saxby, who was chairing the meeting. The meeting led to the claimant being asked to complete the plan in greater detail with the assistance of Ms Barai from HR. There was no evidence that Ms Saxby did not support the claimant during the meeting, although the Tribunal accepted that, once the claimant had identified Ms Saxby as the source of her issues, Ms Saxby adopted a neutral position.

89. Lastly, the claimant complains about the letter sent to her by Ms Saxby dated 14 March 2017 which is in the bundle at page 326. The claimant contended that the letter was inappropriate because it related to her long-term sickness absence and, in particular, because it intimated the possibility of the claimant's dismissal. The claimant had by that stage

been absent because of ill-health for approximately 9 months. The Tribunal considered the letter and its contents carefully together with the evidence of the parties concerning it, and the respondent's Absence Management policy. The Tribunal considered that the letter was not inappropriate in the circumstances. It was not composed by Ms Saxby but was a template letter supplied by the respondent's HR department. Mr Shilliam used a similar HR template letter when he wrote to the claimant in 2018. The Tribunal further considered that it was important to warn an employee that one outcome of a proposed meeting could be dismissal. Such a warning was a requirement of the respondent's Absence Management policy. The contents of the letter met the policy requirements.

90. In light of the above conclusions on the allegations of direct race discrimination, the Tribunal considered that the treatment about which the claimant complains did not amount to unlawful direct discrimination. The claimant was not subjected to less favourable treatment. In reaching this conclusion, the Tribunal noted the lack of any evidence to suggest a link between the treatment complained of and the claimant's race. The claimant did not rely on any actual comparators. However, in the course of the evidence, it became apparent that there was another employee who was an Indian Hindu in the Electoral Services team, who had been given additional working hours, which had been one issue that the claimant had at one point complained about to the respondent in terms of race discrimination.

91. The Claimant asserted that a hypothetical white female comparator who had emailed her manager and copied in a trade union or support group would not have been so treated. The Tribunal did not agree with the claimant's assertion and considered that it was the fact that the claimant had deliberately forwarded her email to Ms Saxby which amounted to an escalation of matters. The Tribunal considered that Ms Saxby would have reacted by seeking a meeting with any employee who tried to "up the ante" as the claimant had done and regardless of the group to whom the email had been copied. In this regard, the Tribunal accepted Ms Saxby's evidence that the claimant had raised a grievance unsuccessfully in the past and was seeking to take it further or to reopen matters. That evidence was echoed by the comments of Mr Shilliam in his evidence, to the effect that the claimant needed to accept the outcome(s) of the grievance process but that she was not able to do so. In the course of this hearing, and despite that much of the claimant's original claims had been dismissed on withdrawal, the claimant repeatedly returned to earlier events and grievances which did not form part of her remaining complaints and stated on many occasions that she was complaining about "20 years of discrimination".

92. The Tribunal also did not accept the claimant's suggestion that sending the email on to Ms Saxby was somehow a mistake. The documents clearly show the claimant's actions to be a deliberate intention to show Ms Saxby what she had done, and there was no evidence of any attempt to recall the message, or to apologise for it, which might have been expected if it had in fact been a mistake.

Failure to make reasonable adjustments

93. The claimant has shown that the respondent applied the PCP of 'a requirement to maintain a consistent attendance at work failing which an employee would be subject to disciplinary sanctions up to and including dismissal' to the claimant'. That PCP did put the claimant at a substantial disadvantage (i.e. being subject to disciplinary action if a certain level of attendance is not maintained) in comparison to persons who are non-disabled. Therefore, the duty to make reasonable adjustments was engaged, albeit that the claimant was not in fact ever subjected to the disadvantage of disciplinary action.

94. It is the claimant's case that the respondent should have undertaken certain steps, by way of reasonable adjustments, from 9 August 2018 during the ill health redeployment process. First, the claimant contended that the respondent should have recommenced a prescribed period of mediation. Mediation had been recommended to the respondent in November 2016 and again in January 2017 during the grievance process. It was discussed with the claimant by Mr Shilliam when he was appointed to manage the claimant's ill-health absence. However, at their meeting on 12 May 2017, the claimant and her trade union representative confirmed to Mr Shilliam that the claimant did not feel able to return to work in Electoral Services. Mediation with Ms Saxby which had been recommended was not therefore pursued at that time because of the claimant's stated position. There would have been little point. The Tribunal found that the respondent did later attempt mediation, in February 2018, instigated by Mr Shilliam at the claimant's behest, but mediation then failed - the mediator reported that the mediation could not be progressed further and the Tribunal was not told why. The Tribunal accepts the submissions of the respondent on this aspect, that it would not have been reasonable to expect Mr Shilliam to pursue mediation again, later in 2018 as, by 9 August 2018, he had decided to use redeployment as a means to help the claimant find alternative employment elsewhere in the respondent Council. In addition, the Tribunal noted that the claimant did not herself at any point after February 2018 request that mediation be recommenced and, in her evidence, the claimant suggested that she had not in fact wanted to pursue mediation at that time.

95. The claimant contends that it would have been a reasonable adjustment for the respondent to have followed the recommendation of occupational

health to relocate the Claimant to an alternative team in the period after 16 July 2017. That recommendation was made in an occupational health report dated 6 March 2017, which suggested that transferring the claimant to a different team might be a way forward "if operationally feasible". The following occupational health report, dated 16 June 2017, said that the claimant was not fit to return to work and suggested that the claimant should be offered support with redeployment once she was fit to engage with that process. Hence, the Tribunal considered that, in 2017, it would not have been reasonable for the respondent to seek to relocate the claimant at a time when the medical advice that it had was saying that the claimant was not fit to return to work. It was not in fact until 16 July 2018, that a further occupational health report concluded that the claimant was fit to participate in a process for relocation to an alternative team. This led to Mr Shilliam writing to the claimant to invite her to the meeting on 9 August 2018 to discuss the occupational health report and options. However, following the unavailability of the claimant's trade union representative and the refusal of a postponement beyond one day, the claimant did not attend the meeting. Mr Shilliam did move to place the claimant on ill-health redeployment but without success, due largely to the claimant's further ill-health and her failure to engage with the redeployment process.

96. In addition, the claimant contended that, as a reasonable adjustment, the respondent should have made its internal processes more flexible by holding a role open for her, for up to 18 months while she recovered her health. The Tribunal did not consider this to be a reasonable adjustment in the circumstances of this case. The Tribunal noted that this request was made at the meeting of 30 October 2018. During the redeployment period, the claimant had sent the respondent's HR department a report from a psychiatrist, Dr Latif, dated 10 June 2018, which suggested that the claimant was likely to be unwell for at least another 12 to 18 months from the commencement of therapy, which had not yet begun. The notes of the meeting of 30 October 2018 record that the claimant's trade union representative had also commented that the period in which the claimant would be unwell could be longer than suggested. Despite the content of the meeting notes, the claimant sought to deny this in her evidence to the Tribunal hearing and she claimed that she had, in fact, confirmed at the meeting of 30 October 2018 that she would be fit to return to work within a few weeks. That was an entirely new position and a contradiction of all other evidence before the Tribunal about what transpired at the meeting of 30 October 2018 and the Tribunal considered that it was not credible.

97. The claimant also agreed under cross-examination that she would not have expected the respondent to hold open a vacancy for her for 12 – 18 months. In determining this aspect, the Tribunal preferred to rely on the contemporaneous meeting notes and the accounts of Mr Shilliam and Ms Barai and concluded that it was entirely unreasonable for the claimant to

expect the respondent to hold open a job for the claimant indefinitely and in the face of the continuation of her ill-health absent indefinitely.

98. Lastly, the claimant contended that it would have been a reasonable adjustment for the respondent to moving her directly into another open role without applying "HE policies and procedures" and/or the ill-health redeployment procedure. After the meeting on 30 October 2018, and confirmed in his evidence to the Tribunal, Mr Shilliam explained that the claimant could not be moved into a position elsewhere in the respondent's organisation without having gone through the respondent's procedures for recruitment or redeployment. The Tribunal considered that the claimant's suggestion was not in any event a reasonable adjustment. It would not have removed the disadvantage caused by a requirement to maintain consistent attendance under the PCP. The Tribunal considered that the adjustment contended for amounted to the claimant expecting the respondent to create an (unspecified) post for her and/or to slot her into a role regardless of any requirement to advertise or undergo competitive recruitment procedures, notwithstanding the fact that, at the material time, the claimant was unfit for work and had not engaged in the respondent's processes during her notice period even with support provided to her.

99. In all the circumstances, the Tribunal concluded that the respondent had not failed in its duty to make reasonable adjustments and that the adjustments contended for by the claimant were not reasonable.

Time limits

100. The Tribunal considered whether the first and/or second claims had been lodged within the applicable time limits and decided that the claim of race discrimination was presented outside of the applicable statutory time limit. The last act relied upon was Ms Saxby's letter dated 14 March 2017. The claimant's first claim was presented to the Tribunal on 31 October 2017 which, even allowing for a period of ACAS Early Conciliation, is beyond the statutory time limit for presentation of such a claim. The claimant has not sought to argue this point – Counsel for the claimant suggested in her closing submissions that the claim was submitted within the relevant period but the Tribunal do not agree. The only argument presented for a just and equitable extension was that the claimant had been following the respondent's agreed procedures in an effort to resolve matters. In those circumstances, and taking account of the fact that the claimant had the benefit of support from her trade union throughout the internal processes, the Tribunal did not consider that it would be just and equitable to have extended time. The point is in any event academic as the Tribunal has found that the complaint of race discrimination fails on its merits.

101. The Tribunal considered that the complaint of disability discrimination is in time in so far as the last act alleged to be a failure to make reasonable

adjustments was the decision by Mr Shilliam to confirm the claimant's dismissal for capability in late October 2018. The second claim was presented to the Tribunal on 14 January 2019. The Tribunal therefore has jurisdiction to hear this complaint but, for all the reasons set out above, the complaint fails.

_____
Employment Judge Batten
Date: 30 March 2020

JUDGMENT SENT TO THE PARTIES ON:

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FOR THE TRIBUNAL OFFICE