



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102245/2017

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Held in Glasgow on 23, 24, 25, 26, 27, 30, 31 July and 15 August 2018

Members Meetings:

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Employment Judge: Shona MacLean
Members: Mr IC Macfarlane
Ms M McAllister

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Mrs Linda M Gallacher

Claimant
Represented by:
Mrs C Greig
Solicitor

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Abellio ScotRail Limited

Respondent
Represented by:
Mr A Crammond
Barrister

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JUDGMENT

The judgment of the Employment Tribunal is that the claimant's claims are dismissed.

REASONS

Background

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1. In the claim form sent to the Tribunal's office on 27 July 2017, the claimant claims unfair dismissal; breach of contract; direct disability discrimination in terms of section 13 of the Equality Act 2010 (the EqA); discrimination arising from disability in terms of section 15 of the EqA; indirect disability discrimination in terms of section 19 of the EqA and failure to make reasonable adjustments in terms of section 20 of the EqA. She also has claims of both direct and indirect discrimination because of the protected

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characteristic of sex in terms of sections 13 and 19 of the EqA and claims of direct and indirect discrimination because of the protected characteristic of age in terms of the sections 13 and 19 of the EqA.

- 5 2. At the final hearing, the Tribunal was advised that the respondent agreed that the claimant was disabled for the purposes of section 6 of the EqA because of symptoms suffered by her in connection with the menopause and depression from dates to be determined by the Tribunal.
- 10 3. It was agreed that the Tribunal would only determine liability and that any issues relating to remedy would be determined at a separate hearing.
4. The parties agreed that the respondent would lead at the final hearing. The Tribunal heard evidence from Jacqueline Taggart, the claimant's former line manager and Jim Gibson, former Head of Human Resources. The claimant
15 gave evidence on her own account.
5. There was a joint set of productions extending to 318 pages along with a supplementary set of productions extending to a further 30 pages. The
20 Tribunal has set out its findings in fact. Not every fact that could be found in the documents or oral evidence has been set out: the Tribunal has set out the facts as found that are essential to the Tribunal's reasons or to an understanding of the important parts of the evidence.
- 25 6. Similarly, there were "skeletal" written submissions which were lengthy that were expanded upon orally. The Tribunal has summarised the submissions and dealt with the points made in submissions while setting out the facts, the law and the application of the law to those facts.
- 30 7. The Tribunal read the submissions with care during its deliberations. It should not be taken that a point was overlooked, or facts ignored because the fact or submission is not in the Reasons in the way that it was presented to the Tribunal by a party.

8. The Tribunal's approach was to consider the issues that had to be determined which were as follows:

Disability discrimination

- 5 a. During what period was the claimant disabled within the meaning of the EqA?
- b. What was the reason for the claimant's dismissal?
- c. Was the claimant dismissed because of her disability?
- d. Was the claimant dismissed by the respondent because of something arising in consequence of her disability?
- 10 e. Did the respondent know or could the respondent have been reasonably expected to know that the claimant was disabled during the relevant period?
- f. If the claimant was dismissed because of something arising in consequence of the claimant's disability, can the respondent show that
- 15 this treatment was justified?
- g. Did the respondent apply a provision, criterion or practice requiring its employees not to have a breakdown in working relationships (PCP)?
- h. Did the PCP put the claimant in pursuance with her disability to a substantial disadvantage compared to persons not so disabled?
- 20 i. Was the PCP justified as a proportionate means of achieving a legitimate aim?
- j. Did the PCP place the claimant at a substantial disadvantage in comparison with persons who are not disabled and so her disability made it more difficult for her to maintain good working relationships?
- 25 k. If so, did the respondent know (or could they reasonably have been expected to have known) that the claimant had a disability that was likely to mean that she was placed at a disadvantage?
- l. If so, did the respondent take such steps as it was reasonable to have taken to avoid that disadvantage?
- 30 m. Who are the relevant comparators?
- n. Did the PCP put the claimant at a substantial disadvantage compared to the relevant comparators?

Sex discrimination

- a. Was the claimant dismissed because of her sex?
- b. Did the PCP put the claimant at a substantial disadvantage compared with any colleagues?
- 5 c. Was the PCP justified as a proportionate means of achieving a legitimate aim?

Age discrimination

- a. Was the claimant dismissed because of her age?
- b. Did the PCP indirectly discriminate against the claimant and employees of her age group (48-55) by putting them at substantial disadvantage when compared with employees not in that age group?
- 10 c. Was the PCP justified as a proportionate means of achieving a legitimate aim?

15 Unfair dismissal

- a. Was the reason for dismissal a potentially fair reason in accordance with section 98 of the Employment Rights Act 1996 (the ERA)?
- b. If so, did the respondent act reasonably in treating such reason as a sufficient reason for dismissing the claimant?

20 Breach of contract

- a. Did the contractual policies or procedures apply to the claimant?
- b. If so did the respondent breach the contract by failing to follow any such contractual policies or procedures?

- 25 9. The Tribunal then made findings in fact and considered the relevant statutory provisions and authorities.

Findings in Fact

- 10. On 3 December 2007, the claimant's employment began with First ScotRail Limited which operated the ScotRail franchise. Her job title was Leadership Designate.
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11. Around April 2008 the claimant held the position of Catering Operations Manager. While reporting to Garry Clark, Head of Hospitality, the claimant participated in the on-call rota for the Caledonian Sleeper. This involved being on call one in every three weeks. The claimant found this very stressful and felt that it affected her sleeping pattern.
12. Around October 2010 Jacqueline Taggart, was appointed Director of Customer Service. Mr Clark reported to her along with John McBinn and Angus Tough.
13. In 2011 the claimant was seconded to the Customer Experience Directorate where she reported directly to Ms Taggart.
14. In October 2012, following a competitive interview process the claimant was promoted to Head of Customer Service Delivery and Standards. She continued to report to Ms Taggart with whom she a very good working relationship. The claimant performed well. She did not have any direct line reports.
15. The claimant approached Ms Taggart about a pay rise as the claimant considered that her salary was lower than Ms Taggart's other direct reports. Ms Taggart was sympathetic to the claimant's position. However, the claimant's pay rise was standard for someone within the organisation being promoted. Ms Taggart did not have authority to increase the claimant's salary.
16. From around April 2013 until 30 September 2014, the claimant was seconded to First Rail Holdings Limited to work on First Group's tender bids for the Caledonian Sleeper and Day Bid franchises. During this period, the claimant reported to Kenny McPhail, Bid Director. Mr McPhail was also Deputy MD for First ScotRail.
17. The claimant and Ms Taggart had little interaction in this period during which someone was seconded to the claimant's substantive post.

18. While on secondment the claimant spoke to Mr McPhail about her salary. He negotiated a salary increase for her which involved forfeiting part of a bid bonus in return for an increase to her salary for her substantive post.
- 5 19. Around June 2014 the claimant was asked to assist with the bid clarification and mobilisation plans for First Group.
20. The claimant returned to her substantive post in September 2014. While on holiday she heard that the First Groups' bid was unsuccessful, and the franchise had been awarded to the respondent from April 2015.
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21. The claimant was asked to work on mobilising the transfer to the respondent's bid. This was frustrating. She felt that the respondent's bid was underdeveloped. It was hard to be motivated and get behind a bid that she did not believe in.
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22. Around November 2014 while working up the process the claimant became aware that the respondent's bid committed to achieving a particular percentage on the National Railway Passenger Survey for three consecutive years failing which there would be substantial fines up to £2million. This was a significant change for the Customer Experience Directorate as it put a value on its work and organisational change was recommended.
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23. The office of Pat Callaghan, Director of Facilities was adjacent to the office occupied by the claimant and others working on the mobilisation. He overheard a conversation in which the claimant made negative comments about Ms Taggart. He told Ms Taggart that she needed to be careful about what she said to the claimant. He declined to elaborate. Ms Taggart mentioned this to the claimant. This made Ms Taggart doubt the nature of her relationship with the claimant.
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24. On 1 April 2015, except for the executive, all employees of First ScotRail, including the claimant, transferred to the respondent. The respondent employs around 5,000 employees.
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25. The transfer was challenging. It was not well coordinated and there was uncertainty for everyone.
26. The respondent's bid involved looking at synergies and working with Network Rail. A new Managing Director was appointed. He decided that the respondent's alliance with Network Rail would start immediately rather than being phased over two years. This involved reorganisation in which all the directors were involved.
27. The claimant considered that there had been a move from a people orientated business to a business focussed on process. The way people worked changed and there were increasing demands. She felt that the working environment was toxic and negative; she wanted out.
28. Around the summer of 2015 the respondent offered a voluntary severance scheme to which the claimant applied. Ms Taggart expressed her disappointment at losing the claimant. The claimant subsequently attended a social event where she spoke to Mr McPhail following which the claimant withdrew her application for voluntary severance.
29. A consultation document was produced in late 2015. The Customer Experience Directorate included operations (running trains) so that there was a joined-up experience for the customer end to end. Ms Taggart's direct reports increased from four to six.
30. The roles of all Ms Taggart's direct reports changed. The claimant was mapped into the role of Head of Customer Services and Standards which had greater responsibilities.
31. In December 2015, the claimant raised the issue of her salary with Ms Taggart who indicated that there was a salary freeze by Mr McPhail, Finance Director. The claimant made Ms Taggart aware of a colleague in another directorate whose director had secured her a salary increase. Ms Taggart was unaware of this. Ms Taggart explained that she made recommendations to Julie

Jenkinson, Director of Human Resources and Mr McPhail and the claimant's salary would be considered as part of the re-evaluation process. Ms Taggart advised that the claimant should wait to see the outcome rather than anticipating what she thought she would get. Ms Taggart felt that she should be trusted to deal with the matter and was doing so. Ms Taggart's impression was that the claimant did not trust her to represent her position properly. Ms Taggart spoke to Ms Jenkinson for advice on how to manage the situation.

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32. The claimant was disappointed in Ms Taggart. The claimant considered that she had asked Ms Taggart for a salary increase on several occasions and did not receive it.

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33. The claimant's salary was subsequently increased from £51,732 to £60,000 with effect from April 2016.

34. Ms Taggart decided that all her direct reports should participate in an on-call rota. This was to deal with operational incidents and resulted in a requirement to be on call to deal with such incidents approximately four times a year. The on-call team consisted of a range of members of staff including a director. An email was sent to Ms Taggart's direct reports in December 2015 attaching a proposed rota. The claimant's name was inadvertently omitted from the list of recipients.

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35. The claimant first heard about her requirement to work on call during a direct reports meeting in January 2016 at which there was discussion about training needs. The claimant learned that she was to provide on-call cover for the first week in February 2016. The claimant refused to do so as she did not consider that she had the necessary technical knowledge or experience. She was angry and upset. When Ms Taggart joined the meeting, she felt that the claimant's anger was directed at her. Ms Taggart proposed that they did not discuss the matter in the meeting but "*take it outside the room*".

36. The claimant was adamant that she was not doing on-call. Ms Taggart was disappointed that the claimant thought that she would ask her to do something

she was unable to do or not provide support. Ms Taggart had not seen the claimant behave in this way before. Later she asked the claimant if she was menopausal. The claimant said that she was not menopausal which Ms Taggart accepted. Ms Taggart had not anticipated that being on-call would be an issue for the claimant as she had worked on-call in a previous role. Ms Taggart could understand the claimant's nervousness about on-call but thought that the claimant's reaction was because she was being asked to do something that she did not want to do.

10 37. At a meeting, the claimant expressed to Ms Taggart that she was stressed about doing on call and lacked experience. The claimant was unhappy about doing on call. The claimant did not enjoy on-call previously (in 2010) and felt that it affected her sleep pattern from which she had never recovered. The claimant was aware that not all heads in other directorates were required to do on call. She did not consider that she should do so as Head of Customer Experience and Standards. Ms Taggart disagreed. Ms Taggart pointed out that on call was 1 in 11 weeks and it had been consulted in. The claimant had accepted her new salary and inferred she was accepting the new role. The claimant indicated that the salary increase was for what she was doing because the new role was bigger than that which she previously undertook. Ms Taggart said that on-call was not negotiable, but she would negotiate when the claimant was added to the roster having been trained and supported.

25 38. There was a further one to one in March 2016 when the claimant reminded Ms Taggart that Ms Taggart would not force her to do on call. Ms Taggart reiterated that on call was part of the claimant's role although Ms Taggart was happy to negotiate when the time would be right for the claimant to start on the rota. Ms Taggart acknowledged that the way that the claimant had been initially informed was inappropriate. The claimant continued to disagree that she should do on call. She was added to the on-call roster in June 2016.

30 39. Ms Taggart felt that while the claimant was entitled to challenge her decision, the claimant did not appear to trust her decision making and that the claimant

was determined to get her own way. During the discussions about on-call Ms Taggart spoke to Ms Jenkinson about how to manage the claimant.

5 40. The claimant was disabled for the purposes of the EqA in relation to symptoms of depression from April 2016 when neither the claimant, Ms Taggart nor the respondent were aware that the claimant suffered from depression or had disability. The claimant did not provide information to Ms Taggart from which she could reasonably have been expected to know about the claimant's depression until January 2017.

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41. Around mid-2016 the claimant mentioned to Ms Taggart that she had recurring urinary tract infections and she was having difficulty sleeping. While these symptoms might have been related to the claimant going through the menopause neither she nor Ms Taggart knew that until late
15 November/December 2017.

42. Around May 2016 the claimant approached Ian McConnell, Programmes and Transformation Director about a vacancy to be advertised in his directorate. The claimant completed an application form but following discussion with Mr
20 McConnell she decided not to apply. Ms Taggart's understanding from Mr McConnell was that the claimant was unlikely to be successful given the focus of the role was on governance. Ms Taggart encouraged the claimant to consider any other opportunities that may be available. Ms Taggart considered that the claimant remained committed to the role of Head of
25 Customer Experience and Standards but knew that the claimant did not want to do the role.

43. In the claimant's mid-year appraisal for 2016 she recorded around October
30 2016: *"This year has been unsettling in both the restructuring of my role and that of my team. My aspiration for my role within ScotRail is to be strategic rather than operational however being part of an operational team and the introduction of an operational on call has driven me to consider a change in roles in the future. Whilst this is not affecting my output and performance I*

have been transparent in my desire to look for a more suitable one which meets my own needs for the longer term”.

- 5 44. Ms Taggart’s comments in response were, *“It’s within Linda’s grasp to make this role what she wants it to be and full ambition to do that. She is still not sure in the medium to long term if the role is for her so a period of reflection would help. She has gained skills through various courses which may allow her to spread her wings and excel in the areas she has strengths.”*
- 10 45. As a result of the restructure, three new roles reporting directly to the claimant were created: Customer Improvement Manager; Contracts and Policy Manager and Standards Manager. The claimant was responsible for interviewing and making appointments to these new roles. Joanne Ferguson had been appointed to the role of Contract and Policy Manager on a temporary contract for six months. The role was advertised internally on a permanent basis from October 2016. Ms Ferguson and another candidate who was known to the claimant from having worked with each other during the bid were shortlisted. The candidates were to be interviewed on 14 November 2016.
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- 20 46. During the previous week, the claimant indicated to Ms Taggart that Ms Ferguson was *“not on her game”*. Ms Taggart was surprised and enquired whether this had previously been raised with Ms Ferguson as this was the first that Ms Taggart had heard of there being any issue. The claimant said that it had not.
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47. At a one to one meeting on 11 November 2016, Ms Taggart asked for details of the claimant’s reservations about Ms Ferguson and why the claimant had not raised them with Ms Ferguson. Ms Taggart said that she wished to be present at the interview. The claimant agreed to this.
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48. During the interview on 14 November 2016, the claimant believed Ms Ferguson had been briefed by Ms Taggart and felt uncomfortable. Ms Taggart felt that the claimant interrupted Ms Ferguson and was being unprofessional.

After both candidates were interviewed, Ms Taggart expressed the view that the other candidate was not ready for the post. The claimant disagreed and said that she wanted the other candidate. Ms Taggart suggested that the post could be advertised externally. The matter was left at that stage as they both had other meetings to attend. Ms Taggart believed that the claimant had briefed the other candidate.

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49. On 15 November 2016, the claimant went on sick leave. The claimant texted Ms Taggart saying that she needed “*time out*”. Ms Taggart was supportive.

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50. Ms Taggart had no idea why the claimant was absent. Ms Taggart spoke to Adrian Thompson, who had replaced Ms Jenkinson as HR Director, for advice about her relationship with the claimant. Ms Taggart was concerned that the claimant was doing a job that she did not enjoy and their relationship was deteriorating and moving to the point of no recovery.

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51. The respondent had significant challenges delivering the bid. There was a need to save money and a second voluntary leavers scheme was proposed. Mr Thompson issued an instruction to all directors to approach any employee who had considered VLS in 2015 and enquire if they were interested in pursuing it now. The claimant fell into that category.

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52. On 21 November 2016, the claimant texted Ms Taggart that she was not ready to return. Ms Taggart thanked the claimant for letting her know.

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53. The claimant first presented to her general practitioner with menopausal symptoms on 22 November 2016 which included variation in mood, tearfulness, irritability and generalised anxiety. She was aware of hot flushes and her sleep was disturbed at night. The claimant was reluctant to try HRT at that point. For a trial, she was prescribed low dose antidepressant to be reviewed in two months. Her first fit note covered the period 22 November 2016 to 6 December 2016 for “*menopausal symptoms*”. HR did not receive this fit note until after 13 December 2016 although the claimant informed Ms

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Taggart by text on 22 November 2016 that she had *“a line for 2 weeks which will give [her] the space that [she] need[s] just now”*.

54. Ms Taggart continued to be supportive of the claimant. Ms Taggart sent
5 flowers and encouraged the claimant to focus on her recovery.

55. On 5 December 2016, the claimant texted Ms Taggart that she was not ready
to return but had booked a couple of days holiday so would return on 8
December 2016. Ms Taggart replied, *“OK. Would be nice to see you back but
10 if [you are] not ready Linda you really need to consider. It’s manic here and
the pressure is significant. No point on coming back to go off again. You need
to look after your health.”*

56. The claimant texted Ms Taggart on 8 December 2016 saying that she would
15 not be back that day and had an appointment with her general practitioner.
Ms Taggart replied, *“OK Linda, I think that is sensible if you don’t feel up to
being back. I don’t have your first line? Let me know how it goes.”*

57. The claimant consulted her general practitioner on 8 December 2016 whose
20 record included, *“mood feeling better but now aware of panic-type sx
(symptoms). Such as palpitations, churning tummy etc. Unable to go back to
work today. Add in Propranolol (anxiolytic beta blocking medication), although
I suspect this is menopausal.”* The second fit note covered the period 6
December 2016 to 20 December 2016 for *“menopausal symptoms”*. The
25 claimant and her general practitioner considered what wording was best to
use on her fit notes.

58. In a text sent on 8 December 2016 the claimant told Ms Taggart that she
would be absent for another two weeks and could not offer to do work as she
30 could not handle it and was concentrating on getting better. The claimant said
that she had instructed HR that she did not want the details of her fit note to
be shared with anyone other than Ms Taggart and HR. Ms Taggart reassured
the claimant that she was not expected to work while sick absent.

59. On 13 December 2016 HR had no record of receiving any fit note from the claimant. Ms Taggart texted the claimant advising of this and asking where it had been sent and the reason for the absence. The text was read around 10.30am. Ms Taggart emailed HR around 8pm to say that she had done this and as yet had no reply. She proposed to telephone the claimant in the morning. The claimant replied just before 10pm explaining what she had done with the fit note and advising that it said, "*menopausal symptoms*". Ms Taggart confirmed that it was not a problem so long as HR had it. Ms Taggart did not see either fit notes as they were sent to HR.
60. The claimant's absence due to illness was five weeks followed by a period of annual leave. She was absent from work for seven weeks. The claimant did not did not consider herself to be disabled nor did she consider that she required reasonable adjustments.
61. The claimant returned to work on 3 January 2017. Ms Taggart was still on annual leave until 9 January 2017.
62. At the end of 2016 the respondent's acquisition of new trains was delayed which impacted revenue and lost initiatives. There were challenges throughout the franchise.
63. During a telephone conversation with the claimant on 5 January 2017 Ms Taggart explained that the Customer Experience Directorate was undergoing significant pressure and cautioned the claimant about returning to work too early if she did not feel better. Ms Taggart explained that it was going to be a challenging year. She also mentioned that there was a voluntary severance scheme (VLS) being introduced.
64. The claimant and Ms Taggart had a meeting around 10 January 2017 during which the claimant said Ms Taggart took notes (the January Meeting). The claimant observed that since mobilisation the workload had been heavy and when she took time off in November 2016 she felt angry. It was the combination of her symptoms of menopause/depression and the pressure of

work. It was acknowledged that the claimant and Ms Taggart had had difficult conversations about salary, on-call and recruitment. The claimant said that it was not the job but the environment and how people are feeling. Ms Taggart said that this was unlikely to change in the foreseeable future given the business challenges and there would be significant pressures for some time. There was discussion about the claimant's medication (anti-depressants and beta blockers). The claimant indicated that she had been offered medication (HRT) but was not planning to take it. Ms Taggart said that the menopause could go on for some time. Ms Taggart questioned whether the claimant should be in work, but the claimant insisted that she was fit. Ms Taggart emphasised the importance of the claimant's health and suggested an OH referral which the claimant thought would be worthwhile. As a result, they agreed a four-week phased return during which:

- a. The claimant's direct reports would report directly to Ms Taggart.
- b. The claimant would work 11am to 3pm and this would be reviewed after four weeks.
- c. Team meeting attendance could be done by teleconference or attendance.
- d. The claimant would consider what she could handle in terms of work load and advise Ms Taggart.
- e. Ms Taggart would arrange for an OH referral and the claimant would consider talking to the employee assistance programme, Validium and /or consider CBT.
- f. One to one meetings were to take place fortnightly.
- g. The team were to be advised that the claimant was on a phased return.

65. The VLS was mentioned but the claimant was not interested. The claimant thanked Ms Taggart for the space that she had been given. Ms Taggart confirmed the importance of the claimant being supported.

66. Ms Taggart confirmed the arrangement for the phased return to Marion Graham, HR Business Partner and asked her to arrange for the claimant to

be referred to OH. Ms Graham was also dealing with the VLS. Ms Taggart confirmed that the claimant was not interested.

5 67. Ms Taggart was supportive of the claimant during her sick absence and on her return to work in January 2017.

10 68. Ms Taggart emailed the claimant on 10 January 2017 (the 10 January Email) confirming what had been discussed and agreed. The subject of the email was headed "Private". It was only sent to the claimant. It did not detail the claimant's conditions or symptoms, nor did it specify any medication.

15 69. The claimant did not believe that the 10 January Email was a full record of the discussion. On 16 January 2017, the claimant sent an email to Ms Taggart adding "*some of [her] own comments*" in red (the Amended 10 January Email). The amendments included the claimant having to take time off in the context of "*menopausal symptoms that [she] had been having for quite some time*". The main cause of her being off and unwell was "*a combination of how she was feeling with the menopausal symptoms and the pressure of work*". The claimant said that her handling of the on-call requirements stemmed from
20 not being aware of the requirement until it was included in the team meeting agenda. The claimant said that in relation to the recruitment issue they disagreed on the suitability of the individual; she was not aware of any change in her behaviour other than voicing her concerns about the individual. The working environment, how people were feeling and the claimant's "*current symptoms*" were having a bigger effect on her than it would normally. The claimant thought she was unlikely to have symptoms for some time as she was receiving the appropriate treatment. Ms Taggart expressed concerns about the increasing pressure and the health of the whole team and that she had advised the other directors that the team could not support further
25 initiatives. The claimant felt the benefit of the first medication quickly but had subsequent symptoms and was prescribed further medication. The claimant had been tearful because she had not "*really spoken much about how [she was] feeling to any one at work and it was also her first day back to a full*"
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office". The claimant indicated that she might not need a four weeks phased return. While Ms Taggart was managing the claimant's team and she was on a phased return the claimant was happy to work on the projects for New Trains, HST and Smart. The claimant made no reference to having depression in the Amended 10 January Email.

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70. Ms Taggart was surprised that the claimant did not speak to her rather than responding in writing in the manner that she did.

10 71. On 25 January 2017, the claimant texted Ms Taggart to say that she would work from home which was not a problem. The claimant experienced anxiety when travelling to work the following day and went home. Ms Taggart texted the claimant that evening about her well-being. She told Ms Taggart that she had telephoned Validium for some sessions. As Ms Taggart did not see the claimant the following day she texted her to be told by the claimant that she was in a Smart meeting.

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72. The claimant had a session with Validium on 3 February 2017. She told Ms Taggart that if she was having a "bad day" she may not be able to come into work. Ms Taggart said that this was not a problem.

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73. After the phased return the claimant's duties were restricted to the extent that she did not resume supervision of her direct reports who continued to report to Ms Taggart. The claimant did not indicate that she wanted to return to doing so. She worked full days on projects: New Trains, HST and Smart which involved interaction with other directors and there was an arrangement that she did not need to attend the office if she was unwell. The claimant felt that she was getting well. The claimant was fit for work and there was no suggestion that she was likely to require further absence.

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74. Ms Taggart was aware from Cathy Craig, the Commercial Director that the claimant had told a colleague that she and the claimant were "clashing".

75. On 6 March 2017, the claimant and Ms Taggart met for a prearranged one to one (the March Meeting). They discussed a project review. Ms Taggart raised the recruitment of Ms Ferguson. Although Ms Taggart had been line managing the claimant's direct reports no appointment to the post had been made. Ms Taggart did not consider it was appropriate for her do so. Ms Taggart considered that the issue needed to be addressed. She wanted to understand why the claimant did not consider Ms Ferguson to be a suitable candidate. Ms Taggart explained that she had spoken to a fellow director regarding the other candidate and that he had agreed with Ms Taggart that the other candidate was not ready for the post. The claimant had also spoken to the other director about this. The claimant said that they would need to agree to disagree in relation to Ms Ferguson's suitability and indicated that Ms Taggart should make the appointment of whoever she wanted.
76. There was also discussion about why the claimant had felt it necessary to send the Amended 10 January Email rather than speak to Ms Taggart. The claimant said that she felt it was important to have her version of their conversation recorded in case it was ever needed. She was not comfortable with only Ms Taggart's comments being recorded. Ms Taggart explained that the notes were private. The claimant said that she felt that they had a difficult relationship particularly with the on-call issue, the salary re-evaluation and the recruitment of Ms Ferguson. She felt that they did not have the same trusting relationship that they had before. However, since returning, the claimant felt that the relationship was returning to normal and that she wanted to put it all behind them and move forward. The claimant said that she had spoken to the rest of the team who had not noticed any change. The claimant said she did not behave with anyone else in the same way that she behaved with Ms Taggart.
77. Ms Taggart was taken aback at the claimant's comments. Ms Taggart felt that the claimant believed that she acted the way she did because of Ms Taggart and how she interacted with her. The claimant did not acknowledge that she had any part in the breakdown of their relationship and it was all Ms Taggart's responsibility. Ms Taggart felt that when she asked the claimant to do

something that the claimant did not want to do the claimant was not interested in Ms Taggart's thoughts on the matter and they were unable to talk about it.

5 78. Ms Taggart spoke to the claimant's direct reports. They expressed concerns about the claimant's leadership, ability to delegate and felt unsupported.

10 79. The respondent had posted a trading loss. Ms Taggart was under personal pressure as the Customer Services Directorate employed a significant part of the workforce and was heading into disputes with the unions over some changes. The directors had been asked to give assurances that the challenges they faced could be addressed.

15 80. Ms Taggart spoke to John Gillies who had been appointed HR Director and Mr McPhail. The claimant's role in the Customer Service Directorate was pivotal. Ms Taggart had reflected on the situation and felt that there was a breakdown in trust between her and the claimant which was disruptive to the Customer Services Directorate and the business. As this was a critical time for the business Ms Taggart did not feel that the situation was recoverable and to take forward the Customer Experience key deliverables she concluded
20 that there needed to be an immediate change and the claimant should leave the Customer Services Directorate. Ms Taggart had on an ongoing basis been looking for opportunities for the claimant elsewhere within the business, as had the claimant but to no avail. The only alternative was for the claimant to be dismissed but Ms Taggart had to meet the cost of this from her budget. Mr
25 Gillies and Mr McPhail supported this decision. Ms Taggart was asked to prepare her justification for the decision and her commitment to cover the costs.

30 81. Mr Gillies and Mr McPhail spoke to Jim Gibson, Head of HR and told him that Ms Taggart had taken the decision to exit the claimant from the business because of loss of trust and confidence which they supported. Mr Gibson was asked to guide Ms Taggart through the process and give her support.

82. Mr Gibson was aware of the respondent's disciplinary and performance management procedures. However, given the reason for the dismissal and the fact that the decision had already been taken and supported by Mr Gillies and Mr McPhail, Mr Gibson did not consider that the matter was one of
5 conduct or performance management where following a process would help manage the situation. He was also aware that in the preceding three months, three other individuals, who were not disabled, had been asked to leave the business without any process.
- 10 83. Ms Taggart had a discussion with Mr Gibson on 12 April 2017. She sent him a draft report headed "*Business Case Head of Customer Experience*" which he revised to reflect their discussion. Mr Gibson was unaware that the draft report had been reviewed by an HR adviser but in any event, it reflected the earlier discussion. Mr Gibson was aware that the claimant had been sick
15 absent and had a phased return. He understood this to be generic sick leave.
84. Mr Gibson advised that having taken the decision Ms Taggart should meet with the claimant as early as possible, make clear what was the purpose of the meeting and ensure that the claimant understood the key message and in
20 recognition of the fact that it would be emotionally difficult advised that there would be a more detailed follow up later.
85. The claimant's annual appraisal was arranged for 19 April 2017. At that
25 meeting (the April Meeting), Ms Taggart said following their discussion at the March Meeting she had reflected on what more could be done to build up trust and confidence that she felt had been lost. This was not good for the team or the business. After discussion with senior colleagues Ms Taggart said that the only way forward was for the claimant that she was to be exited from the business. Ms Taggart said that it was clear that the claimant did not trust her
30 as was shown by the return to work. She could not "*work with someone who is okay one minute and not the next*". The claimant asked for someone from HR. Mr Gibson joined the April Meeting. The claimant said that she wanted to record the conversation on her mobile telephone. Mr Gibson said that if she wanted a record he would ask a colleague to do that. The claimant said she

did not want to discuss matters. Mr Gibson said that was fine and the claimant said that she would contact him in a couple of days.

5 86. The following morning Ms Taggart was told that colleagues in the office knew about the April Meeting. Ms Taggart spoke to Mr Gibson and it was agreed that she should speak to her team on a confidential basis.

10 87. The claimant sent an email to Mr Gibson on 20 April 2017 which she copied to Dominic Booth, Managing Director acknowledging that she had been told by Ms Taggart that she was being exited from the business because Ms Taggart had considered their relationship and there was a lack of trust. The claimant did not dispute that her relationship with Ms Taggart had broken down. She did not mention any medical conditions. The claimant sought confirmation of her status. Mr Gibson offered to meet the claimant the following day. The claimant declined as she was not ready to meet. She was going on holiday and proposed meeting in the week commencing 1 May 2017.

15 88. The claimant met Mr Gibson on 2 May 2017. She not ask him for the reasons for her being dismissed. The claimant did not suggest mediation or joint counselling. The claimant did not raise a grievance.

20 89. The decision to terminate was not conduct or performance based. He confirmed that Ms Taggart had persuaded the business there had been an irretrievable breakdown of her working relationship with the claimant. The respondent did not obtain an OH report. The claimant was not offered a right of appeal.

25 90. The claimant's employment was terminated on 13 May 2017. The claimant was paid nine weeks pay in lieu of notice. The respondent did not follow any other process in relation to the dismissal.

30 91. The claimant consulted her general practitioner on 23 May 2017 whose record included, "*Anxiety states. Has been made redundant by her boss. Has a very*

strong case for unfair dismissal. Anxious, lethargic. Long chat. Continue with Fluoxetine”.

Observations on witnesses and conflict of evidence

5 92. This case was unusual in that none of the respondent’s witnesses remained in its employment. Ms Taggart left the business on 19 August 2017 following a period of annual leave in July 2017 and garden leave in August 2017 and was currently unemployed. Mr Gibson retired in January 2018 and attended the hearing under a witness order requested by the respondent.

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93. The Tribunal considered that Ms Taggart gave her evidence in a dignified manner even under lengthy cross-examination. She endeavoured to assist the Tribunal and made appropriate concessions. The Tribunal found her to be a credible and reliable witness. Ms Taggart did not display any animosity during the hearing towards the claimant or the respondent despite recounting events which had been challenging on a personal and professional level.

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94. Mr Gibson’s evidence was given in a candid unembellished manner. He was credible and reliable. He too made appropriate concessions and the Tribunal found his evidence persuasive.

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95. The Tribunal had no doubt that the claimant genuinely believed what she said in evidence. However, this was based on her perception and recollection of events which the Tribunal felt with the passage of time had become her reality.

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The Tribunal formed this view because at the time the claimant’s responses and behaviour appeared inconsistent with the position that she now appeared to be adopting. The Tribunal felt that the claimant did not appear to have any insight that she was not the only one to find the business environment stressful and challenging to deal with. The Tribunal also considered that the claimant’s view of the workplace and her position in it did not chime with reality. For example, the claimant said that she expected Mr Booth, the Managing Director to contact her after the April Meeting to say that it had all been a big mistake.

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96. In relation to most of the material findings in fact the Tribunal considered that the evidence of the respondent's witnesses was the only evidence available and the Tribunal considered that it was credible and reliable. However, the
5 Tribunal had the following observations.

97. The respondent's witnesses were cross-examined at length about the timing and nature of the respondent's response to the claimant's Subject Access Request (SAR) made in June 2017. The Tribunal appreciated that given the
10 circumstances of her dismissal the claimant felt it necessary to make her claim to the Tribunal in the widest possible terms. However, having raised proceedings it was open to the claimant to apply to the Tribunal for orders which she did not do until shortly before this hearing despite an earlier hearing being fixed in December 2017 which was postponed.

15 98. The Tribunal accepted Mr Gibson's evidence that there was no electronic system, so the process for obtaining documents falling under the SAR was done manually. Also, he was named in the request, so he did not consider it was appropriate to be too deeply involved. He acknowledged that the process was clumsy. Ms Taggart assumed that the documents were being located
20 centrally and was not physically in the business from mid-July 2017. The Tribunal felt Ms Taggart's evidence about when she produced documents was straight forward and plausible. The Tribunal found it surprising that the claimant, who said that she took contemporaneous notes did not produce any
25 of her own notes at the hearing.

99. There was significant evidence about the claimant's role from 2017 requiring her to participate in on-call. Ms Taggart gave evidence why she considered that doing on-call was a key part of the claimant's new role and was crucial
30 as part of the operational team. This had been part of the consultation process and was expected of Heads of team in the Customer Experience Directorate. The claimant disagreed and if her role required it the all Heads of team in the business should do it. Ms Taggart said that they were not all part of an operational team. The claimant said that she was not part of the operation

and Ms Taggart said that as Head of Customer Experience the claimant was very much part of the organisation. The Tribunal considered that Ms Taggart's explanation was entirely plausible given the nature of the respondent's bid and in any event, it was a reasonable management decision. The Tribunal considered that even at the hearing the claimant did not understand or accept why Ms Taggart wanted her to do on-call. The claimant had not in the Tribunal's view moved on and put the matter behind her.

100. There was also evidence about the suitability of the two candidates interviewed in November 2017. Ms Taggart and the claimant had opposite views. Ms Taggart preferred Ms Ferguson who had been doing the job temporarily. She considered that the other candidate was not ready for the post and that was subsequently confirmed by the director to whom the other candidate reported. The claimant had worked with the other candidate in the bid team. The claimant considered that Ms Ferguson was not "*on her game*" but had not articulated this to her. The claimant and Ms Taggart believed the other had "*briefed*" their preferred candidate. The Tribunal noted that their positions had not changed at the hearing.

101. The Tribunal felt this was significant in relation to the March Meeting when Ms Taggart raised the recruitment issue. She wanted to get a consensus given that the claimant would be managing the individual. Ms Taggart shared her fellow director's view and was prepared to advertise externally. The claimant did not want to discuss it and said that they would need to agree to disagree in relation to Ms Ferguson's suitability and indicated that Ms Taggart should make the appointment of whoever she wanted. The claimant suggested in evidence that this was her moving on. The Tribunal was not convinced that was so. The Tribunal's impression was that she did not want to deal with this issue and her response was truculent.

102. There was disputed evidence about Ms Taggart's view of the menopause and the claimant's absence. Ms Taggart admitted that in early 2016 in response to the claimant's unexpected reaction at a meeting to working on-call she had asked the claimant if she was menopausal. Ms Taggart said that because of

their relationship it was like asking her husband if he was drunk. The claimant said that she was not menopausal which Ms Taggart did not question. Ms Taggart said that she was genuinely concerned about the claimant returning to work in January 2017 if she was not well enough. She cared about the claimant and was aware of the business pressures. The claimant said that when asked if she was menopausal Ms Taggart said, "*who are you*". The claimant also said that Ms Taggart did not want a person affected by illness in a busy department.

10 103. The Tribunal considered that the claimant's reaction to doing on-call was out of character. That said she had not been party to earlier email correspondence mentioning this and she was also unaccustomed to being told to do something that she did not want to do. The claimant said that she was not menopausal. She did not offer any other explanation for her reaction to doing on-call at the meeting. Ms Taggart acknowledged that the on-call decision had been poorly communicated to the claimant. She sought to explain the rationale behind her decision which the claimant did not accept. The Tribunal considered that Ms Taggart no doubt had her own experience of the menopause to which she alluded at the January Meeting. However, the Tribunal did not consider that it was necessarily a negative view and from the discussion at the January Meeting Ms Taggart was open to accepting that women have different experiences of the condition and ways of handling it. The Tribunal also felt that Ms Taggart was genuine in her concern about the claimant's return to work in January 2017. The Tribunal's impression was that the concern was about the claimant's well-being rather than not wanting someone in the Customer Service Directorate affected by illness. The Tribunal reached this view because of the way in which Ms Taggart handled the claimant's sick absence and willingness to accommodate a supported return.

30 104. There was disputed evidence about whether the claimant told Ms Taggart about experiencing hot flushes before November 2016. Ms Taggart had no recollection of this although readily accepted that she knew about the claimant's UTIs and her difficulty sleeping. The claimant said that Ms Taggart

was aware she had hot flushes. The Tribunal accepted Ms Taggart's evidence as it considered that she was candid about what she knew in relation to the claimant's symptoms and volunteered that she was told of the claimant's depression at the January Meeting despite there being no reference to this in the 10 January Email or even the Amended 10 January Email.

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105. The respondent conceded that although in January 2017 Ms Taggart asked HR to refer the claimant to OH that was not done. The claimant said that she raised the issue of OH referral with Ms Taggart after the January Meeting but did not specify when or in what context. Ms Taggart had no recollection of this. It was suggested to Ms Taggart in cross examination that the respondent had over the course of the proceedings given different reasons for not following up her instructions on OH referral. The Tribunal considered that Ms Taggart's evidence was sincere. It was busy in the business at the time and she had not seen or instructed any of the respondent's replies in these proceedings. The Tribunal felt that this was entirely plausible. The task had been delegated to Ms Graham in HR. She was also dealing with VLS and therefore may have been slow to process by which point the claimant was involved in an agreed phased return to work, then restricted duties working on high level projects with arrangements to stay off if there was an issue. The claimant was receiving counselling and was feeling better after a short period of absence. Mr Gibson was unaware from either Ms Taggart or the claimant that the OH referral was outstanding. Against this background the Tribunal thought it was highly unlikely that the claimant mentioned the need for an OH referral with Ms Taggart after the January Meeting. Had the claimant done so the Tribunal felt that Ms Taggart would have recalled this and explored why, especially as Ms Taggart was willing to accommodate the arrangements the claimant requested and had been put in place.

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106. While the respondent conceded that the claimant's symptoms amounted to a disability the type of symptoms suffered by the claimant at a given time and the period over which she suffered symptoms amounting to disability were a matter for evidence. From the claimant's evidence, it was unclear when she

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alleges she became disabled in terms of the EqA. She did however concede during cross examination that she had not suffered any disadvantage in the workplace as a result of her symptoms before she went on sick leave.

5 107. A psychiatric report dated 21 March 2018 which had been jointly instructed was produced. The consultant's view based on what the claimant told him was that the mental impairments fluctuated but were substantial from "early 2016" and the likely cause was "*protracted workload pressure*". The consultant was unable to comment on the degree to which the claimant's
10 mental impairment was related to the menopause. He recorded that the claimant, "*has tended to under report and minimise the nature and extent of her psychological difficulties and these factors have contributed to a lack of any more aggressive interventions in relation to her treatment. This had been encouraged by [the claimant's] self-reliant approach to life and the hope that her psychological difficulties might subside and resolve spontaneously with*
15 *the passage of time and her own efforts.*"

108. On the evidence available the Tribunal found that the claimant was disabled for the purposes of the EqA in relation to symptoms of depression from April
20 2016. In relation to the menopausal symptoms, the claimant did not consult her general practitioner until 22 November 2016. While the Tribunal accepted that the claimant had UTIs, disturbed sleep and hot flushes in 2016 it was not until late November 2016 that her menopausal symptoms had the necessary significant effect on her normal day to day activities for the purposes of the
25 EqA which remained when her general practitioner provided a medical report dated 18 October 2018.

The Law – Discrimination

109. Section 4 of the EqA lists protected characteristics, including disability, age and sex. Section 6 of the EqA defines disability: to be disabled within the
30 meaning of the EqA the claimant is required to prove that she suffered a mental or physical impairment, which had a substantial and long-term adverse effect on her ability to carry out day to day activities.

110. Direct discrimination is defined in section 13 of the EqA. The provision is satisfied if there is less favourable treatment because of a protected characteristic. There must be less favourable treatment than an actual or hypothetical comparator whose circumstances are not materially different from the claimant (section 23 of the EqA).
111. Section 15(1) of the EqA defines discrimination arising from disability. The provision requires there to be: (a) Unfavourable treatment; (b) Because of “something; (c) The “something” has to have arisen in consequence of the claimant’s disability; and (d) Which the respondent cannot show was a proportionate means of achieving a legitimate aim. Section 15(2) of the EqA states that section 15(1) does not apply if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.
112. Section 20 of the EqA defines the duty to make reasonable adjustments. To succeed, there requires to be: (a) a PCP applied by the respondent which; (b) puts the disabled person at a substantial disadvantage; (c) in relation to a relevant matter in comparison with persons who are not disabled; and (d) a failure by the respondent to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21 of the EqA states that a failure to make reasonable adjustments is discrimination.
113. Schedule 8 of the EqA provides further provision on the issue of reasonable adjustments. Paragraph 2(2) states that a reference to a PCP is a reference to a PCP applied by or on behalf of the Respondent. Paragraph 2(3) states that a relevant matter is that which is specified in the first column of the applicable table in Part 2 of the Schedule. Part 3 of Schedule 8 of the EqA provides for limitations on the duty to make reasonable adjustments. Paragraph 20 provides that the respondent is not subject to the duty to make reasonable adjustments if the respondent does not know, and could not reasonably be expected to have known (in essence) that the claimant (i) has a disability and (ii) is likely to be placed at the disadvantage referred to.

114. Section 39 of the EqA provides that an employer must not discriminate against an employee by dismissing them.
115. Section 136 of the EqA provides that if there are facts from which the court decides, in the absence of any other explanation, that a person contravened the provisions of the EqA the court must hold that the contravention occurred.
116. Section 19 of the EqA defines indirect discrimination. The requirements of the section state that a PCP is discriminatory in relation to protected characteristic if: (a) the respondent applies or would apply the PCP to persons with whom the claimant does not share the characteristic; (b) it puts or would put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it; (c) it puts, or would put, the claimant at that disadvantage; and (d) the respondent cannot show it to be a proportionate means of achieving a legitimate aim.
117. Section 23 of the EqA states that on a comparison of cases for the purposes of section 13, 14 and 19 of the EqA, there must be no material difference between the circumstances relating to each case. Section 23(2) of the EqA specifically states that the circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13 of the EqA the protected characteristic is disability.

Case Authorities

118. Section 13 of the EqA: *Glasgow City Council v Zafar* [1998] IRLR 36; *Amnesty International v Ahmed* [2009] IRLR 884; *Shamoon v Chief Constable of Royal Ulster Constabulary* [2003] UKHL 11; *Igen Ltd v Wong* [2005] EWCA Civ 142.
119. Section 15 of the EqA: *Nagarajan v London Regional Transport* [1999] IRLR 572; *Pnaiser v NHS England* [2016] IRLR 170; *City of York Council v Grosset* [2018] EWCA Civ 1105; *Charlesworth v Dransfields Engineering Services Ltd* (UKEAT/0197/16/JOJ); *Basildon v Thurrock NHs Foundation Trust v Weerasinghe* [2016] ICR 305; *Hall v Chief Constable of Yorkshire* [2015]

IRLR893; Risby v London Borough of Waltham Forrest UKEAT/0318/15; Land Registry v Houghton [2015] All ER D 294; City of York Council v Grosset 2018 EWCA 1105.

5 120. Section 19: *British Airways plc v Starmar [2005] IRLR 862; Pendleton v Derbyshire County Council [2016] IRLR 580.*

121. Section 20 of the EqA: *Cave v Goodwin [2001] EWCA Civ 391). Royal Bank of Scotland v Ashton [2011] ICR 632; Higgins v Secretary of State for Work and Pensions (Jobcentre Plus) [2014] ICR 341); HM Prison Service v Johnson [2007] IRLR 951); Conway v Community Options Ltd (UKEAT/0034/12); Project Management Institute v Latif [2007] IRLR 579; Newcastle City Council v Spires (UKEAT/0034/10) Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664; Latif v Project Management Institute [2007] IRLR 579; HM Prison Service v Johnson [2007] IRLR 951); SSE v Mackay UKEATS/0075/06, Jennings v Barts and The London NHS Trust UKEAT/0056/12); Donelien v Liberata Ltd [2018] EWCA Civ 129; Wilcox v Birmingham Cab Services Ltd [2011] All ER (D) 73; Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43; Archibald v Fife Council [2004] UKHL 32; Environment Agency v Rowan [2008] IRLR 20; Smith v Churchill Stairlifts plc [2005] EWCA Civ 1220; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265; Gallop v Newport City Council [2013] EWCA Civ 1583.*

122. Sex and age discrimination: *Sahota v Home Office and Pipkin UKEAT/032/09 and Lyons v DWP Job Centre Plus UKEAT/0348.*

The Law - Unfair Dismissal

123. Section 94(1) of the ERA provides that an employee has the right not to be unfairly dismissed by their employer.

30 124. Section 98 of the ERA provides that in determining if a dismissal is fair it is for the employer to show the (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within

subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

5 125. A reason falls within subsection (2) if (a) it relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, (b) relates to the conduct of the employee, (c) redundant, or (d) contravention of an enactment. "Capability", in relation to an employee, means her capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which she held.

10 126. If the employer shows the reason or principal reason for the dismissal and shows that it falls within the category of reasons which the law specifies as being potentially valid reasons section 98(4) requires the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer and (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

Case Authorities

127. *Mercia Rubber Mouldings Ltd v Lingwood* [1974] ICR 256; *Willow Oak Developments Ltd v Silverwood* [2006] IRLR 607); *Gilham v Kent County Council* [1985] IRLR 18); *Abernethy v Mott, Hay and Anderson* [1974] ICR 323; *Iceland Frozen Foods v Jones* [1982] IRLR 439; *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550; *Boys and Girls Welfare Society v McDonald* [1996] ICR 693); *the Governing Body of Tubbenden Primary School v Sylvester* UKEAT/0527/22; *Turner v Vestric Ltd* [1981] IRLR 2; *Lund v St Edmund's School Canterbury* UKEAT/0514/12; *Hussain v Jury's Inn Group* UKEAT/0283/15; *Holmes v QINETIQ Ltd* [2016] IRLR 66; *Phoenix House Ltd v Stockman* [2016] IRLR 848; *Polkey v AE Dayton Services Ltd*

[1089] 3All ER 974;Afzal v East London Pizza Lid trading as Dominos Pizza
UKEAT/0265/17.

Submissions

The Respondent

5 Discrimination

128. As pleaded, the claimant claims that her dismissal was an act of
discrimination. She makes claims pursuant to sections 13, 15 19 and 20/21
of the EqA. All such claims are without merit and ought to be dismissed. The
Claimant has not brought sufficient to show a *prima facie* case of
10 discrimination and, in any event, the evidence is more than sufficient (if there
is such a *prima facie* case, which is denied) to prove a non-discriminatory
reason for the alleged complaints.

Disability

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129. It remains unclear from the claimant's evidence exactly what point in time she
alleges that caused her to become a disabled person within the meaning of
the EqA. It is also unclear exactly what symptoms she states caused her
to be disabled and as a result of which condition(s). It remains entirely unclear
20 at what point in time she alleges she began to suffer from an impairment or
impairments, the adverse effects said to have existed on her ability to carry
out day to day activities, when the same became substantial and/or when the
same are said to satisfy the long-term requirements of section 6 of the EqA.

25 130. The Tribunal has noted the concession which the respondent made at the
start of the hearing relating to symptoms suffered by the claimant. However,
the period over which the claimant allegedly suffered any symptoms
amounting to a disability remained a matter for evidence. Similarly, no
concession has been made as to the type of symptoms which the claimant
30 suffered at any given time. All such matters remained a matter for the claimant

to prove. Other issues such as the questions of knowledge, whether something arose in consequence of disability, etc, all remain live issues.

5 131. The respondent asserts that the reason for the claimant's dismissal was an irretrievable breakdown in trust and confidence and/or a breakdown in the relationship between two senior individuals. The relationship had irretrievably broken down, was no longer workable and there were not any reasonable alternative options or roles available to the claimant.

10 132. The respondent asserts that there is no connection whatsoever between the claimant's alleged disabilities and her dismissal and/or the reasons for her dismissal. Also the claimant's disability/disabilities did not place her at any disadvantage, whether substantial or otherwise, compared to non-disabled persons and/or as a result of any requirements (PCP) applied to her.

15 133. The respondent denied that there was less favourable treatment. The claimant has not identified a comparator. There was no evidence to support a conclusion that the claimant was treated less favourably than either an actual or hypothetical comparator. If she was treated less favourably that
20 treatment was not because of the claimant's disability or disabilities, whether consciously or subconsciously.

25 134. The respondent denied that the claimant was treated unfavourably because of something arising in consequence of her disability. The respondent also denied as a matter of law and/or fact that the reason for the dismissal is capable of amounting to "something" within the meaning of section 15 of the EqA; In any event, it is likewise denied as a matter of law and/or fact that the reason the claimant was dismissed (or any relevant "something") was in any way arising in consequence of the claimant's disability or disabilities.

30 135. It was denied that the respondent (or Ms Taggart) knew or could reasonably have been expected to know that the claimant had a disability at any material time and/or that the "something" was in consequence of the claimant's disability, whether as a result of the menopause, depression or at all. The

Respondent repeats the above in support. Without the requisite knowledge, section 15(1) of the EqA does not apply; and/or in any event, further or alternatively, the respondent asserts that any treatment of the claimant was a proportionate means of achieving a legitimate aim. It is a legitimate aim to ensure that the respondent has an effective workforce and/or to ensure and/or maintain a workforce in which there is trust and confidence and/or effective working relationships between senior managers and/or other staff. Even the law implies a term as to mutual trust and confidence into an employee's contract of employment. It was an aim proportionately pursued in all of the circumstances and in which there were no reasonable adjustments which could have been made to avoid the dismissal of the claimant.

136. It was denied that the respondent applied the PCP alleged – the requirement not to have a breakdown in working relationships – and/or that it amounts to a PCP in law and which was applied to person with whom the claimant does not share the characteristic. At its highest, it is term implied into a contract of employment as a matter of law, not one applied or implemented by the respondent.

137. It was denied that any or any alleged PCP put or would put persons with whom the claimant shares the characteristic at a particular disadvantage compared to those who do not share the characteristic. There was no evidence led that others who shared the claimant's or any disability would be put to any particular disadvantage at all in terms of their ability to maintain working relationships. Moreover, there was no evidence that the claimant's disability put or even would put her at a disadvantage at all, still less any (currently unspecified) pool of comparators who are not materially different. Any one in relation to whom there was a break down in relationships and/or an irretrievable breakdown in trust and confidence would be treated the same and there is no evidence (from the claimant, medical or otherwise) that the claimant's disability (or those who share this disability) were or would be put to any disadvantage. In any event, further or alternatively, it was denied that

there is any such group disadvantage capable in law and/or on the evidence or at all capable of satisfying this criterion.

5 138. It was denied that the claimant was put or would be put to any such disadvantage. There was no connection between the claimant's disability and the breakdown in her working relationships and/or the ability to have trust and confidence, nor is there is any evidence to prove that the claimant was more likely to be put to any such disadvantage in complying with any such PCP in relation to any alleged PCP applied. The claimant was not put, nor would she
10 be put, to any disadvantage as a result of any PCP; and/or in any event, further or alternatively, the imposition of a requirement not to have a break down in working relationships is plainly a legitimate aim being proportionately pursued. It is entirely legitimate to seek to ensure that there is no breakdown in working relationship and/or to ensure the maintenance of an effective work
15 force and effective working relations. The only way to ensure this would be to require workers not to have a break down in relationships (insofar as any such PCP is found to have been applied, as to which see above). For example, it is a common implied term in any contract of employment to have mutual trust and confidence – the law sees it fit to imply the same in to contracts of
20 employment. The only way of achieving the aim is to impose the requirement in the first place; there is no alternative or more proportionate means of seeking to achieve that legitimate aim. An objective balance is very clearly struck by imposing any such requirements on employees.

25 139. The claimant asserted the same PCP in relation to sections 20/21 of the EqA. Again the respondent denied that it applied a PCP as alleged or at all. The Respondent repeats the above in support.

30 140. It was denied that any or any alleged PCP put the claimant at any or any substantial disadvantage in relation to relevant matters compared to persons who are not disabled. The claimant was not placed at any disadvantage at all. If there was any disadvantage suffered (which was denied), it was not due to her disability or being a disabled person nor was because of any alleged PCP.

141. The respondent denied that knowledge of: (i) the claimant being a disabled person, whether as a result of the menopause, depression or at all; and (ii) that the claimant was likely to be placed at any disadvantage (which is denied).

142. Accordingly the respondent was not under duty to make reasonable adjustments as a result the above. Further or alternatively, no such duty could or did arise as there was no prospect of the relationship being recovered and the Claimant staying in the workplace / employment - the relationship had irretrievably broken down (see above case law on the issue); and/or it was denied that any of the proposed adjustments in the claim form were: (i) capable of amounting in law to reasonable adjustments; (ii) ones which would avoid any alleged (but denied) disadvantage suffered (iii) ones which were reasonable to make in all of the circumstances, in any event; and/or (iv) ones, if not made, indicate that the respondent failed to make reasonable adjustments – indeed, the respondent did make reasonable adjustments agreed to the claimant’s satisfaction of the Claimant) following her return to work in January 2017

Age and Sex

143. At no time during cross examination of any of the respondent’s witnesses was it put to them that their actions were due to or in any way connected to the age and/or sex of the claimant. The EqA does not contain provision for a claim such as discrimination “arising in consequence of” sex or age, which is what the claimant appears to be asserting in the present case.

144. In any event, for largely similar reasons as detailed above, in relation to the claims such claims have no reasonable prospects of success and ought to be dismissed. It was denied that any of the legal requirements in respect of either the direct or indirect and/or age or sex discrimination claims are made out. Further or alternatively, in view of direct age discrimination being capable of

justification, in the circumstances, the respondent asserts (for similar reasons as above) that it had a legitimate aim proportionately pursued.

Ordinary Unfair Dismissal

5 145. The respondent asserted that the claimant was dismissed for some other substantial reason. This is a potentially fair reason within the meaning of section 98 of the ERA. At this stage the employer need only establish an SOSR reason for the dismissal which *could* justify the dismissal of an employee holding the job in question: it is not necessary to show that it did
10 justify the dismissal.

146. In any set of circumstances, an irretrievable break down in trust and confidence and/or working relationships is recognised as being capable of giving rise to some other substantial reason capable of being a potentially fair
15 reason.

147. Once the Tribunal determines that the dismissal was for SOSR, the Tribunal must determine whether the dismissal was reasonable in all the circumstances (including the size and administrative resources of the
20 employer's undertaking).

148. The respondent asserted that the dismissal was substantively and procedurally fair in all of the circumstances. The decision to dismiss the claimant, in all of the circumstances, was within the band of reasonable
25 responses. Indeed, the Tribunal ought to view the circumstances in view of the reason for dismissal being an irretrievable breakdown in trust and confidence and in view of the ACAS Code of Practice specifically applying only to conduct and capability dismissals. Moreover, it is important for the Tribunal to consider the context – all of the circumstances - in which the
30 claimant's dismissal took place when considering this issue.

149. It was accepted that no formal procedure in advance of dismissing the claimant was undertaken in the present case. However, it was denied in the circumstances of this case that this rendered the decision to dismiss the

claimant unreasonable in all of the circumstances of this case or that the dismissal of the claimant was in any way substantively unfair.

Breach of Contract

5 150. The precise contractual term or policy upon which the claimant relies remains unclear. She has failed to prove that any of the policies relied upon are contractual in nature.

10 151. Further or alternatively, it was denied that there has been any breach of said policies by terminating the claimant's contract of employment. The policies did not apply to the circumstances of the claimant's dismissal.

The Claimant

15 Discrimination

Disability

20 152. The Tribunal was referred to the medical report produced and the claimant's evidence which it was invited to prefer.

25 153. There was no comparator so the Tribunal was invited to consider the reason for the claimant's treatment. Her position was that there was only one reason – her disabilities. However, if the Tribunal found that there was more than one reason, there may still be unlawful discrimination. The protected characteristic in question need not have been the sole reason for that conduct.

30 154. The claimant's submission was that the following facts supported the claim that her disabilities was the reason for, or had a significant influence on, or was an important factor in the decision to dismiss: Ms Taggart's use of language about the menopause; during absence/on return to work Ms Taggart's emphasis was on "manic" pressure, words such as "are you up for it"; Ms Taggart's reference to the fact that menopause could "go on for years"; and Ms Taggart's handwritten comments the notes of April Meeting.

155. It was also submitted that there was lack of credibility in relation to the respondent's reason: the amount of time between incidents and the decision; the failure to discuss with claimant; failure to follow any procedure; failure to investigate health/follow up OH referral; inconsistent explanations for failure to refer to OH; the non-replacement of claimant after dismissal; and the non-supporting evidence of examples in "business case" or 20 April 2017 "examples" email.
156. The PCP in relation to the indirect discrimination claim was the requirement not to have a breakdown in working relationships (resulting in the particular disadvantage – being subject to dismissal as a result).
157. The claimant's position was that people with her particular disabilities have an "additional burden", a particular disadvantage. People in either group may have the PCP applied to them but the claimant's group has an additional burden, a particular disadvantage. She relied on the medical evidence. The business needs were not credible in this case and there were many less discriminatory options available.
158. The claimant also submitted that the decision to dismiss was because of something arising in consequence of her disabilities which included the respondent's negative view of the menopause, concerns about her symptoms and, if the Tribunal accepted that there was a breakdown in the working relationship, any symptoms which contributed to any such breakdown.
159. The claimant does not need to prove that the respondent knew that her "behaviour" leading to any breakdown (if there was any) was a consequence of her disabilities. The respondent's accepted knowledge of the facts of the claimant's disabilities, at the time of the unfavourable treatment (the dismissal), included: Ms Taggart had knowledge of (a) diagnoses of menopause and depression because claimant told her; (b) the claimant had been prescribed antidepressants and betablockers; (c) the claimant subsequently required and obtained counselling; (d) the claimant had received advice from the counselling, including working from home when

necessary and was still on restricted duties; and (e) an OH referral had been initiated but had not proceeded. Accordingly the respondent did not fall within section 15(2).

5 160. In relation to the reasonable adjustments claim the PCP was as above. She said that the proper comparator must be identified by reference to the disadvantage caused by the PCP and this will be employees who can meet the PCP and therefore are not disadvantaged by being subject to the risk of dismissal because of an irretrievable breakdown in working relationships. The comparators are non-disabled employees who can meet the requirement (not to have a breakdown in working relationships) and so are not disadvantaged by being subject to the risk of dismissal.

15 161. It is essential for a reasonable employer to consider whether an employee is disabled and form their own judgement.

Sex and Age

20 162. The claimant says that only women suffer from the menopause. The respondent had a negative attitude to the medical condition. The hypothetical comparator was someone of the opposite sex.

25 163. The indirect sex discrimination claim supposes that the respondent established that the real reason for the dismissal was a breakdown in working relationships. The claimant's submission was that although this may appear to be an apparently neutral PCP, in fact it puts workers sharing a protected characteristic (women suffering from the menopause) at a particular disadvantage. The claimant said the PCP was the requirement not to have an irretrievable breakdown in working relationships. This assumes a connection that the menopause can bring with it symptoms that can contribute towards breakdown of working relationships. (difficulty sleeping i.e. tiredness, low mood or anxiety, problems with memory and concentration, mood changes, mood swings). The claimant was put at a disadvantage (i.e. was dismissed) compared to people who do not share the particular characteristic.

164. Potentially business needs can be a legitimate aim, but the claimant's position was that there is no credible evidence supporting this. In any event, the decision to dismiss was disproportionate.

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165. As with the sex discrimination claim, the age discrimination claims relate to the menopause only. The respondent believed that a person going through the menopause can no longer be relied on to undertake the role competently, the employer's conduct is influenced by its view of the competence of a person going through the menopause, which typically is age group 45 – 55. The hypothetical comparator was someone outwith the age group.

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166. The indirect age discrimination claim supposes that the respondent submission is that although this may appear to be an apparently PCP in fact it puts workers sharing a protected characteristic (namely in this age group) at a particular disadvantage. The PCP is the requirement not to have an irretrievable breakdown in working relationship. This assumes a connection that the menopause can bring with it symptoms that can contribute towards breakdown of working relationships. (difficulty sleeping i.e. tiredness, low mood or anxiety, problems with memory and concentration, mood changes, mood swings). The claimant was put at a disadvantage (i.e. was dismissed) compared to people who do not share the particular characteristic. The claimant was put at a disadvantage compared to people who do not share the particular characteristic.

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167. Potentially business needs can be a legitimate aim, but the claimant's position is that there is no credible evidence supporting this. In any event, the decision to dismiss was disproportionate.

30 Ordinary Unfair Dismissal

168. The respondent asserted "some substantial reason" – namely "*that there was a breakdown in the relationship between two senior individuals*". If it is not established then there will be no potentially fair reason and the dismissal will

be unfair. The claimant's submission was that the reason or principal reason for the dismissal was the claimant's disabilities (menopausal symptoms and depression) and the respondent's beliefs about the effects or impact of same in the workplace.

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169. The claimant submitted that the evidence supporting the respondent's reason was not credible. The tribunal was invited to prefer the claimant's evidence. Failing which if the content of the "business case" and "examples" email are believed, then the reason or principal reason is capability (ill health or performance) or misconduct. If the respondent does not establish the reason it put forwards, then no fair reason is established and therefore it is not a fair dismissal.

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170. If the respondent established the reason for the dismissal as SOSR, the claimant's position is that the dismissal was unfair. It was premature and therefore unreasonable of the respondent to deem any "breakdown" as "irretrievable" (1) in the circumstances and (2) without giving the claimant any opportunity to comment and/or without following a procedure before coming to the decision that it was "irretrievable". Irretrievable means - irreversible, beyond repair, unrectifiable, irrecoverable, unrecoverable, irreparable, unrepairable. It was unreasonable of the respondent to reach this decision without first fully considering, including with the claimant, whether the relationship could be improved/repaid/recovered. The decision to dismiss based on SOSR/breakdown in relationship did not fall within the band of reasonable responses. Further the claimant's submission was that following a fair procedure would have avoided the dismissal.

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171. Any relevant Code of Practice must be taken into consideration by a tribunal insofar as its provisions are relevant. The claimant's position was that the Code applies to this situation. The Code can apply to a dismissal for 'some other substantial reason' where the substantial reason for the dismissal has something to do with the employee's conduct or behaviour at work

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172. Both capability (ill health and performance) and misconduct appear to be part of the Respondent's reasoning. If the Tribunal accepts the content of the respondent's "business case" and content of 20 April email, then there are clearly issues falling within the Disciplinary Procedures; Guidelines for Handling Poor Performance; the Managing Attendance Policy in relation to offering support generally and seeking medical advice generally. Other internal policies that the Respondent should have considered if acting reasonably include; the Return to Work Guidance Notes and references to OH and to counselling; the Occupational Health Referral Guidance; Dignity and Respect Policy; and Individual Grievance Procedure. The claimant's submission was that following such internal procedures would have been reasonable and would likely have avoided the dismissal.

173. The claimant had been employed for nine years and had been very well thought of. Although Mr Gibson said that three others had been dismissed without process but there was no evidence as to whether their situation was similar the claimant and the Tribunal had to look at all the circumstances and it would be very unusual if an employer was found to be acting reasonably in all the circumstances because he treats others equally unfairly. The claimant's submission is that failing to give a right of appeal was fundamental to the question of fairness.

Breach of Contract

174. The claimant's submission was that the Disciplinary Procedure and the Grievance Procedure are expressly contractual.

Discussion and Deliberation

175. The Tribunal started its deliberations by referring to the claim and response forms as amended as it was mindful that was the case of which the parties had notice and was before the Tribunal.

176. The claimant brought several types of discrimination claims based on different protected characteristics: disability; sex and age. In relation to the direct

discrimination claims the alleged act of discrimination was the claimant's dismissal. Also, the claimant brought an unfair dismissal claim and a breach of contract claim.

5 177. The Tribunal considered that it was appropriate to consider first the discrimination issues although that involved considering the reason for the claimant's dismissal which was one of the issues to be determined in the unfair dismissal claim.

10 178. Before doing so the Tribunal asked itself during what period was the claimant disabled within the meaning of the EqA? The Tribunal found that the claimant was disabled for the purposes of the EqA from April 2016. However, that was in relation to the claimant's symptoms of depression. The Tribunal found that it was not until late November 2016 that the claimant's menopausal symptoms
15 had the necessary significant effect on her normal day to day activities for the purposes of the EqA which remained at October 2017.

179. The Tribunal then turned to consider what was the reason for the claimant's dismissal in May 2017 when she was disabled within the meaning of the EqA.
20 The respondent asserts in the response form that the claimant was dismissed because of a breakdown in the relationship between her and Ms Taggart. The claimant asserts in the claim form that she was dismissed because of her disability or because of the respondent's belief about the effects of her menopausal symptoms.

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180. There was no dispute that it was Ms Taggart's decision to dismiss the claimant. The Tribunal therefore considered her evidence about her reason for dismissing the claimant and the rationale behind it.

30 181. From its findings the Tribunal considered that during 2016 there were significant issues between the claimant and Ms Taggart about salary, on-call and recruitment which created increasing tension in their relationship at a time

when the claimant was unhappy with her role, the respondent's ethos and Ms Taggart was under increasing business pressure.

5 182. The Tribunal considered its findings in relation to each issue. The claimant was disappointed in Ms Taggart's handling of the salary review as a colleague in another directorate had received an increase and the claimant had not. Ms Taggart's impression was that the claimant did not trust her to represent her position properly. The claimant's salary was increased in April [2016]. The claimant did not consider that as Head of Customer Experience and Standards she should do on-call. Ms Taggart disagreed and explained her reasoning which the claimant did not accept. The claimant participated in the on-call rota from June 2016. The claimant and Ms Taggart disagreed on the suitability of Ms Ferguson being appointed into a permanent post to the extent that each believed the other "briefed" their preferred candidate.

15 183. Towards the end of 2016 the only outstanding issue appeared to be the recruitment issue as it was unresolved when the claimant went on sick leave for five weeks. The Tribunal found that Ms Taggart was supportive of the claimant during her sick absence and on her return to work in January 2017. Agreed actions were put in place to support the claimant's phased return and afterwards with her agreement her duties continued to be restricted. The claimant was content to be involved in high profile projects during this period while her direct reports were managed by Ms Taggart.

25 184. Ms Taggart was surprised that the claimant felt it necessary to send the Amended 10 January Email in the manner she did rather than speak to her. The Tribunal considered that the claimant's amendments indicated that her view about the issues remained unchanged. Against this background the Tribunal could understand why Ms Taggart delayed raising the recruitment issue for as long as possible.

30 185. The claimant continued to be involved in high profile projects. The Tribunal's impression was that the claimant enjoyed this part of her work and was

content to leave Ms Taggart to supervise the claimant's direct reports. While the Tribunal did not doubt that this involved additional work for Ms Taggart in addition to her already heavy workload the Tribunal did not detect any animosity from Ms Taggart in this respect. To the contrary she seemed willing to do what she could to support the claimant.

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186. Following the March Meeting, Ms Taggart was taken aback at the claimant's comments. Ms Taggart felt that the claimant believed that she acted the way she did because of Ms Taggart and how she interacted with her. The claimant did not acknowledge that she had any part in the breakdown of their relationship and it was all Ms Taggart's responsibility. Ms Taggart felt that when she asked the claimant to do something that the claimant did not want to do the claimant was not interested in Ms Taggart's thoughts on the matter and they were unable to talk about it.

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187. The claimant's submission was that this and the subsequent draft report and the examples set out in an email of 20 April 2017 were not credible to support the reason advanced by the respondent. The Tribunal did not agree. The Tribunal considered that it was clear from Ms Taggart's evidence that while there had been issues between them in the past Ms Taggart saw this in the context of the claimant not enjoying her new role. It seemed to the Tribunal that at the March Meeting Ms Taggart understood the claimant to be saying that she was the problem. Ms Taggart no longer had trust and confidence in the claimant. The Tribunal also considered that it was clear from the claimant's evidence that she felt that they had had a difficult relationship with the salary, on call and recruitment issues; it was not the same trusting relationship. On her return from sick leave the claimant felt the need to set out her position in the Amended January Email; she had spoken to another director about her preferred candidate; she did not want to discuss the recruitment issue and did not accept the business reasons given by Ms Taggart for decisions that had been taken. There was no longer trust and confidence between the claimant and Ms Taggart.

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188. Ms Taggart also spoke to the claimant's direct reports. They expressed concerns about the claimant's leadership and felt unsupported. The claimant did not challenge the accuracy of the comments made by her subordinates. The Tribunal did not doubt that the claimant found adjusting to her new expanding role challenging and she excelled in certain areas. However, the Tribunal thought it was highly likely that her direct reports felt unsupported when she did not have the time to manage them and feedback on their performance. It was not clear to what extent this was due to the claimant having insufficient time to do so or lack of experience and needing support or training. The reference in the draft report to this remaining a challenge in another area suggest the latter. However, in the Tribunal's view while Ms Taggart had identified this as a weakness in the claimant's skills set that did not mean it was a performance issue. Under other circumstances the Tribunal considered that this would have been addressed through the appraisal system especially as, in the event, the claimant who considered herself to be a high achiever, conceded that there was room for improvement in this area.
189. The Tribunal did not accept the claimant's evidence that Ms Taggart did not want a person affected by illness in the Customer Services Directorate. Although Ms Taggart said at the April Meeting that she did not want to work with someone who was "*okay one minute and not the next*" it was in the Tribunal's view said in the context of having referred to the January Meeting where agreement was reached yet six days later the claimant felt it necessary to send the Amended January Email setting out her position rather than speaking to Ms Taggart.
190. The claimant's comments at the March Meeting understandably in the Tribunal's view caused Ms Taggart to reflect on the position. The recruitment issue was unresolved. The claimant appeared to have no empathy for how the candidates that had been involved in the recruitment exercise felt and how the uncertainty might affect them. Ms Taggart understood from what the claimant said that she was the problem. The Tribunal was satisfied that by March 2017 there was evidence that there was a breakdown in their

relationship which was disruptive to the Customer Services Directorate and the business.

5 191. At a critical time for the business Ms Taggart had to consider what options were available and how this would impact financially on the Customer Services Directorate and its ability to meet key deliverables. Ms Taggart did not consider that their relationship was recoverable. She had on an ongoing basis been looking for opportunities for the claimant elsewhere within the business, as had the claimant who had indicated that she did not want to do
10 the role in the medium to long term but to no avail.

192. At no time has the claimant conceded that there was any validity in Ms Taggart's position in relation to salary, on-call or recruitment nor has she conceded that on reflection her own view on the issues has changed. The
15 Tribunal did not consider that there was any suggestion by the respondent that the claimant was not capable of performing her role or there was misconduct on her part. To the contrary the Tribunal's impression was that had the personal relationship not deteriorated to the extent that it did none of the examples raised would have resulted in Ms Taggart taking any disciplinary
20 action against the claimant.

193. The Tribunal then moved onto consider whether the claimant was dismissed because of her disability.

25 194. The claimant submitted that it was rare for an individual or organisation to admit unlawful discrimination. She invited the Tribunal to draw inferences from facts which support her claim that her disabilities were the reason for or had a substantial influence on the decision to dismiss: Ms Taggart's use of language about the menopause and the claimant's behaviour; during absence and on return to work emphasis on "manic" pressure, words such as "are you
30 up for it"; Ms Taggart's reference to the menopause "go on for years"; and Ms Taggart's comments at the April Meeting. The Tribunal was also asked to consider; the amount of time between incidents and the decision; the failure to discuss with the claimant; failure to follow any procedure; investigate

health/follow up OH referral; inconsistent explanations for failure to refer to OH; non-replacement of claimant after dismissal; no supporting evidence of examples in “business case” or “examples” email.

5 195. For direct discrimination there must be less favourable treatment than an actual or hypothetical comparator whose circumstances are not materially different from the claimant. While the Tribunal accepted Mr Gibson’s evidence that other employees who were not disabled had been dismissed without process the Tribunal did not know if the circumstances were not materially
10 different from the claimant. The Tribunal’s approach was therefore to consider why the claimant was treated as she was.

196. The issues that affected the relationship between the claimant and Ms Taggart predated the claimant’s menopausal symptoms amounting to a
15 disability. HR were aware of Ms Taggart’s concerns about the relationship before the claimant was absent on sick leave in November 2016 and the reason for it and expected duration were known.

197. Ms Taggart was supportive of the claimant during and on her return from sick
20 leave. Ms Taggart put the claimant under no pressure to return to work before she was ready to so do. Ms Taggart was unaware that the claimant had depression and had no detail about the nature of the claimant’s menopausal symptoms.

25 198. By early January 2017 the claimant had been away from the business for seven weeks. It was in the Tribunal’s view appropriate for Ms Taggart to alert her to the increasing business pressures in the Customer Standards Directorate to which she was returning. Ms Taggart was unaware that the claimant had depression.

30 199. While Ms Taggart conceded that earlier in 2016 she asked the claimant if she was menopausal, the claimant replied that she was not. The Tribunal did not find that Ms Taggart held negative views of those suffering from the

menopause (or indeed depression which was not suggested). Ms Taggart continued to be supportive to the claimant on her return to work and readily acceded to the claimant's requests to work from home and undertake restricted duties.

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200. The 10 January Email summarised the discussion at the January Meeting and set out the agreed arrangements to support the claimant's return to work. It was the claimant who felt the need to set out her position in the Amended 10 January Email.

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201. For the reasons previously set out the Tribunal considered that Ms Taggart's timing in raising the recruitment issue was reasonable. The matter was in abeyance and eventually the claimant would be taking over the management of her direct reports.

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202. The Tribunal accepted Ms Taggart's explanation for not following up the OH referral. The Tribunal considered that the OH referral had fallen off the radar. In the Tribunal's view neither the claimant nor Ms Taggart pursued the matter which was understandable against the background of the claimant undertaking restricted duties which suited her and Ms Taggart accommodating any arrangements requested by the claimant.

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203. In relation to the lack of process and discussion with the claimant this was determined by Mr Gibson because he was told that the reason for the claimant's dismissal was the breakdown in the relationship.

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204. The Tribunal concluded that the claimant was not dismissed because of her disability.

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205. The Tribunal then asked if the claimant was dismissed by the respondent because of something arising in consequence of her disability?

206. The claimant's submission was that the decision to dismiss was because of something arising in consequence of her disabilities which included Ms Taggart's negative view of the menopause, concern about the symptoms and if the Tribunal accepted that there was a breakdown in the working relationship any symptoms which contributed to any such breakdown.

207. As explained earlier the Tribunal did not find that Ms Taggart had a negative view of the menopause. The Tribunal considered Ms Taggart's comment that symptoms of the menopause could go on for years but did not consider that inferred the claimant being unfit to be at work or being disadvantaged. Ms Taggart accepted that the claimant thought it was unlikely for her to have symptoms for years because she was receiving the appropriate treatment. There was no evidence that the claimant would require more sick leave or not be able to deal with the pressures of business. To the contrary the claimant wanted to return to projects that were at critical stages and thought she may not need the full phased return.

208. There was no evidence and the Tribunal did not understand the claimant to suggest that any lack of trust and confidence by her in Ms Taggart arose from the claimant's symptoms or disabilities.

209. The Tribunal found that there were significant issues between the claimant and Ms Taggart in 2016 but there was no evidence that they arose because of her disabilities or their effects either before or after her sick leave. The claimant's reasons at the time to which she adhered at the hearing were unrelated to symptoms of a disability which suggested her avoiding situations rather than challenging them.

210. The claimant said that she was high functioning and working on high level projects. She did not say that her consideration of other roles arose in consequence of her disability.

211. The claimant did not suggest that her management of her direct reports was connected to her disability. The Tribunal's impression of the claimant's evidence was that she had good relationships with her colleagues and other directors. It was only with Ms Taggart that she had issues but on the evidence
5 before the Tribunal these did not arise in consequence of her disability.

212. The Tribunal asked if the respondent knew or could the respondent have been reasonably expected to know that the claimant was disabled during the relevant period.

10 213. The claimant was unaware that she had depression and menopausal symptoms until 22 November 2016. She was unable to say how Ms Taggart would know that she was suffering the effects of a disability during 2016.

15 214. While Ms Taggart asked the claimant in early 2016 if she was menopausal, the claimant said that she was not. The Tribunal did not find that the claimant said that she was menopausal or suffering the symptoms of the menopause before November 2016 and in relation to depression until December 2016. The fit notes provided in December 2017 refer to menopausal symptoms and
20 do not provide details. There is no mention of depression.

215. The claimant's absence was relatively short and included holidays. On her return in early January 2017 she did not say she was disabled or that she required adjustments.

25 216. At the January Meeting depression and medication are discussed. There was no detail about how this impacted the claimant's normal day to day activities or the period of time the claimant has or was likely to have the condition or that the claimant was likely to suffer any disadvantage as a result of the
30 condition.

217. While menopause was discussed at the January Meeting, there was little detail provided as to the psychological symptoms suffered as a result of the menopausal symptoms, their severity, how long (if they were in fact suffered)

they are likely to be suffered in a substantial way and/or how long they would last for. In the Amended 10 January Email, the claimant said that she considered it unlikely that the menopause would go on for years.

5 218. At the beginning of February 2017, the claimant completed a phased return and returned to full time work on restricted duties and her team under the line management of Ms Taggart. The claimant attended counselling and there was an arrangement that the claimant need not attend work if she was unwell. The claimant did not suggest that she was not fit for work or that she was likely to
10 require any further absence. She continued to attend and was involved in various high-level projects. There was no suggestion that she was disadvantaged while at work. There was also no suggestion that the claimant was anything other than content about the supports that were in place.

15 219. Against this background the Tribunal considered that had an OH report been sought would have been based on the information provided by the claimant who at that time under reported her symptoms and did not consider herself to be at any disadvantage in light of the arrangements that had been put in place.

20 220. The Tribunal concluded that while Ms Taggart had knowledge of certain information pertaining to the claimant's disabilities neither she nor the respondent knew or could reasonably have been expected to have known that the claimant was disabled.

25 221. As the claimant was not dismissed because of something arising in consequence of her disability, the Tribunal considered whether the respondent could show that this treatment was justified.

30 222. The Tribunal then asked did the respondent apply a provision, criterion or practice requiring its employees not to have a breakdown in working relationships (PCP).

35 223. The claimant's submission was that a PCP is not defined in legislation and the case law to which the Tribunal was referred illustrates the very wide concept of what can amount to a PCP. The respondent's submission was that

the requirement not to have a breakdown in working relationships was at its highest an implied contracted term as a matter of law and not one applied by or implemented by the respondent. The Tribunal considered that there was force to the respondent's argument.

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224. In any event there was no evidence led that others who shared the claimant's or any disability would be put to any particular disadvantage in terms of their ability to maintain working relationships. Nor was there evidence that the claimant's disability put or even would put her at a disadvantage at all.

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225. The Tribunal considered that anyone in relation to whom there was a breakdown in relationships and/or an irretrievable breakdown in trust and confidence would be treated the same. There was no evidence that the claimant's disability (or those who share this disability) were or would be put to any disadvantage.

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226. In the Tribunal's view there was no connection between the claimant's disability and the breakdown in her working relationships and/or the ability to have trust and confidence, nor is there is any evidence to prove that the claimant was more likely to be put to any such disadvantage in complying with any such PCP in relation to any alleged PCP applied. The claimant was not put, nor would she be put, to any disadvantage as a result of any PCP.

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227. In any event, the Tribunal agreed with the respondent's submission that the imposition of a requirement not to have a break down in working relationships was a legitimate aim being proportionately pursued.

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228. It is legitimate to seek to ensure that there is no breakdown in working relationships and/or to ensure the maintenance of an effective work force and effective working relations. It is a common implied term in any contract of employment to have mutual trust and confidence. The only way of achieving the aim is to impose the requirement in the first place; there is no alternative or more proportionate means of seeking to achieve that legitimate aim.

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229. The Tribunal then asked did the PCP place the claimant at a substantial disadvantage in comparison with persons who are not disabled and so her disability made it more difficult for her to maintain good working relationships.

5 230. The claimant asserted the same PCP. As explained above the Tribunal considered that there was force to the respondent's argument that this was not something applied by the respondent but implied by operation of the law.

10 231. In any event for the reasons explained above the Tribunal concluded that the claimant's disability was not the cause of or connected to the matters which led to her dismissal. The respondent did not have knowledge of the claimant being a disabled person or that she was likely to be placed at any substantial disadvantage. Accordingly, the Tribunal did not consider that the obligation to make reasonable adjustments arose.

15 232. In the claim form the claimant set out proposed adjustments. The respondent submitted that the proposed adjustments were (i) incapable of amounting in law to reasonable adjustments; (ii) ones which would avoid any alleged (but denied) disadvantage suffered (iii) ones which were reasonable to make in all
20 of the circumstances, in any event; and/or (iv) ones, if not made, indicate that the respondent failed to make reasonable adjustments – indeed, the respondent did make reasonable adjustments (agreed to the satisfaction of the claimant) following her return to work in January 2017.

25 233. The Tribunal referred to the list of proposed adjustments in the claim form. Most related to the claimant were what the respondent should have told or not told the claimant (being told that the decision was not conduct or performance based; not giving the claimant any details or explanation of the grounds for the decision; failing to obtain an OH report; failing to follow any process or
30 internal procedures; failing to tell the claimant to raise a grievance; failing to discuss alternative employment, mediation with the claimant or offering an appeal).

234. The Tribunal considered that many of the proposed adjustments were not adjustments but consultation and the Tribunal did not consider that they would have alleviated the alleged disadvantage. The business pressure on the Customer Services Directorate was ramping up and Ms Taggart need to have trust and confidence in her team more than ever. The working relationship between the claimant and Ms Taggart was dysfunctional and by March 2017 there was a lack of trust and confidence; the relationship had broken down irretrievably. The proposed adjustments were not reasonable as they would have exacerbated the situation and not avoided the claimant's dismissal when there was no available alternative role.
235. Accordingly, the Tribunal concluded that the claimant's claims of disability discrimination were without merit and were dismissed.
236. The Tribunal then turned to the age and sex discrimination claims. The claimant submitted that these claims were only to be considered if the respondent established that the real reason for the dismissal was a breakdown in working relationship and related only to menopause.
237. It was not put to Ms Taggart or Mr Gibson that the claimant's dismissal was in any way due to her age or sex. In any event, to the Tribunal the claimant seemed to be suggesting that she was dismissed because she was menopausal which occurs in women of a certain age. Menopause in the Tribunal's view is a consequence of sex and age.
238. In any event for the reasons explained above the Tribunal was not satisfied that the claimant's dismissal was because she was menopausal. Ms Taggart did not in the Tribunal's view have a negative view of the menopause.
239. As regards the indirect discrimination claims the Tribunal again considered that the alleged PCP was an implied term of the employment contract and not applied by the respondent. Further the Tribunal did not consider that there was evidence that others of the claimant's age and sex would be put to any

particular disadvantage in terms of their ability to maintain working relationships nor was the claimant put or would put her at a disadvantage.

5 240. Accordingly, the Tribunal dismissed the claims of age and/or sex discrimination.

241. The Tribunal next turned to the ordinary unfair dismissal claim. The Tribunal started by asking what was the reason for the claimant's dismissal?

10 242. Ms Taggart made the decision and she said it was because of the breakdown of her relationship with the claimant. Mr Gibson's evidence was that he understood this to be the reason for the claimant's dismissal from his discussion with Ms Taggart at the time. The claimant said that the reason for her dismissal was her disabilities and the respondent's belief about the effect and impact of her disabilities in the workplace. In her submissions the claimant
15 said that if the content of the draft report and examples were believed then the reason or principal reason was capability (ill health or performance) or misconduct.

20 243. In the context of the discrimination claim the Tribunal had assessed the facts and circumstances which were in Ms Taggart's mind of and known to the her and which caused her to dismiss the claimant.

244. The Tribunal found that there were significant issues between the claimant
25 and Ms Taggart in 2016. They worked at a senior level in an important part of the business which was under high pressure and public scrutiny to deliver a public service. While Ms Taggart sought HR advice on how to manage the situation there was no suggestion that there was any misconduct by the claimant in raising the issues that she did. Ms Taggart and the claimant did
30 not have a clash of personality nor was it suggested that the claimant's conduct caused the breakdown. The fact was that the claimant and Ms Taggart had different opinions particularly about the requirement for the claimant to work on call and the recruitment issue. The claimant had already

indicated her desire to leave the Customer Services Directorate but despite efforts had been unable to find a suitable alternative role.

5 245. The recruitment issue remained unresolved into 2017. At the March Meeting Ms Taggart genuinely believed that the claimant no longer had trust and confidence in her; their relationship had broken down and that it could not be retrieved. The Tribunal considered that the claimant's evidence also demonstrated that she had no trust and confidence in Ms Taggart.

10 246. While the draft report referred to various matters that the claimant submitted were characterised as performance or conduct, the Tribunal considered that none of these would have resulted in any disciplinary or performance management. The Tribunal was in no doubt that had Ms Taggart not believed that the claimant had no trust and confidence in her, the claimant would not
15 have been dismissed.

20 247. The Tribunal concluded that the reason for the dismissal was a lack of trust and confidence between two employees at senior level which was a barrier to delivering the objectives of the business. The dismissal was for some other substantial reason.

25 248. The Tribunal then turned to consider whether the dismissal was reasonable in all the circumstances (including the size and administrative resources of the employer's undertaking) in accordance with section 98(4) of the ERA.

249. The Tribunal was mindful that at this stage the burden of proof was neutral; it must not substitute its own decision for the that of the employer; and that the test was one of the band or reasonable responses.

30 250. It was accepted that there was no formal procedure before dismissing the claimant. Often this failure would lead the Tribunal to conclude that the dismissal was unfair. However, it was not for the Tribunal to substitute its own decision for that of the respondent. The Tribunal therefore considered the reasonableness of not having a formal procedure in all the circumstances of
35 this particular case.

251. The Tribunal had concluded that the reason for dismissal was an irretrievable breakdown in trust and confidence. Accordingly, the ACAS Code of Practice did not apply only to conduct and capability dismissals.

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252. The Tribunal then considered the reasonableness of not following any process in the circumstances of this case. The claimant referred to numerous internal policies and submitted that following these would have been reasonable and avoided dismissal. The Tribunal agreed with the respondent's submission that an irretrievable breakdown in trust and confidence particularly between two senior managers in an important area of the business and at a critical time did not naturally fit into any internal policy especially when there are no alternative roles available within the business.

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15 253. The Tribunal noted that Ms Taggart did not react at the March Meeting but reflected and reached the decision following discussion with the HR Director and Finance Director. Ms Taggart did not decide on the process but took advice from Mr Gibson which was based on his experience and expertise.

20 254. Having heard evidence from the claimant and Ms Taggart about the issues that arose between them and their respective opinions the Tribunal did not consider that any procedure would serve any useful purpose and if anything it would have worsened the situation.

25 255. The Tribunal considered that while the claimant suggested following these procedures now there was no evidence that at the time the claimant was interested in retrieving her relationship with Ms Taggart. She was also aware that there were no alternative roles within the business as she had been looking for some time.

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256. The Tribunal felt that any appeal would have been going through the motions. Several members of the executive already knew of the breakdown in the relationship between the claimant and Ms Taggart which could not be ignored or allowed to continue when the business was under pressure to deliver and

substantial fines would be imposed if targets were not met. It was not a situation where an alternative decision could be reached.

5 257. The Tribunal therefore concluded that in the particular circumstances of this case the decision to dismiss was substantially and procedurally fair.

10 258. Finally, the Tribunal turned to consider the breach of contract claim. From the claimant's submission the Tribunal understood her position to be that the disciplinary and grievance procedures were contractual and required that she would be given a hearing at which she could state her case.

15 259. For the reasons indicated above the Tribunal did not consider that the disciplinary procedure applied in the circumstances of the claimant's dismissal.

20 260. The claimant's contract of employment was capable of being terminated with notice. The claimant was aware at the April Meeting that her employment was being terminated. She met with Mr Gibson on 2 May 2017. The grievance procedure is initiated by an employee. At no time did the claimant raise a grievance. He employment was terminated on 13 May 2017 and the claimant received the appropriate notice pay.

261. The Tribunal therefore dismissed the claimant's claims.

25 Employment Judge: Shona MacLean

Date of Judgement: 18 October 2018

Entered in Register,

Copied to Parties: 19 October 2018