EMPLOYMENT TRIBUNALS

Claimant: Miss S Irving

Respondent: MD Insurance Services Limited

Heard at: Liverpool **On:** 11, 12, 13 and 14 February 2020 and 16 March 2020

Before: Employment Judge Benson
Mrs A Ramsden
Mrs J Fletcher

REPRESENTATION:

Claimant: In person
Respondent: Mr J Jenkins, Counsel
Mr Woods (Counsel 16 March 2020)

JUDGMENT having been sent to the parties on 20 March 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The claimant brought claims of disability discrimination being direct discrimination; discrimination arising from a disability; a failure to make reasonable adjustments; victimisation and harassment.

2. A detailed list of issues was agreed between the parties and was referred to by the Tribunal in reaching its decision.

Evidence

3. Evidence was heard from the claimant and on behalf of the respondent from Mr D Rigby, Technical Support Unit ("TSU") Nationals Manager, Mr J MacKay, TSU Manager and Ms K Souter, DRS Operations Manager. We were referred to documents within an agreed bundle of documents, together with written and oral submissions.

Findings of Fact

4. The claimant worked for the respondent for some years and it was accepted by the respondent that she was a disabled person by reason of depression from April 2018. This was a long-term condition. The claimant did not take medication for her depression, nor did she declare it to the respondent at the time or on her appointment.

May/June 2017

5. During a meeting on 9 June 2017, Mr MacKay and the respondent's HR officer were alerted to the fact that the claimant suffered from depression. It was referred to in passing by the claimant when, in another context, she mentioned that her doctor had said that she should take antidepressants but she did not want to.

May/June 2017 to August 2018

6. In May 2018 the claimant's dog died and this had an impact upon her mental health. At regular one-to-one meetings, which the claimant had with Mr MacKay every few weeks or so, she discussed various work issues. We have seen copies of some of the notes of these meetings and they support Mr MacKay's evidence on this matter. At no time during those meeting did the claimant refer to her depression. The meeting notes for June 2018 did reflect that the claimant was unhappy but this was about her team.

7. In the claimant's PDP for 2017 (which is undated) the claimant notes that 2017 had been quite challenging for her as she had had to deal with emotional and mental issues which had been part of the breakdown in communications. There is no mention of depression in the PDP although the claimant in evidence says that she was continually telling Mr MacKay in that meeting and in these meetings and outside that she was suffering from depression. However, the claimant accepted that she never used the word depression rather that she referred to being unhappy and suggested that Mr MacKay should have known what she meant.

8. In 2018, it was clear to Mr MacKay that the claimant was not happy in her role. However, he understood this was because she thought that she should have been promoted, and wasn't. Mr MacKay encouraged the claimant to attend training to develop her career but she decided not to go on it. She had applied unsuccessfully for two other roles which Mr MacKay had supported. She had also expressed an interest in a legacy project which she was eventually not asked to do.

Seat Move

9. In July 2018 an issue arose concerning a seat move. At this time two teams, including the claimant's team, were being merged. Mr MacKay was the manager of both. In a meeting to discuss team changes Mr MacKay raised seating and asked all of those present whether they had any objections to the seating plan. Everyone apart from the claimant agreed to the plan. He then asked the claimant whether she agreed, as he knew that she liked sitting where she was. The claimant felt put on the spot.

10. In August 2018 the claimant's anxiety increased and she began suffering from nausea, had panic attacks and was upset at lot of the time. She was struggling to come into work. She was able to control these symptoms whilst in work, though mentioned to Holly Taylor, a colleague that she was struggling and not happy on her team.

11. On 6 August 2018 the claimant attended a PDP update and one-to-one with Mr MacKay. During this meeting she told Mr MacKay that she was unhappy and demotivated. After the meeting a note was completed to which we were referred. It primarily refers to a lack of fulfilment in her role. She had expressed interest in taking on new work but to no avail, and she indicated that she would like more feedback and encouragement. There was no mention of her depression. She did however advise Mr MacKay that she was going to send an email about being demotivated and unhappy. There was nothing in that meeting which would have alerted Mr MacKay to make further enquiries about her depression or mental health.

12. Mr MacKay followed this up with emails to his manager (page 113 of the bundle and others). He surmised as set out in the email (dated 6 August at 15:35) that there were a number of things that may be causing the claimant's unhappiness and concerns. He does not mention in this email or later exchanges that the claimant's depression or ill health may be possible causes. It did not at that stage occur to Mr MacKay that any of the claimant's issues were related to this.

13 August 2018

13. In a weekly feedback report on 13 August the claimant emailed Mr MacKay and said to him that her happiness was at an all-time low. Around this time other members of the claimant's team and Mr MacKay's manager were commenting upon the claimant and her attitude. She was generally a talkative individual but had become quiet and at times unresponsive to her colleagues. Her behaviour had changed and at times she was abrupt and came across as rude. This was causing and creating a negative atmosphere and Mr MacKay was told to sort it out. Mr MacKay was aware that there was general unhappiness in the team about the changes which were being implemented, and he saw that the claimant's behaviour related to this too.

14 August 2018

14. 14 August 2018 was the nearest workday to the claimant's birthday. The company and staff celebrated birthdays and would decorate an employee's desk and give presents and cards. On that day the claimant came into work and was

disappointed at the efforts which had been made for her. She went to the kitchen to compose herself and throughout the morning felt upset, but not visibly so. Around lunchtime Mr MacKay asked to speak to her informally and they went to sit on the sofa away from the desks. He spoke to the claimant about the issues raised by her colleagues concerning her behaviour and her creating a negative atmosphere which he said he and his manager had also noticed. The claimant broke down and was visibly upset. She said to Mr MacKay, as set out in his report later that day to Mr Devaney, "Si said I can't talk about this as I am about to have a breakdown". She was upset for the rest of the day and was then on holiday for the following week.

August Meeting

15. On 21 August 2018, the claimant returned to work. Mr MacKay met with her to have an informal fact find to discuss the respondent's concerns about her behaviour, attitude and how she interacted with colleagues and management in the team. This meeting lasted two hours. She did not ask for any companion or ask that the meeting be adjourned so that she could be accompanied.

16. At the outset of and throughout the meeting on 21 August 2018 the claimant raised her depression and the impact it was having upon her. Mr MacKay asked whether she used UNUM, which was an external occupational health company, but did not explore with the claimant why she felt the way she did or the background to her mental health issues. Rather he continued to pursue what he saw as conduct issues, including attitude, the questioning of colleagues and management, and behaviour.

17. The claimant raised her mental health and that this impacted upon her behaviour to the extent that it might be the cause of the matters which Mr MacKay was discussing with her. She hoped that having raised these issues in a frank and open manner, things might change. Mr MacKay's reaction, rather than seeking to understand the claimant and her condition, was again to refer to UNUM, saying that he would speak to HR and asking her to come to him if she needed to talk. He also advised her that there might be formal procedures for performance and misconduct.

18. One of the concerns raised by Mr MacKay, was the time the claimant spent away from her desk, specifically making coffee and using toilet facilities on a different floor. Although Mr MacKay sought to limit the claimant to going to a different floor to make coffee to a couple of occasions each day, which was what she indicated she would normally do, he did not prevent her continuing to have access to the free coffee facilities used by staff on their own floor. He also questioned whether she had a medical problem which would mean she had to use a toilet on a different floor. In this meeting the claimant was taken aback by the negative feedback from her colleagues and she disputed some of the issues which were raised.

19. Mr MacKay spoke again to HR following the meeting and he was reluctant to proceed with the disciplinary warning which HR had anticipated would be the next step. He was aware that a warning would have an impact upon her bonus payment. He was advised that some action needed to be taken and therefore proceeded with a Performance Improvement Plan ("PIP").

20. On 24 August 2018 the claimant met with Mr MacKay again. He confirmed that the claimant was to be put on a PIP. The notes of that meeting were agreed and the plan was presented to the claimant. The claimant had a few questions and at that meeting Mr MacKay also reminded the claimant that she still had access to UNUM. Thereafter Mr MacKay felt that the claimant's behaviour and relationships improved.

21. On 29 August 2018 the claimant advised HR that she had seen her GP and had been referred to counselling, but that UNUM could not assist.

PIP Review Meetings

22. There then followed a series of PIP review meetings on a weekly basis. The first of those was on 31 August and notes were produced, to which we were referred, confirming that the claimant was working well. The respondent was very happy with the improvement in her relationships with colleagues. When asked how she felt things were going, she said she could not say much as she was taking advice. The claimant gave the impression outwardly that all was good. Mr MacKay and Mr Rigby confirmed that she was interacting with colleagues, was more open, and matters were progressing positively. They considered that the PIP was achieving what they had hoped for.

23. This was not however the claimant's position, as she says she was unable to express how she felt. She was intimidated by the PIP and what might happen to her. This was not the impression she was giving to Mr MacKay and her colleagues, however we accept that at that time she was putting on a brave face and she was intimidated by the existence of the PIP. This is confirmed in her grievance on 30 September 2018 at page 163. We note that the PIP mentions that if there is no improvement then the claimant would be subject to disciplinary action. As such we consider that it was more than just a support mechanism, which is what the respondent suggests. Throughout these review meetings the claimant mentions that she is seeing HR and has ongoing concerns about her mental health.

Grievance

24. On 30 September 2018 the claimant submitted a grievance which outlined her concerns and referred to advice that she had received. She raised that she considered that the company had failed to make reasonable adjustments and discriminated against her as a consequence of her disability. The only adjustment she refers to is imprecise being that the company has failed to give her the support she needs.

25. Mr MacKay was interviewed on 17 October 2018. On that date the claimant went off work with depression and stress. Prior to this the claimant emailed Mr Rigby asking whether, if she needed to take time off for her health, that would mean that she needed to be signed off as sick. Mr Rigby confirmed that she would and as the potential absence was medical sickness related then this would go down as sickness or 'signed off', dependent upon the length of absence that was required.

26. On 30 October 2018 the claimant was interviewed. She did not feel that she should be on a PIP and that she should have had more support; she said she should

have had better adjustments in work, more flexible time and they should be more relaxed about depression, and if people were struggling to come in. Essentially, she was dealing with the respondent's attitude to adjustments at that stage.

27. The grievance outcome was provided on 6 November 2018 and the grievance was not upheld. Mr Rigby decided that mediation between the claimant and Mr MacKay would be useful but that they should continue with the PIP for the final two weeks as it appeared to be working; that there should be ongoing monthly meetings with Mr MacKay, and in respect of other adjustments he would want to see what medical advice said and what was suggested. He accepted that the claimant had asked for the PIP to be stopped and further support put in place. Other than the ongoing meetings with Mr MacKay no other adjustments were put in place at that time. In his outcome letter Mr Rigby said:

> "It is questionable as to whether a role with further progression would aid your management of your depression or not."

Adjustments

28. On 19 November 2018 the claimant returned to work and had a return to work meeting with Mr Rigby. She said she was not fit. At that meeting she sought reasonable adjustments. Mr Rigby responded to these by an email on 20 November 2018. In respect of working from home Mr Rigby said that they could not currently permit it. There was no reason given at the time. He did not explore it with her or how it could be achieved. Although it was not stated in that email or to the claimant at the time, we accept that what was in Mr Rigby's mind was the Crisp training, which was a company-wide new IT system that all staff needed to be trained upon. She requested flexible hours between 8.00am and 4.00pm and he asked for a further explanation as to how that would assist. This was answered and it was agreed from 28 November. She asked for time off for appointments, which was also agreed, and her request for paid sick leave was rejected.

29. On 23 November 2018 the GP note sets out these adjustments, including the working from home.

30. On 27 November 2018 the claimant met with Mr Rigby to discuss her doctor's recommendations, and on that date HR agreed by email to the GP's recommended adjustments other than the working from home, which was not referred to by HR. On 30 November an HR referral was made asking the OH practitioner to comment upon the working from home. The claimant was advised of this on 4 December 2018 and the PIP and PDP were both put on hold at that time.

31. On 4 December 2018 the claimant also asked to report direct to Kerry Souter as she did not feel comfortable reporting to Mr MacKay. This was refused but an offer to meet with Mr MacKay and her to mediate was made.

32. There were ongoing meetings with the claimant during this period but the respondent was waiting for the Occupational Health report. During this time the claimant continued to struggle with her mental health.

33. The Occupational Health report had been received by the respondent dated 2 January 2019 and adjustments recommended. Most of these were put in place,

including the change of reporting line. One of the adjustments: working from home for part of the week if operational feasible, was not agreed. The respondent did confirm that they would come back to the claimant on this point once they had time to further consider it.

34. On 14 January 2019 Ms Souter became the claimant's support manager.

35. Kerry Souter and Mr Rigby met with the claimant again on 18 and 25 January 2019. They discussed with the claimant the reasons that they did not consider it was appropriate for her to work from home. These were summarised as support, cost implications, health and safety and Crisp training.

36. At the meeting on 25 January 2019 the claimant asked to move her desk and be permitted to sit elsewhere. She said she wanted to sit away from other people. She was given options to consider and on 4 February she said that none of the options would help as it was still too busy for her. Mr Rigby told her that there was nowhere he could find that was away from others which would achieve what she felt she needed. He enquired whether she could think of any, but she said that she could not.

37. In mid-February, Mr Rigby produced a review containing his considerations as to the benefits and disadvantages of the claimant's request to be allowed to work from home. The reasons in favour were workload, productivity and medical. The reasons against were Crisp training, Merge training, welfare checks and one-to-ones, new line manager, isolation, health and safety and IT equipment and additional cost. Within that report he states that there were workarounds to many of the disadvantages, particularly if the claimant was only working part-time from home. The key issues for him were the need for the claimant to be present for the Crisp and Merge training.

38. Thereafter there continued to be regular meetings to discuss how the claimant was and how the adjustments were operating. The claimant undertook the delayed Crisp training between 20 February and 1 March. It had been agreed with her how this training could be delivered so that she would be able to participate.

39. On 1 April 2019 Holly Taylor became the claimant's line manager, and on 11 April 2019 the claimant commenced a period of absence by reason of depression.

40. At her return to work meeting on 20 May 2019 the claimant said she did not feel she was well enough to return but could not stay off any longer. Upon her return, she was advised that she would be line managed by a new manager, Ms Taylor. Kerry Souter had moved into a new role and it was difficult for her to continue to be the claimant's support within the company. From a welfare perspective she was asked to continue to liaise with Ms Price and Mr Rigby. They also discussed whether she would be interested in moving to a new varied role, and all other adjustments continued.

41. On 22 May 2019 the respondent approached the Occupational Health Provider for a further report. That report was received on 7 June 2019 and it recommended that the claimant have supportive conversations with Ms Souter and also that adjustments be made regarding working from home, including a suggestion

that the claimant could work in the office in the mornings and at home in the afternoons.

42. On 18 July 2019 after discussion with the claimant the respondent confirmed that the claimant could work from home on a part-time basis for a trial period of three months. Monday and Friday were to be full-time in the office, with Tuesday, Wednesday and Thursday being part-time. The respondent considered that their concern about Crisp training had gone as that training had been completed and that the working pattern removed some of the other concerns that they had previously. From 22 July 2019 the claimant commenced a further period of absence and has remained absent since that date. She remains employed.

The Law

Direct Discrimination

43. Section 13 of the EQA provides that a person (a) discriminated against another (B) if, because of a protected characteristic, A treats B less favourably that A treats or would treat others.

44. Section 23 (1) provides that on a comparison of cases for the purposes of section 13….there must be no material differences between the circumstances relating to each case.

45. Section 23(2) provides that the circumstances relating to each case, include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

Discrimination arising from disability

46. Section 15 of the EQA provides that

> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

47. There is therefore a need for knowledge or constructive knowledge of the claimant's disability at the time that the claimant is treated unfavourably.

48. While the EQA stops short of imposing an explicit duty to enquire about a person's possible or suspected disability, the EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15).

49. Failure to enquire into a possible disability is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know had it made such an enquiry A Ltd v Z EAT 0273/18.

Duty to make reasonable adjustments

50. By section 20 of EQA 2010 the duty to make adjustments comprises three requirements.

51. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

52. A disadvantage is substantial if it is more than minor or trivial: section 212(1) EQA 2010.

53. Paragraph 6.28 of the EHRC Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

(1) Whether taking any particular steps would be effective in preventing the substantial disadvantage;
(2) The practicability of the step;
(3) The financial and other costs of making the adjustment and the extent of any disruption caused;
(4) The extent of the employer's financial and other resources;
(5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
(6) the type and size of employer.

54. Claimants bringing complaints of failure to make adjustments must prove sufficient facts from which the tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made.

55. The duty to make reasonable adjustments does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the CP (Schedule 8 paragraph 20).

Harassment

56. Section 40(1)(a) prohibits harassment of an employee. The definition of harassment appears in section 26, for which disability is a relevant protected characteristic, and so far as material reads as follows:

(1) A person (A) harasses another (B) if -

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

Chapter 7 of the EHRC Code deals with harassment.

Victimisation

57. Section 27 EQA provides protection against victimisation.

58. (1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

59. It is clear from the case law that the tribunal must enquire whether the alleged victimisation arises in any of the prohibited circumstances covered by the Act, if so did the employer subject the claimant to a detriment and if so what that

because the claimant had done a protected act. Knowledge of the protected act is required and without that the detriment cannot be because of a protected act.

Burden of proof

60. Section 136 of EQA 2010 applies to any proceedings relating to a contravention of EQA. Section 136(2) and (3) provide that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

61. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Time Limits

62. The time limit for bringing a claim appears in section 123 EQA as follows:-

> *(*1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –
>
> (a) the period of three months starting with the date of the act to which the complaint relates, or
> (b) such other period as the Employment Tribunal thinks just and equitable.
>
> (2) …
>
> (3) for the purposes of this section –
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it."

Application of Law to Facts

63. We have considered this claim by reference to the List of Issues which we agreed at the outset of the hearing.

Knowledge of Disability

64. At no time prior to 21 August 2018 did the claimant clearly express to Mr MacKay or to the respondent anything which would have caused them to understand that she was a disabled person. There was one mention of depression in May/June 2017 but thereafter most of her conversions talked about her being 'unhappy'. The claimant felt that that by that and the one passing mention of depression, Mr MacKay should have understood the extent of her mental health condition. Her change in behaviour, such as being quiet when she was normally more outgoing, was just one part of the jigsaw, and Mr MacKay believed that there were other issues, such as the changes within the team and her lack of progress which contributed to her unhappiness. The claimant was not sufficiently direct in her various meetings for Mr MacKay to understand what she believed she was saying. Even her reaction to their discussion on her work birthday was not in our mind sufficient for Mr MacKay to be expected to understand that the claimant was a disabled person, within the meaning of section 6 of the Equality Act 2010.

65. We find therefore that the claimant has not shown that the respondent had knowledge of the claimant's disability nor that it was invested with constructive knowledge until the meeting of 21 August 2018 when she met with Mr MacKay for her factfinding meeting.

66. At that meeting Mr MacKay had many more pieces of the jigsaw. The claimant expressed with clarity her mental health issues, her changes in behaviour, previously being quiet and talking a lot, and also breaking down for no apparent reason, were relevant to him at that stage. There was an awareness of the claimant being unhappy. Depression had been mentioned in the past. All of these should have triggered further enquiries. We find that the knowledge of the claimant's disability was something which the respondent ought to have been aware of at that meeting. The claimant had now referred specifically to depression. It is clear from the minutes of that meeting that the claimant was willing to open up about her depression and the way she was feeling. Mr MacKay however did not explore with the claimant why she felt the way she did and the background to her mental issues. The claimant explained to Mr MacKay that the issues about which he was concerned, were matters which resulted from her depression. Instead he raised her attitude, behaviour, being distant with colleagues, seating issues, negative atmosphere, distancing herself from colleagues, isolating herself and one word answers, but these were all issues which should have put him on notice.

67. It is necessary when we are considering this to establish what the employer might reasonably have been expected to know if it had made enquiry. There was enough information given to the respondent by the claimant at that meeting for Mr MacKay to have explored with her further her mental health issues, and had he done so we consider he would have been aware that her condition would have met the definition of a disabled person under the Equality Act 2010. We therefore find that the claimant was a disabled person from 21 August 2018.

The Claims

Burden of Proof

68. This is a case where the facts were largely not in dispute. As such other than where we have referred to the burden specifically, we have generally been able to

make findings based upon evidence we have heard without the need to invoke section 136 EQA.

Direct Discrimination

69. The comment made in the outcome letter about which the claimant complains is not something which was actively pursued by the claimant in the hearing. This was part of an overall statement by Mr Rigby in considering her current role and other potential roles within the company together with her workload. It was an entirely justifiable comment and not one where the claimant has shifted the burden to show facts that would amount to direct or any other discrimination.

70. This claim therefore fails.

Discrimination arising from disability

71. The unfavourable treatment can be summarised as the raising of criticism by Mr MacKay and telling the claimant that her attitude could be seen as anti-management, both of which happened at the meeting on 21 August 2018, and further putting the claimant on a PIP, which commenced on 24 August 2018.

72. In our view, all of those amount to unfavourable treatment of the claimant. We do not consider that the comment made by Mr MacKay in relation to the doctor's note as detailed in paragraph 25 above was anything other than an explanation as to the respondent's sickness policy and procedure and as such was not unfavourable treatment.

73. The claimant's attitude or conduct, as the respondent described it, arose as a consequence of the claimant's disability of depression. We have had regard to the Occupational Health report in which the Occupational Health practitioner described the symptoms that the claimant was suffering from, and these included anxiety around people causing her to isolate herself and avoid social situations. The decision to speak to the claimant and put her on her PIP about her interactions with her colleagues and apparent rudeness are something which arose as a result of the behaviour which she was exhibiting.

74. The respondent says that this was a proportionate means of achieving a legitimate aim. The respondent relies upon the need to address employee behaviour which was had a detrimental effect upon colleagues. There were complaints from the claimant's colleagues and the managers had noticed these, and they considered that they needed to be addressed. This is a legitimate aim. The question therefore is whether it was achieved by proportionate means. Until the meeting on 21 August, when the respondent was considering how to manage the claimant's conduct, there was nothing which had raised its concerns that this had anything to do with her mental health. It was therefore proportionate that they raised this criticism with her and told the claimant that her attitude could be seen as antimanagement. However, having been put on notice of the claimant's disability and that the issues which were causing the respondent concern about her behaviour were related to her disability, then it was not proportionate to proceed with that discussion and put the claimant on a PIP on 24 August 2018. There were other more sensitive and supportive means which could have addressed these issues.

75. The claim in relation to putting the claimant on a PIP therefore succeeds. The other claims of discrimination arising from disability fail.

Reasonable Adjustments

76. With reference to the List of Issues, we do not consider that 3.1.2, 3.1.3 and 3.1.6 are PCPs that were applied to the claimant. As such we proceed with the other adjustments which were sought.

The PCP: requiring employees to perform repetitive tasks

77. This was applied to the claimant and to others and it would have put the claimant at a substantial disadvantage because of the difficulty she faced with her depression. Anxiety and a lack of concentration would mean that she would feel the need to check and recheck her work. However, we do not consider that the adjustment proposed, which was being provided with more varied work, would have removed the disadvantage. More varied work would not in our view have assisted, and indeed could have resulted in more anxiety as new tasks were introduced.

78. This claim fails.

The PCP: putting employees on PIPs to improve behaviour and attitude

79. This was a PCP which was applied to others and which would put the claimant at a substantial disadvantage. The claimant we accept, having been placed on the PIP and warned that if there was no improvement within the required time period, would and did suffer substantial disadvantage by way of anxiety and additional pressure compared with someone who did not have depression. That disadvantage could easily have been removed by pausing the PIP as at 6 November or indeed, as we have said above, not putting the claimant on a PIP in the first place. This was a reasonable and appropriate adjustment for the respondent to have taken. It would have taken the pressure off the claimant and allowed her issues to be addressed without the threat of disciplinary action hanging over her.

80. As such this claim succeeds.

The PCP: requiring employees to attend its work premises to work

81. This was a PCP which was applied to all employees and put the claimant at a substantial disadvantage. The claimant raised this issue in November 2018. She knew this would assist her and this was supported by her GP in November, and also by the Occupational Health report in January 2019 and the Occupational Health practitioner in June 2019. The claimant's mental health caused anxiety and difficulties in social situations. She saw this as a solution. It was, in our view, reasonable for the respondent, having received the GP note, to obtain their own medical view. The GP reference was without any detail, but once they had the Occupational Report in January 2019, which refers to working from home for part of the week, it would have been an adjustment which was reasonable to implement or at least to commence that implementation. Instead the respondent considered that their requirements trumped this.

82. There was detailed consideration of the request to work from home by Mr Rigby, and he confirmed that there were ways that working from home could be achieved, certainly after the Crisp training. That training was completed on 1 March 2019. Accepting that it might have taken a little time to set up the claimant to work at home, following the receipt of the Occupational Health report in January and with the CRISP training being completed, we consider that as at 1 March 2019 it would have been reasonable to allow the claimant to work from home. That adjustment was eventually put in place in July of that year, but it seemed that very little had changed.

83. We therefore find that this claim succeeds.

The PCP of requiring employees to attend team meetings and making changes to teams

84. The adjustment which was sought by the claimant was retaining Ms Souter as a mental health supervisor. The claimant claims that this would have alleviated the disadvantage she suffered as a result of struggling with team meetings and changes. The respondent provided Ms Souter as a mental health supporter or supervisor from January 2019 through to 1 April. It was not a reasonable adjustment in our view for Ms Souter to be required in that role from November of the previous year. At that time Mr Rigby was seeking to mend the relationship with Mr MacKay, whom the claimant had got on well with previously. When it was clear that this was not going to be successful, arrangements were made for Ms Souter to step in. Unfortunately, Ms Souter's workload and role changed so she could not assist from 1 April 2019. In any event we consider that from 1 April onwards Ms Souter would not necessarily have been of much support to the claimant in meetings and with changes as the majority of these had already happened in the previous year before the claimant had asked for her to be put in place.

85. This claim fails.

Requiring employees to complete training on new systems

86. Although this was something which had put the claimant at a substantial disadvantage in view of her depression, the adjustments which the respondent did make were reasonable and it would not have been reasonable in our view to have put the claimant's training on hold as she suggests. Both Crisp and Merge training were crucial for the running of the business and not something that the claimant could have missed if she was to do her job.

87. As such this claim also fails.

Harassment

88. The allegation was that Ms MacKay asked the claimant during a meeting in July 2018 whether she was happy to move desks. In view of our findings of fact above, we do not consider that the question which Mr MacKay asked was done so with the purpose of humiliating the claimant or causing her any offence. Nor to be consider that looking at the matter objectively and taking into account the claimant's perception and the circumstances at the time, could it be said to be reasonable for it to have had that effect. It was a legitimate question for the claimant to be asked in view of her earlier concerns.

89. This claim therefore fails.

Victimisation

90. The protected act of which the claimant complains is that she notified Mr MacKay on 6 August 2018 that she was had send an email to HR complaining about his lack of support for her depression. The key document which we consider is relevant is the email dated 6 August which is at page 113 of the bundle. This email was sent by Mr MacKay to his manager, Mr Devaney, after the meeting. The telling evidence in our view is that although Mr MacKay notes that the claimant is unhappy and sets out various reasons why this may be, he does not mention that the claimant is suggesting that she has been treated unfairly because of her depression. In fact, this is not mentioned in that or any of the subsequent correspondence.

91. It is correct that Mr MacKay does indicate that he is sending the email because he wants to cover himself, but we consider that had the claimant mentioned her depression as being the reason for wanting to send this email about Mr MacKay and complaining about his lack of support for her depression, we think that Mr MacKay would have raised that with Mr Devaney in his email. We do not therefore consider that the test is met in relation to whether there has been a breach of the Equality Act 2010, and as such we consider that the act which the claimant relies upon was not a protected act for the purpose of a victimisation claim.

92. For that reason, that claim also fails.

Time Issue

93. We find that the allegations in respect of which the claimant has succeeded, were part of a course of conduct extending over a period. The allegations flow from one another and involve the conduct of a discrete number of the respondent's managers, being primarily Mr MacKay and Mr Rigby. In view of our findings in respect of the failure to make a reasonable adjustment in not allowing the claimant to work from home, which was the last of the discriminatory acts, the claims were presented in time.

Employment Judge Benson
Date: 4 September 2020

REASONS SENT TO THE PARTIES ON
12 October 2020

FOR THE TRIBUNAL OFFICE