EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MS J MCCARTHY	**V**	**SAINSBURY'S SUPERMARKETS LIMITED**

HELD AT: LONDON CENTRAL **ON: 2 - 4 & 7 SEPTEMBER 2020**

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: MS JF TOMBS
MRS J GRANT

REPRESENTATION:
FOR THE CLAIMANT **Mr J McCarthy (Father)**
FOR THE RESPONDENT **Ms I Ferber (Counsel)**

JUDGMENT

1. Claims of discrimination arising from disability (s.15 EqA 2010) are upheld in part.

2. The claim of a failure to make reasonable adjustments succeeds and is upheld.

3. All claims of harassment fail and are dismissed.

4. All claims of victimisation fail and are dismissed.

RESERVED REASONS

The Issues

1. Disability – knowledge

The parties accept that the claimant was disabled at the material periods in this claim by reason of the following conditions: depression, severe anxiety, and complex PTSD.

2. Discrimination Arising from Disability

(1) Did the respondent treat the claimant unfavourably by:
   i. Stuart Davies threatening to demote her / make her redundant during a call on 12 August and in emails on 19 and 20 August 2019?
   ii. Breach her right to confidentiality by forwarding an OH report to a senior manager?

(2) Was this treatment because of matters arising from her disability – the claimant's disability related absences?

(3) If yes, was the alleged unfavourable treatment a proportionate means of achieving the legitimate aim – of safeguarding the claimant's mental wellbeing in order to facilitate a return to work and to ensure managers were able to support the claimant on her return?

3. Reasonable Adjustments

(1) Did the respondent have and apply a PCP of a requirement for reliability – i.e. to work according to a fixed workplan?

(2) Did the PCP place the claimant at a substantial disadvantage in comparison with persons who are not disabled, by causing exacerbation of her mental health and causing her poor attendance?

(3) Did the respondent have knowledge that the PCP placed the claimant at a substantial disadvantage?

(4) Would an adjustment have minimised or mitigated the substantial disadvantage? The claimant relies on the following adjustment: to allow her to work from home as and when required.

(5) Can the respondent prove that the substantial disadvantage would have not have been eliminated or reduced by the proposed adjustments?

(6) Did the respondent fail to take such steps as were reasonable to avoid the substantial disadvantage caused by the application of the PCP?

4. Harassment related to disability

(1) Did the respondent engage in the following unwanted conduct:

i. Mr Davies threatening to demote her during a call on 12 August and in emails on 19/20 August 2019?
ii. Mr Davies refusing the claimant's request to work from home and instead instructing her to take sick leave on 19 July, 7 & 9 August 2019?
iii. Mr Davies inviting the claimant to a meeting to discuss her absence at short notice, by phone on 12 September 2019?
iv. Ms Cox/Mr Davies telling the claimant in the 12 September call to "tell the truth" when she attended an OH appointment?

(2) If so did this conduct relate to the claimant's disability?

(3) Did the conduct have the purpose or effect (taking into account the claimant's perception, the other circumstances of the case and whether it was reasonable for that conduct to have that effect) of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5. Victimisation

(1) The respondent agrees that the claimant's grievance dated 11 November constitutes a protected act. Did the claimant also do a protected act by discussing her complaint of disability discrimination on a call with employee relations on 1 November 2019?

(2) Did the respondent subject the claimant to any detriments by:

i. Obstructing her effects to lodge a grievance by refusing to accept her grievance on a call on 4 November 2019, and by sending her a copy of the Bangladeshi grievance policy on 5 November 2019
ii. Delay in dealing with the grievance

(3) If so was the detriment because the claimant did a protected act?

The Law

6. Equality Act 2010

s15 Discrimination arising from disability

(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.

s20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) ...

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

s21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

a. on a comparison for the purposes of section 13, the protected characteristic is disability;

s123 Time limits

(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of –

a. the period of 3 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.

s136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Relevant case law

7. Discrimination arising from disability

(1) There are two steps, *"both of which are causal, though the causative relationship is differently expressed in respect of each of them"*:

i. did A treat B unfavourably because of an (identified) something? and
ii. did that something arise in consequence of B's disability?

"The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence." (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305).

(2) If the employer knows (or has constructive knowledge) of disability, it need not to be aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability (*City of York Council v Grosset [2018] EWCA Civ 1105*). In this case a lack of judgment by a teacher was contributed to by stress, which was significantly contributed to by cystic fibrosis; the Court of Appeal found that it did not matter that the school was unaware that the lack of judgment had arisen in consequence of his disability when s.15(10(a) is applied. If the employer knows of the disability, it would *"be wise to look into the matter more carefully before taking the unfavourable treatment"*.

(3) There must be some connection between the "something" and the claimant's disability; the test is an objective test, and the connection

could arise from a series of links (*iForce Ltd v Wood UKEAT/0167/18)* – but there must be some connection between the "something" and the claimant's disability.

(4) The test was refined in *Pnaiser v NHS England [2016] IRLR 170, EAT*:

i. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A, and there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

ii. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant.

iii. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. - it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

iv. "It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

(5) The fact that an employer has a mistaken belief in misconduct as a motivation for dismissal is not relevant in considering s.15 discrimination, in a case where the employer had a genuine but mistaken belief the claimant had been working elsewhere during sickness absence: it is sufficient for disability to be *'a significant influence … or a cause which is not the main or sole cause, but is nonetheless an effective cause of the* unfavourable treatment'.' *(Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT)*.

(6) Justification: *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213*: three elements of the test: *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?".* When assessing proportionality, an ET's judgment must be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. *Hensman v Ministry of Defence UKEAT/0067/14/DM*, *[2014]).* The test of justification is an objective one to be applied by the tribunal, while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning. The test under s 15(1)(b) EqA is an objective one according to which the tribunal must make its own assessment" (*City of York Council v Grosset UKEAT/0015/16).* Under s 15(1)(b) the question is whether the unfavourable treatment is a proportionate means of achieving a different objective, i.e. the relevant legitimate aim. *Ali v Torrosian (t/a Bedford Hill Family Practice) [2018] UKEAT/0029/18:* this objective balancing exercise requires that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim. Although there may be evidential difficulties for a Respondent in discharging the burden of showing objective justification when it has failed to expressly carry out this exercise at the time, the ultimate question for the Tribunal is whether it has done so.

8. <u>Reasonable adjustments</u>

(1) A failure to make reasonable adjustment involves considering:

i. the provision, criteria or practice applied by or on behalf of an employer;
ii. the identity of non-disabled comparators (where appropriate); and
iii. the nature and extent of the substantial disadvantage suffered by the claimant.

Environment Agency v Rowan [2008] IRLR 20, *[2008] ICR 218*

"the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP'. *Newham Sixth Form College v Sanders [2014] EWCA Civ 734*.

(2) *Provision, criterion or practice:* It is a concept which is not to be approached in too restrictive a manner; as HHJ Eady QC stated in *Carrera v United First Partners Research UKEAT/0266/15 (7 April 2016, unreported)*, 'the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted'. In this case the ET were found to have correctly identified the PCP as 'a requirement for a consistent attendance at work'.

(3) Pool of comparators: has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? *Archibald v Fife Council [2004] UKHL 32*, *[2004] IRLR 651*, *[2004] ICR 954*: the proper comparators were the other employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

(4) While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (Tarbuck v Sainsburys Supermarkets Ltd), it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments (*Watkins v HSBC Bank Plc [2018] IRLR 1015)*

(5) The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage. *Leeds Teaching Hospital NHS Trust v Foster UK EAT /0552/10*, *[2011] EqLR 1075:* when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring. *Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)* - 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made *will* remove the substantial disadvantage'.

(6) The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. *Lincolnshire Police v Weaver [2008] All ER (D) 291 (Mar)*: it is proper to examine the question not only from the perspective of a claimant, but that a tribunal must also take into account 'wider implications' including 'operational objectives' of the employer.

(7) *Employer's knowledge: Gallop v Newport City Council [2013] EWCA Civ 1583*, *[2014] IRLR 211* – a reasonable employer must consider whether an employee is disabled, and form their own judgment. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal (*Jennings v Barts and The London NHS Trust UKEAT/0056/12*, *[2013] EqLR 326*,) Also, 'if a wrong label is attached to a mental impairment a later re-

labelling of that condition is not diagnosing a mental impairment for the first time using the benefit of hindsight, it is giving the same mental impairment a different name'. *Donelien v Liberata UK Ltd UKEAT/0297/14:* when considering whether a respondent to a claim 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge' as this might imply an erroneous test. The burden – given the way the statute is expressed – is on the employer to show it was unreasonable to have the required knowledge.

9. Harassment

(1) *Driskel v Peninsula Business Services Ltd [2000] IRLR 151*: Determining whether alleged harassment constitutes discrimination involves an objective assessment by the tribunal of all the facts; the claimant's subjective perception of the conduct in question must also be considered. The tribunal is therefore required to determine both the actual effect on the particular individual complainant and the question whether that was reasonable in the circumstances of the case. *Pemberton v Inwood [2018] EWCA Civ 564*: "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))." This means that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

(2) *Dhaliwal* : "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.'

(3) 'Conduct': *'Prospects for People with Learning Difficulties v Harris UKEAT/0612/11*: suspension or other acts by an employer which would not normally constitute an act of harassment, can amount to acts of harassment; in this case the lack of forethought on the part of

the employer and the peremptory nature of the suspension, with scant justification and absent prior consultation with the claimant, justified the tribunal's finding of unlawful harassment in this case.

(4) Purpose or effect: Harassment will be unlawful if the conduct had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Where the claim simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention—which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect; the objective element. The fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

(5) Related to the prohibited grounds: The conduct must be 'related to' a relevant protected characteristic, including conduct associated with that characteristic. The tribunal has to apply an objective test in determining whether the conduct complained of was 'related to' the protected characteristic in issue. *Hartley v Foreign and Commonwealth Office UKEAT/0033/15:* Where adverse comments were made by managers amount an employee, the fact that the intent of the managers was not to "aim" at her condition was irrelevant – the tribunal must assess *"if the overall effect was unwanted conduct related to her disability.'*

10. Victimisation

(1) The parties accept that the claimant's grievance dated 11 November 2019 was a protected act.

(2) Detriment: *MOD v Jeremiah [1979] IRLR 436*, *[1980] ICR 13, CA:* a detriment exists 'if a reasonable worker would take the view that the treatment was to his detriment'. A detriment must be capable of being objectively regarded as such- *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*, *[2003] IRLR 285*, *[2003] ICR 337,* 'an unjustified sense of grievance cannot amount to 'detriment'. *Deer v University of Oxford[2015] EWCA Civ 52* - the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

(3) Reason for the treatment: **T**he detriment must be 'because' of the protected act. *Greater Manchester Police v Bailey [2017] EWCA Civ 425* - it remains the case as under the pre-EqA legislation that this is an issue of the "reason why" the treatment occurred. Once the

existence of the protected act, and the 'detriment' have been established, in examining the reason for that treatment, the issue of the respondent's state of mind is likely to be critical. However there is no need to show that the doing of the protected act was the legal cause of the victimisation, nor that the alleged discriminator was consciously motivated by a wish to treat someone badly they had engaged in protected conduct. A respondent will not be able to escape liability by showing an absence of intention to discriminate, provided that the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment can be shown to exist. *Woods v Pasab Ltd (T/a Jones Pharmacy*) *[2012] EWCA Civ 1578:* 'the real reason, the core reason, for the treatment must be identified'

(4) Where there is more than one motive in play, all that is needed is that the discriminatory reason should be 'of sufficient weight' *O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701*, *[2001] IRLR 615, CA*

(5) A claim for victimisation is not dependent upon the claim which gives rise to the protected act being successful - *Garrett v Lidl Ltd UKEAT/0541/08*

Witnesses

11. The Tribunal heard evidence from the claimant. For the respondent we heard evidence from the claimant's manager Mr Stuart Davies, from Mr Davies line manager Ms Libby Cox and from Mr Peter Brown, Store Manager, who heard the claimant's grievance.

12. The Tribunal spent the first morning of the hearing reading the witness statements and the documents referred to in the statements. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process.

13. The claimant did not attend all of the hearing – she was absent after she had given evidence because of continuing ill-health. Her father confirmed that the claimant was happy to proceed in her absence and that he would discuss any issues with her during breaks or at the end of the day. The Tribunal stated that it would adjourn as needed to enable him to discuss issues arising.

14. The Tribunal thanks Ms Ferber and Mr McCarthy for their sensitive and extremely professional and capable conduct of this hearing.

15. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

16. The claimant remains employed by the respondent, her work record being good during her employment, receiving promotions and praise in her role. The claimant worked in what the respondent characterises as a *"business critical"* role, Strategy Analyst, and the claimant accepts this characterisation of her role.

17. For two years prior to the issues in this claim, significant difficulties in her private life caused the claimant serious mental ill-health, for which she received medication from her GP and treatment from her local mental health trust as well as support from family and friends; during this period she had very significant time off work. Prior to these difficulties arising, the claimant's health and attendance record was good. She was open towards her employers about the issues she was experiencing and as she states in her claim form until the issues in this claim she considers she received support from her employer, *"… and for this I am grateful"* (26).

18. In December 2018, following an absence commencing 12 October 2018, the claimant attended a meeting with Mr Davies, a colleague with whom she was friendly and who had recently been appointed as her manager, and with Mr Davies' manager, Ms Cox, It was agreed that the claimant would start a phased return, commencing with a flexible working pattern to be agreed a week in advance, working some days in the office, some from home, some half-days, and other planned days off on her phased return classed as sickness absence; when working in the office she would work flexibly to avoid rush-hour travel.

19. The phased return did not go as planned, with the claimant's poor health meaning from the 1st day of return she asked to change her hours (saying she was *"massively struggling"*). The respondent clearly was not happy at this time – as it puts it in its case chronology, from January 2019 *"the agreed working routine as part of proposed RTW was consistently changed/altered/taken as sick/frequent unapproved wfh all related to Jen's mental health, no consistency in reliability/working hours led to difficulty in managing workload deadlines."* (96).

20. The respondent initially shared little of this concern with the claimant, instead agreeing to the claimant's changes with positive messages of support. Examples include: in early January 2019 the claimant texted saying *"I am really struggling to get in I think I may have to throw in the towel for today. It's a particularly difficult one."* The response from Mr Davies was *"don't push yourself … it's fine don't worry".* (111); on 22 January *"I'm happy to take today as sick as I don't think I'd be much use to anyone … but I may log in this afternoon…" to which the reply was "…see how you go and feel but if you don't feel great don't force yourself…" (112);* on 8 February 2019 *"I'm feeling really bad this morning so I think I will need to take today off …."*, to which Mr Davies responded *"… the most important thing is you have time off when need it, so absolutely fine…"* (115) on 18 February 2019 the claimant asked to swap her am for working pm to which Mr Davies said *"no worries.. am vs pm makes limited difference today…"* (116)

21. The claimant was signed off work again from 18 February 2019 and received hospital treatment; the claimant told her employer that a long-term treatment plan was being put in place. The claimant had an Occupational Health assessment and OH's report dated 26 March 2019 referenced a change of medication and adding further medication; *"Due to her depression her mood is low, she can suffer exhaustion, she has difficulty with her concentration which can impact on her ability to process things. She can have panic attacks which can cause her breathing difficulties …. She can struggle to leave the house as crowds can be a trigger for her anxiety."* The report stated that the claimant was likely to be off work for approximately 10 weeks, and a phased return for 5 weeks, that *"she will benefit from regular meetings with management … to discuss any concerns… She may benefit from adapting the times of her shifts…".* There was a recommendation that large meetings be kept to a minimum, *"in my opinion she may be likely to have a higher than average level of absence due to her depression and PTSD which can cause exhaustion, panic attacks and in turn can cause her difficulty carrying out her day to day activity" (117-8)*.

22. The claimant returned to work in July 2019 on a phased return, agreed between the claimant and Mr Davies - reduced hours with a mixture of working from the office and working from home. Again, the expectation was that this plan would be adhered to, as said by Mr Davies in his evidence, *"this was the norm/expectation".* Mr Davies said that there was *"never an issue of her working from home a proportion of the week"* but that some work – speaking to stakeholders, having meetings, speaking to colleagues - could not easily be done on the phone; his evidence was that the respondent was *"looking for consistency and reliability in working hours … we need certainty for the next 5 days - what can we expect acknowledging peaks and troughs in her health".*

23. The claimant says on her return to work in July 2019 she received a *"forceful and aggressive lecture"*, that she had to be 100% well 100% of the time. The use of these words was disputed by the respondent, who say that there was a discussion about consistency and reliability, and Mr Davies having to pick up her work in her absence. Mr Davies in his grievance interview describes Ms Cox giving the claimant a *"lecture"* in which *"she stressed the importance"* of the claimant's attendance. Ms Cox in her grievance interview accepts that she referenced that *"reliability was key. Back to normal/back to work back to role…"* but that the issue was *"complex"* – the claimant wanted to return *"however she needed to deliver on commitments, projects or calls planned"* (262-4). The Tribunal accepted that the claimant was forcefully told on her return that she must be consistent and reliable in her attendance at work – and that Mr Davies accepted that this was effectively a lecture.

24. The claimant did not keep to the proposed schedule, the majority of the reasons were related to her disability. On 15 July she referenced being *"…very ambitious to begin with"* but that she was now *"a bit overwhelmed"* (138). The claimant worked from home on some days the schedule stated she was in the office, she changed her hours at short notice (for example page 134) and was

off sick on other working days. Mr Davies' messages continued to be supportive – for example on 29 July he said *"working from home today is fine given the task, so long as feel in good place to work?"* (141); on 1 August *"the best thing is always to prioritise health…. You definitely shouldn't be working (or stressing about the need to work…)"* (142). On 6 August 2019 the claimant asked to change her hours because of a medical appointment, Mr Davies responded *"that's fine Jen - minor change which is fine with me"* (145). Mr Davies' evidence, which we accepted was his perception, was that the claimant was giving *"an impression that she was not ready to return to work, an impression that she needed more time off, and would benefit her to have this time off to recover. These were the conversations we were having".*

25. On 7 August 2019 the message from the respondent to the claimant changed. The claimant texted at 7.23 in the morning saying, *"my mental health has been really poor yesterday afternoon and into this morning … I feel confident that I can continue the work you set for me at home this morning and dial into any meetings..."* The response from Mr Davies was, *"…Let me check with Libby this morning – just need to get a second opinion from what we previously discussed re wfh on office days…"* (146). The claimant said she would *"hang-fire with doing anything now…".* The claimant did not work that day, as the position of the respondent was that if the claimant could not attend work as planned, she should take the day off sick rather than working from home. The claimant has not returned to work since this date.

26. Ms Cox's position was that she gave a second opinion to Mr Davies on 7 August which was based on the working arrangement agreed for that week, that there was *"an agreement … that we would keep to the plan". She* accepted that the claimant had not missed deadlines, but that the *"support required from the claimant was not there…"* that Mr Davies was having to undertake additional work to meet deadlines. As Mr Davies put it in his evidence, he *"did not dictate"* the hours the claimant was to work, it was for her to provide her hours to work the Friday before, as this would enable him to plan work-load for the week ahead *"…this is the latest point for me to decide what Jen can work on. And this is leading from previous return to work when it was impossible to know what work would be done."*

27. In July 2019 the issue of workload was significantly compounded for Mr Davies, the Tribunal found, because a temporary member of staff in the team left in July 2019 and was not replaced – as he put it in his evidence *"I was worried about being exposed … the time limits were getting more serious at work - timelines added on top."*

28. The respondent accepted that the claimant's work done from home was of a good standard: as put in a question to the claimant *"there is never any suggestion that your work from home was not excellent, the worry was you would push yourself to work when not the right thing for you medically".* The claimant's position, which the tribunal accepted as accurate statement of her ability to work on the days in question, was that on these occasions *"I could have worked from home, and I have produced good work from home. There*

were no meetings I had to be in. I was an analyst. It was entirely possible to work from home. The reason I took the next day off sick was because I was told I could not work from home, so had to take off sick … I felt there was a lack of flexibility, as OH said it should be flexible. … I had completed very good work from home. And I question why there was an objection, why a problem wfh…."

29. On 12 August 2019 the claimant and Mr Davies spoke. A significant issue arising out of this call was *"an option"* discussed – the claimant taking a lower grade C3 role, for which she would be interviewed (149). The claimant's evidence was that this was the main issue discussed apart from a proposed OH appointment. Mr Davies evidence was that he was providing a number of options one of which was that OH *"may determine"* her current role is causing stress or is too demanding given her health, in which case a lower grade role would be an option. We note that in his follow-up email on the C3 role dated 20 August 2019, Mr Davies reiterated that this role *was "one of a number of options"* and it would be reliant on role availability, success at interview and meeting consistency and reliability expectations (156).

30. On 19 August 2019 Mr Davies emailed the claimant, ccing Ms Cox. The email was formal in tone, detailing the claimant's absence history, saying that the claimant was *"… advised that failure to attend [OH] appointment will result in management only being able to make a decision based on the evidence that is available…".* Under the heading *"potential routes forward"* the claimant was informed that the absence was *"now getting to a period beyond 1 year, JS is struggling keeping open an effective vacancy"* in the claimant's role; that there was as a consequence of the claimant's absences a *"reduced capacity in a business critical role…";* that the role is project based with defined deadlines *"requiring the key success criteria of consistency and reliability. We are therefore looking for a recommendation from Occupational Health about the best next step forward with Jen's health interests at the centre, but also with business needs considered".* The claimant was told that *"next steps"* would be considered with Employee Relations when the OH report was received, that after this he and the claimant would discuss *"the outcome and any subsequent proposals put forward by Employee Relations as soon as possible".* (152-3)

31. The issue of the C3 role became a significant issue. It was not referred to in Mr Davies follow-up email of 19 August, the claimant emailed asking why, and she asked for clarity on this issue which she received the following day (156). The Tribunal accepted that the claimant's belief after the 12 August call was that the respondent was considering whether she should move to a C3 role, which would also involve an application process. The claimant had also been informed on 7 August that she must take days of sick when she considered that she was able to work from home but not able to attend the office. The claimant believed that the respondent viewed her position in her role as potentially at risk. The Tribunal accepted that this combination of issues – the calls of 7 and 12 August 2019 - caused the claimant a significant deterioration in her health. As she put it in her evidence *"I took rest of week to absorb … I was now being told I had to interview for a grade lower role, this made me question my own role. … After this call I was in a tailspin, I did not know what was happening. I had worked for company,*

loved it, and did not understand that when signed-off sick, when unwell, he needed to have this conversation with me."

32. The Tribunal also accepted that it was decided that Mr Davies would have these discussions with the claimant - the need to work according to the plan or take time off sick, and the prospect of a C3 role – in part because of his concern about whether the claimant was coping, that he was *"worried"* about the claimant's health, that he was acting in part out of a duty of care. We also considered the fact there was now even more pressure on him because of a member of staff leaving, and we concluded that this also played a significant part in the management decision for Mr Davies to bring up the C3 role; the reduced capacity to undertake a business critical role coupled with the claimant's ill-health absences was a long-term issue which required addressing.

33. The Occupational Health report dated 21 August 2019 states the following - that the claimant *"…reports that she has been making good progress and taking steps to proactively make good lifestyle choices … she stated that her absences from work have been intermittent … she still has 'blips' when she feels low … she greatly enjoys her role and has good relationships in the workplace. She is very motivated to remain in work, but does find that on some days her depressive symptoms overtake".* The report states that according to the claimant, she had been unable to work in the office on some days when *"a noisy office environment would have been difficult for her, but she had been not allowed to do so, and the day was therefore considered a sickness absence…"*. The report states that the claimant has *"heightened anxiety and a deterioration in the quality of sleep"* because, the claimant says, it was suggested to her she *"she might be demoted to a lower grade role."* The report stated that the claimant was fit to return to work, but there should be a meeting with her manager *"to clarify matters and discuss concerns";* the recommendations were that the claimant's attendance targets be adjusted as she will remain vulnerable to further periods of sickness absence; the clamant be allowed to work from home on days when her symptoms are more problematic, *"as this this will help reduce her level of sickness absence on days when she may find it difficult to commute or be in the presence of colleagues … In this way she could maintain her performance as well."* The current adjustment of flexible start times was *"supported"* by OH. The report states that it is for management to determine if the proposed adjustments *"are operationally feasible"*. The report states that the claimant is fit for her role.

34. There was a delay in the respondent receiving the report, and in the meantime the claimant texted*, "Finding stuff hard – think I'm really stressed with everything that is going one at work, so hope you get the report through so we can look at a way forward."* On being asked, the claimant responded *"Happy for you to share with Libby. I think it's important everyone who needs to be involved sees it. I'm happy to be completely transparent, there was nothing particularly surprising in it…"* (164-5).

35. For the respondent, the recommendations in this report were reasonable. In his evidence Mr Davies said that *"we would have accepted"* these

recommendations, that if the claimant had suggested these adjustments on 4 August: *"We would have agreed, I wanted her back at work I needed someone in the team, so I would have considered it."*

36. A significant issue arose when the OH report was forwarded to Ms Cox's manager; for the claimant this was a breach of confidentiality, that she should have been asked before the report was disclosed to others. Her point is that this manager was *"never privy"* to any conversations, that she was *"completely unaware"* of him, that she was not asked for her consent to send the report to him. Mr Davies said that he *"did not see it as an issue"* in forwarding the report, that this manager was a party to discussions with Employee Relations, and was also concerned about the impact of the claimant's absences on the team.

37. At this time, receipt of the OH report, the claimant had a medical certificate signing her off work; the respondent therefore had contradictory information because the OH report said she was fit for work. For the claimant her view was that the OH report was right, that if the OH suggested adjustments were in place, she was fit to return to work. The claimant accepted that there was a conflict between the report and the medical certificate, but, she says, she was *"open and honest"* with Mr Davies that the only thing stopping her returning to work is the *"…conflict that needs to be resolved."* The Tribunal noted that this was a recommendation of OH – a meeting *"to clarify matters and discuss concerns",* which did not occur.

38. Instead, a call was arranged between Mr Davies, Ms Cox and the claimant on 12 September; for the respondent, the issue to be addressed was the contradictory statements between the OH report and GP's certificate. The claimant says that in this call she was told she would need to attend a further OH appointment to resolve this contradiction, and that she was told by Ms Cox to *"tell the truth"* to OH. For the claimant, this comment suggested that she had not been truthful. *"I came away from this conversation and I cancelled my 30th birthday party as I was distraught"*. The respondent's case, put to the claimant, was that the respondent was worried about the fact that the claimant had been too ambitious in coming back to work, and that the respondent's concern was that the claimant may *"downplay"* her condition to get back to work *"this is the context of being 'honest' with OH - in a positive way – say how bad you are feeling so OH can be realistic about recommendations"*. While Ms Cox did not recall the words 'tell the truth', she did say there was confusion between the reports, *"so we were encouraging her to help clarify the confusion and to be open and honest with OH…"*

39. The Tribunal accepted that in the conversation, Ms Cox said words to the effect that the claimant should be open and honest, or should *"tell the truth"* to Occupational Health. We accepted that it was said in the context set out by Ms Cox, of a confusing situation on the claimant's health status, and where Ms Cox and Mr Davies considered that the claimant had returned to work too early in the past. However we also accepted that these words can be interpreted differently, including in the way the claimant interpreted them, that she believed she was being told she had not necessarily been truthful in the past, *"…this*

affected me very adversely. I absolutely told the truth I did not dress up or down anything in the report, and I was very hurt that they would infer I would in some way bend it too my favour." The Tribunal accepted that this comment had a significant adverse impact on the claimant, including her deciding to cancel her 30th birthday celebrations.

40. The next relevant issue in the claim is the grievance lodged on 4 November 2019 in which the claimant raised allegations covering the period from June 2019 onwards. The grievance sets out a narrative of her concerns, including allegations that reasonable adjustments were not made, that adjustments made were withdrawn and that that standards of being 100% well were *"imposed without reasonable adjustments",* that *"by allowing the reasonable adjustment of working from home the vast majority of sick days could have been avoided. Instead this adjustment was restricted."* She alleges discrimination arising from disability and bullying and harassment (205-210, and 213-218).

41. The claimant sent the grievance to the 'wrong' addressee and was notified of this fact. Mr Davies provided her the correct email address on 8 November, and she resubmitted her grievance on 11 November, acknowledgment of which was sent to her on 12 November 2019 and she was told that an "independent manager" would be in contact shortly;

42. By 10th December 2019 no further response had been received, the claimant's father who was now authorised to act for the claimant in this matter chased up; it was at this time that a store manager, Mr Pete Brown, was appointed to hear her grievance.

43. The claimant was provided with a link to the 'fair treatment policy' on the company intranet (222). She could not in fact access this from home. On asking for an accessible policy she was told of the Bangladeshi version of the policy. Mr Brown said in his evidence that the policy is available on the intranet for all staff to view, that the policy would be the same across all divisions, and he could not say why this policy was provided.

44. The outcome of the grievance (while after the date of this claim to the tribunal contains issues of relevance) was that no complaints were upheld. It was noted that the claimant's changes to her work schedule at the last minute *"added to workload of others in the team. This could also delay business critical timelines"*. The allegation of a *"forceful and aggressive lecture"* from Ms Cox was not upheld; the discussion around alternative roles *"has been interpreted as an attempt to remove you from your role. …Your role … has key deadlines and time sensitive tasks … Therefore it is not unreasonable to explore alternative options with you if you have been unable to continue to work within that role…"* (295-300).

Submissions

45. For the Respondent, Ms Ferber first considered s.15 EqA – there are two issues: (i) did the respondent threaten to demote the claimant and (ii) breach

confidentiality? Neither happened. *Dunn* – the *"something"* arising out of disability need not be the sole reason for the unfavourable treatment, it must be a significant, more than trivial, reason. However, in this case nothing arises from disability. There was no threat to demote – in fact there was an offer of an adjustment to a different less stressful role. "*However, very sadly, the claimant's illness causes her to perceive neutral information has threatening"*, as her medical report acknowledges - *"hypervigilance and increase stress response ... very threatening".*

46. There was no breach of confidentiality; Ms Cox's manager was provided the OH report – the claimant had given permission, and this was the line manager's responsibility *"this was not a gratuitous cc'ing. The text at 165 is carefully written; there's no medical info in there … nothing confidential."* If there is a disadvantage in cc'ing which does arise from disability, there is a legitimate aim in cc'ing him as a responsible manager, and it was proportionate to do so.

47. The failure to make reasonable adjustments: the PCP of "Reliability - working to fixed work plan". The respondent accepts that this was a PCP from 2 August – this was agreed between the claimant and the respondent on this date, however the respondent *"could not reasonably be expected to know"* that the claimant was likely to be placed at the pleaded disadvantage, *"there was no appreciation of this effect"* when there was an agreement reached for the claimant not to work from home on days she was expected in the office. *"The concern was that the claimant was working on days when she was too unwell to attend the office."*

48. Ms Ferber accepted that the concept of *"consistency and reliability"* was a disadvantage to the claimant, and that the adjustment requested by the claimant to ameliorate this disadvantage was working from home.

49. On Mr Davies evidence that he would have provided working from home as an adjustment if she had asked for this on the 2nd August, at this time the respondent did not have actual knowledge of this disadvantage. Ms Ferber accepted that there was knowledge of poor attendance, that this was a disadvantage to the claimant.

50. The issue - whether an adjustment is reasonable - is an objective test, and part of the test is whether the adjustment is likely to remove the disadvantage. Lots of things feed into this - the pattern of attendance had been very similar in January to August - and the claimant had increasingly worked from home while sick and this was increasing again in August - a similar pattern of attendance. The claimant is increasingly working from home days that should have been days in the office, saying she's 'not feeling well'. Her mental health was really poor and she wanted to continue to work from home. Mr Davies knows this, also her email 19 July saying she's been *"too ambitious"* about trying to achieve things at work. So a situation where the claimant loves her role and wants to work, has all sorts of reasons to work, enjoys work as well as needed money, wanting to assist, are feeding into wish to continue to work even when she's not feeling well. The issue is that stopping her working from home when she was

not well enough to work was going to reduce her attendance and make her ill; but allowing her to work was going to do the same .

51. Ms Ferber argued that it was reasonable for the employer to insist on reliable and consistent hours of work. The issue was that the claimant was unable to get back into a routine and be well and healthy at work. Ms Ferber argued that the context of the 2 August 2019 agreement was that the claimant was making herself available to work at home while too ill to travel and this was creating a vicious cycle. So the respondent did not have the knowledge that working from home would alleviate this disadvantage, as they believed that it was the opposite - that working from home was exacerbating ill health. It's not working from home which is an issue, its working from home when too ill to come into the office that is the issue.

52. Also, Ms Ferber argued, the respondent could not have the knowledge that by stopping the claimant from working from home on days when she could not work in office would make her more ill; in fact the opposite, as it believed that the claimant working from home while she was too ill to work from the office was also making her ill.

53. The issue of consistency and reliability on 2nd August – it was both – an improvement was needed. And the motive of the employer, while irrelevant to the issues, it was in fact to assist the claimant to achieve better mental health.

54. On the issue of harassment – was it 'objectively reasonable' for the words to amount to harassment? The claimant had agreed with the respondent that they would proceed this way and the respondent was aware that the claimant had diarised to come in to work, or work from home, or she was too ill to work so therefore could not work. This is the agreement. How can it be reasonable for the claimant to see this as degrading and offensive?

55. Invitation to a meeting at short notice: the claimant in fact agreed to have a meeting as soon as possible, it's *"difficult to square".* The claimant was invited to have a meeting because of the issue of the sick note versus the OH report; Mr Davies picks up the phone and asks to have a meeting – it's not a formal letter. The OH report says that the claimant is fit to return and it would be beneficial to have a discussion (158), Mr Davies *"called up and suggested a meeting".* This is reasonable – she wants the OH report to be actioned.

56. The issue of *"Tell the truth"* – in fact Ms Ferber argued it was an issue of being *"open and honest",* but note that they had a reasonably close relationship with the claimant. This could only be perceived reasonably *"as a gentle encouragement - an open comment to someone being asked to see OH".* There was a good relationship between the claimant and Ms Cox *"a kind, careful person"*, and she felt she had a good enough relationship that she was happy to say something like this to the claimant. It's not therefore reasonable in law for that comment to have that effect. Even if you 'take the claimant as you find her' *"the context is a kind thoughtful person making a reasonable comment".*

57. Ms Ferber concluded briefly on the issue of victimisation, pointing to her written closing (which we considered), saying that the claimant had not been subjected to any detriment because of her grievance or other protected act.

58. Mr McCarthy for his daughter argued that there was no evidence the claimant's relationship with Ms Cox was good – it was not, but it was good with Mr Davies. The claimant had always been open an honest. The respondent is a large employer with comprehensive policies on mental health and inclusion. And policies show a high standard. Also policies say be enquiring and find out. Not 'just wait'. So a high threshold. And ethos - look after disabled staff and understand mental health. These are bright individuals, with enquiring and analytical roles.

59. When the claimant was returning to work she is *"functional and capable".* But she lacked confidence and self-worth - as part of her mental health condition. By 29 May 2019 - her illness is *"mild to moderate"* – see GP's report. She was working and capable of work. However a series of acts caused exacerbation - see page 17 statement. The respondent accepts that stress makes things worse for the claimant. They knew stressors would make it worse. See answers to questions of witnesses - all accepted that would be worse. All of the issues set out at paragraph 17 would cause stress and exacerbate mental health; this is what caused her to cancel her birthday party.

60. The respondent did have knowledge of the effect of her illness; the March 2019 Occupational Health report references social anxiety - same in and outside of work, that crowds are an issue, therefore the respondent was on notice that travel/attendance at work will *"cause anxiety/panic attacks. So the respondent is on notice, but chose not to do anything about it."*

61. The fixed work schedule – there was actual knowledge that this was not working – see all the last minute changes to the schedule in the bundle. The respondent's witnesses are bright *"but they chose not to look and not to enquire, and this is what happens. The respondent knows that coming into work is going to be very difficult, but they chose to look the other way"*. There was no return to work meeting in July; there was no risk assessment, "*they did not understand the condition".*

62. Reasonable adjustments: Mr McCarthy argued that the respondent wanted 'capacity', but this they could have achieved by allowing the claimant to work from home. Instead they set up a *"fixed schedule predicted in advance and she was monitored against it and then had to go cap in hand every time there's a change."*

63. The contention of the respondent is that this adjustment of allowing her to work from home would not have alleviated any disadvantage as things were going down-hill. But the claimant loved her work, it was cathartic, and it showed her self-worth. Work was never an issue and being able to perform her role was going to be good for her. *"What was not good for her is to be asked to do her*

work that she could not do so. This is obvious – she's screaming out for flexibility, instead she got rigidity".

64. It is disputed that the respondent needed the claimant to be present at work, the 'vast majority' of the times she was in work she *"hid away in a corner".* Training could be done online. In fact the requirement to be in the office at least two days a week *"is not to do with work requirements, it's just an expectation".* There is a notice period to change the schedule – so this is nothing about the role, it's not a requirement to do the role, *"it's a regime which is unsuitable for the claimant, and for anyone in her condition".*

65. Discrimination arising from disability: look at the threat to demote in context and how it was presented. The claimant is being asked to do things she can't do – consistency at work, reliability and the options are to demote to C3: the respondent *"should have known"* that this would cause anxiety and trauma given the claimant's condition, including hypervigilance.

66. The breach of right to confidentiality: the approval by the claimant was given in the context of the OH report being sent to Ms Cox and to Employee Relations, approval was given in the context of that discussion. When sent to a senior manager, this was a surprise to her. This was confidential information *"it's the trust"*, sent without her knowledge *"suddenly gone two levels up".* Mr McCarthy referenced his daughter's hypervigilance as a symptom that *"this does play a role and the respondent should have known of this. … Her confidence was low, she felt attacked, she started to curl up into a ball."*

67. How did the invitation to another OH meeting amount to unwanted conduct? Mr McCarthy argued that his daughter would naturally comply with an invitation, she wanted to work, but the issue *"goes to method and timing":* a call without notice was *"bad"* - a text should have been sent. And what was said – *"this time tell the truth"* and not open and honest as suggest by the respondent. But either comment *"honesty is a fundamental tenant"* for the claimant – *"Why do they need to say open/honest? Unless they have a doubt that she has been."* There was no conflict over the OH report and the sick note; the report does not say go back to work that day; she has had a further knock and needed time to recover. There has been an implication that she has not been open, its implicit that she's not been believed. A better stance would have been – 'tell me what would help you'. As the respondent said, *"it's become formal"*.

68. Victimisation: the respondent could and should have started the grievance process earlier.

Conclusions on the evidence at the law

Discrimination arising from disability

69. We first asked what had happened on the call on 12 August 2019 – what was said to the claimant and was there a threat to demote or threat of redundancy by Mr Davies? We noted that Mr Davies 20 August email states that if OH

determined the role was causing stress or is too demanding, one option may be a lower grade role, subject to the requirement for consistency and reliability, and subject to success at interview. The Tribunal had no doubt that Mr Davies had the best of intentions in making this suggestion – the claimant was in his view unwell and was struggling. The Tribunal concluded that as well as Mr Davies concern about the claimant's health, the need for the team to work with consistency and reliability also played a significant part in the decision, taken in conjunction with Ms Cox and perhaps more senior managers, to reference *"a potential outcome"* as a *"change to C3 role"* (156). The issue of consistency and reliability was a significant issue for the respondent throughout the evidence, and we accepted Mr Davies evidence that the claimant changing her agreed work-pattern was disruptive to team planning, it added to his workload, and it impacted on her ability to have work-place ad-hoc discussions. However, the respondent's position also was that the claimant's work was of a good standard while she worked from home.

70. The Tribunal concluded that this remark amounted to unfavourable treatment. Even if only presented as an option, it was a significant part of the conversation and we concluded no other real alternatives were discussed during this call. It was the team managers' thought processes, communicated to the claimant, that a demotion was an issue to consider, one which we considered that many employees would see as a threat of demotion, a role she would have to be apply and be interviewed for.

71. We next considered whether this treatment was because of matters arising from her disability – the claimant's disability related absences. We concluded that it was. The unfavourable treatment was because the claimant was not working to the fixed-schedule, in particular she was asking to work from home on days she was unable to travel to the office, and as a consequence she was now on sick leave; it was in this context and while discussing a referral to OH that the issue of the C3 role arose. We noted also the respondent's justification for raising the C3 role was health-related, that the claimant's ill health caused the respondent concern about whether she was coping in her role. We concluded that this treatment - the reference to the C3 role – arose in consequence of the claimant's disability, that it was her ill-health, absence and issues with consistency and reliability which were all in the mind of Ms Cox and Mr Davies when this suggestion was made

72. The legitimate aim: We noted that the legitimate aim pleaded by the respondent – that this was raise*d "to safeguard the claimant's well-being in order to facilitate a return to work and to ensure the claimant's managers … were aligned in order to support the claimant…."?* (paragraph 28 page 72). We accepted that this was a legitimate aim. And we concluded that this reason was part of the reason for raising the issue. However, we also concluded that a significant reason for this remark being made was because of the requirement for consistency and reliability from the claimant; this requirement was compounded by the loss of another team member, and the claimant's return to work was not going to plan. The Tribunal noted that consistency and reliability is not the respondent's pleaded legitimate aim. We did accept that this was a role which was regarded

as business critical, and the claimant's absences were causing additional stress on Mr Davies and the rest of the team and which was impacting on service delivery.

73. We did not consider that the suggestion made to the claimant about the C3 role, particularly in the context of this suggestion which was in a call when the claimant was off work, was a proportionate means of achieving the respondent's pleaded legitimate aim of safeguarding the claimant's wellbeing in order to facilitate a return to work and to ensure management support for the claimant. In saying this, the Tribunal accepted that this suggestion was made with a degree of good intention – both because of concern about the claimant's health and because of concern about the impact on Mr Davies. However, in considering the balancing exercise we did not consider that this conduct was either an appropriate or a reasonably necessary means of achieving the legitimate aim. A conversation to this effect may be a reasonable conversation to be had, but the Tribunal considered that it would not usually be appropriate to do so without first seeking advice from OH on whether the role is having an impact on health and/or absences; in this case it was inappropriate to hold the conversation at this time. We also concluded that it was neither appropriate nor reasonably necessary to raise this issue in the way that the respondent did – in a phone call when she was off sick with depression and complex PTSD. We also concluded that what was said – being told that for this "option" she would have to interview and demonstrate consistency and reliability - was not an appropriate or a reasonably necessary way of achieving the legitimate aim. We concluded that in this context and referring to the C3 role in this way was likely to have the consequences the respondent was trying to avoid, of harming the claimant's wellbeing; this was we considered a foreseeable consequence, and it came to pass. We also considered that in this case a lesser measure of asking appropriate questions of OH - for example 'is the role a factor in her ill-health and absences? - and awaiting the outcome of the OH report before taking this option forward with the claimant would have been a more proportionate way of achieving this legitimate aim.

74. We therefore concluded that the respondent's actions in raising the C3 role in the way it did in a call when the claimant was on sick leave amounted to unfavourable treatment because of matters arising from her disability, and this action was not a proportionate means of achieving the respondent's legitimate aim. This part of the s.15 Equality Act claim of discrimination arising from disability therefore succeeds.

75. We next considered whether the respondent had breached the claimant's right of confidentiality by forwarding the OH report to a senior manager. We first considered whether this was 'unfavourable treatment'. We concluded not. The reason for this conclusion: the claimant had given express permission for the report to be forwarded and her text strongly suggested that she was leaving this to the discretion of Mr Davies and Ms Cox. The Tribunal considered that they acted reasonably within the discretion given to them by the claimant, and that this cannot therefore amount to unfavourable treatment. If we are wrong, we considered whether this was a proportionate means of achieving the legitimate

aim. We concluded that it was; it was sharing information within the management team who would be involved in decisions about the claimant's return to work. We accepted that Mr Stuart and Ms Cox needed guidance, there was concern about the impact of the claimant's absences on Mr Davies. We concluded that the aim was to seek the input of a manager who was supporting and assisting the team, including Mr Stuart and Ms Cox, to assist in finding a resolution to the issues. This part of the s.15 Equality Act claim of discrimination arising from disability therefore fails and is dismissed.

Reasonable adjustments

76. The respondent accepts that it applied a PCP of a requirement for reliability - i.e. to work according to a fixed workplan - from 2 August 2019. The respondent accepts that the claimant was placed at a substantial disadvantage (paragraph 30 closing).

77. The respondent's case is that it had no knowledge that this PCP placed the claimant at a disadvantage. We concluded that in fact the respondent did have knowledge that this PCP placed the claimant at a disadvantage, because she was unable to work to the agreed fixed work-plan and she was required to take sickness absence instead of working from home, as she was told on 7 August 2019. The respondent was fully aware when it informed the claimant on 7 August that she would suffer the substantial disadvantage of having to take sick leave on a day she considered she was fit to work from home.

78. The Tribunal also concluded that an adjustment would have minimised or mitigated the substantial disadvantage: the claimant said that the adjustment would have been to allow her to work from home when she was not able to come to the office; Mr Davies in his evidence accepted that this would have been an option the respondent would have considered. When this adjustment was recommended by OH on 21 August 2019, the respondent did not object to it as a potential adjustment.

79. The Tribunal also concluded that the respondent cannot show that the disadvantage would not have been eliminated or reduced by this adjustment. It was the respondent's case that the claimant's work from home was of a reasonable standard; the claimant felt able to work from home; OH said it may be an adjustment which would assist the claimant. We concluded that the respondent cannot show that the disadvantage would not have been eliminated by this adjustment. In fact the evidence pointed the other way as the claimant would be able to work from home and, as Mr Davies said, any assistance would have been of benefit to him, even if part of it was assistance from home.

80. The Tribunal concluded that the respondent failed to take such steps as were reasonable to avoid the substantial disadvantage: Mr Davies said the respondent would have allowed her to work from home as an adjustment had this been suggested earlier; it follows that this was an adjustment which could have been allowed pending the OH report. This would have avoided the

substantial disadvantage, and it would have provided Mr Davies with at least some relief with the team's work demands.

81. The claim of a failure to make reasonable adjustments therefore succeeds.

Harassment

82. The Tribunal considered whether the call on 12 August 2019 in which the C3 role was mentioned and the follow-up email of 19 August 2019 constituted harassment related to the claimant's disability. We first considered whether it was conduct related to the claimant's disability. We concluded that it was. On the respondent's own case it was raised because of concerns whether the claimant was coping in role because of her ill-health and because of her absences and it was directly related to her ill-health and absences. We concluded that the C3 role was raised for reasons directly related to her disability.

83. We next considered if this conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We concluded that this certainly was not the purpose of the call; we found that its purpose was to inform the claimant of the respondent's thinking on her role, including whether she was coping with her role and the issue of the effect of her absences on the team. We found therefore that the motives for making this comment were benign.

84. We next considered whether this issue and the way it was raised in the call and in the email had the effect of harassing her. We concluded that the claimant saw this as a hostile comment, that the effect on her was she considered it to be a remark which was humiliating, as it suggested the respondent felt she was not up to the role. It also potentially led to what she perceived as a hostile work environment for her.

85. However we also carefully noted the way the issue was put in the email to the claimant on 20 August – that this was an option to be considered after the OH appointment. While the claimant was clearly very upset, and she considered it to be a very negative call which she considered to be hostile, the email provided a degree of clarity which may not have been apparent to her on the call. That this was an issue which was subject to OH advice, it was an option if OH felt the claimant was not coping in her role. The claimant was already aware that consistency and reliability were required, and so this part of the email could not subjectively be for the claimant an issue of harassment, even read in conjunction with the rest of the email.

86. We therefore concluded that it was not reasonable for the totality of what the claimant had been told in the call and what was said in the 20 August email to amount to harassment - it was not reasonable for the claimant to consider that this conduct amounted to harassment. We noted that the fact that the claimant was peculiarly sensitive to adverse comments does not *necessarily* mean that harassment will be shown to exist.

87. We next considered whether Mr Davies refusing the claimant's requests to work from home and instead take sick leave amounted to harassment. We accepted that this conduct was related to the claimant's disability, for the reasons set out above. We did not consider its purpose was to harass the claimant. On the effect of this treatment, we again accepted that the claimant had a subjective perception that it was hostile and humiliating to be told to take sick leave when told to work from home. However, we did not consider that it was reasonable for the claimant to consider that this treatment amounted to harassment. The claimant was aware that she had to ask permission to work from home, that there was every possibility the respondent may refuse to allow her to do so because the claimant was not sticking to the plan, and the claimant had been told in advance that this may be the case. On being told on 7 August the issue was being checked, the claimant said ok. The claimant had not objected the week before when she was told that she should not work from home on days planned in the office. She had not asked for this as an adjustment, or queried why this was not possible. The Tribunal accepted that the claimant took this refusal very personally, very hard indeed, but we did not consider that it was reasonable for this treatment to amount to hostile and humiliating conduct in these circumstances.

88. We did not consider that Mr Davies inviting the claimant to a meeting to discuss her absence at short notice, by phone on 12 September 2019, amounted to harassment. We accepted that it was conduct related to her disability – i.e. her current absence. But the August OH report had recommended the claimant and her managers keep in touch, and the respondent wanted to discuss issues arising from her absence, including the issue of the OH report and medical certificate. The claimant had given no indication that she did not want to be contacted by phone. While we accepted that the claimant's subjective impression was that this amounted to harassment after the event when piecing together the events, objectively we did not consider that the fact of the call could amount to harassment as defined.

89. We carefully considered whether the comment - be open/honest/tell the truth - said to the claimant on the 12 September 2019 call amounted to harassment. We concluded that it did not do so, for the following reasons. We concluded that its purpose was not to harass. On careful consideration, we did not consider that it was reasonable for the remark to have this effect. We concluded that it was a comment related to her disability, as it was in said in the context of an OH appointment to discuss her absence and the way forward. The claimant was clearly offended and very distressed indeed, and she regarded it as humiliating and that it violated her dignity. She believed that she was being told that either she had not told the truth beforehand or that there was a risk she would not do so at the forthcoming OH appointment.

90. However, we also carefully noted the context; that the respondent was concerned that the OH report said that she could work, and the GP fit note said that she was not fit for work, and the claimant had said she had been too ambitious, and the respondent believed that she had been too ambitious. The

respondent was, we found, genuinely concerned about whether the claimant was fit for work, or not. The Tribunal also noted that this genuine concern was known to the claimant, that the respondent made it clear to the claimant that its concern was about the conflict between the medical statements, and that it wanted to be sure that the claimant was not being too optimistic when discussing her ability to work with OH.

91. We concluded therefore, in this context of genuine concern within the respondent about the conflict in medical reports and this concern was communicated to the claimant, that this remark, to be 'open and honest' or 'tell the truth', could not objectively be seen as harassment. While a clunky use of language, in the context of this conversation the claimant was being told of the respondent's genuine concerns about the medical reports, the claimant's health and the respondent's need for accurate evidence to determine the best way forward. The claimant was aware of this context, and it was for this reason we did not consider that, objectively, it could amount to harassment .

92. We concluded therefore that the claims of harassment fail and are dismissed.

Victimisation

93. We accepted in full the respondent's evidence for the reason for the delay in commencing the grievance process, the initial advice given to her, and the providing the Bangladeshi policy. There was no connection to the claimant's protected act, and this is assuming a protected act was made prior to the grievance. The claimant initially sent her grievance to the wrong addressee and was given incorrect advice; there was a delay in getting her the correct policy and in setting up the grievance investigation. These were all very unfortunate errors, and we accepted that they compounded the claimant's feelings and contributed to her ill-health. However there was no evidence that this was anything other than human error; there was no evidence that this error in any way was caused by the claimant's allegations of discrimination. The claim of victimisation therefore fails and is dismissed.

Time

94. While not actively pursued by the respondent as an issue, we considered the issue of time. Were all claims of discrimination brought within time?

95. EC notification commenced on 5 November 2019, and ended on 5 December 2019. Th claim was issued on 10 December 2019. The first act of discrimination as found occurred on 7 August; ACAS conciliation therefore commenced within the 3 month time limit and the claim was issued within one month of the end of the conciliation period. The Tribunal concluded that all of the claim was therefore brought within the relevant time period.

Remedy

96. The parties are asked to write to the Tribunal within 14 days providing their dates of availability for a one hour telephone Preliminary (Case Management) Hearing. It would be preferable if this hearing could take place in January 2021.

_____

EMPLOYMENT JUDGE M EMERY

Dated: 21 December 2020

Judgment sent to the parties
On: 29/12/20

……
For the staff of the Tribunal office

……