Case Number: 1800167/20V

EMPLOYMENT TRIBUNALS

Claimant:	Miss V Woodhouse
Respondent:	Doncaster Metropolitan Borough Council
Heard at:	Leeds Employment Tribunal
Before:	Employment Judge Deeley, Mrs JL Hiser, Mr D Pugh
On:	25, 26, 29 and 30 March 2021
Representation	
Claimant:	In person (with assistance from a friend, Mrs A Mitchell)
Respondent:	Mr H Wiltshire

JUDGMENT having been sent to the parties on 31 March 2021 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

WRITTEN REASONS

INTRODUCTION

Tribunal proceedings

1. Neither party objected to holding this hearing as a remote hearing. The form of remote hearing was "V: video - fully (all remote)". A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing.

2. This claim was case managed during three preliminary hearings by:

   2.1 Employment Judge Morgan on 29 May 2020;

   2.2 Employment Judge Shore on 4 August 2020; and

2.3 Employment Judge Maidment on 23 September 2020, when the Judge concluded that the claimant's conditions met the test for disability status under s6 EQA.

3. We considered the following evidence during the hearing:

3.1 a joint file of documents and the additional documents referred to below;

3.2 witness statements and oral evidence from:

3.2.1 the claimant;

3.2.2 the respondent's witnesses:

Name	Role at the relevant time
1) Mrs Sara Clark	Advanced Practitioner
2) Mrs Kelly Wilks	HR Business Manager
3) Ms Claire Warren	Head of Service
4) Mrs Annika Leyland-Bolton	Grievance appeal manager

4. Both parties provided additional disclosure documents during the hearing. Neither side objected and we included the additional documents in the hearing file.

5. We also considered the helpful written and oral submissions made by the claimant and by the respondent's representative.

Adjustments

6. We asked both parties if they wished us to consider any adjustments to these proceedings. This hearing was converted to a CVP hearing at the claimant's request, because she felt that this would help her to manage the difficulties that her medical conditions may cause her during the hearing.

7. We agreed the following adjustments with the claimant:

7.1 taking more frequent breaks and allowing additional breaks at the claimant's request at any time; and

7.2 permitting the claimant to use a notepad during her witness evidence to assist with recollection.

8. We also reminded the respondent that their witnesses could also request additional breaks at any time if needed.

Consideration of anonymity etc. orders

9. We raised the possibility of anonymity and other similar orders with the parties at the hearing of this claim. We also noted in the written Judgment of this claim that any written reasons (if requested) may refer to information relating to the claimant's medical conditions and the claimant may wish to consider applying to the Tribunal for an order regarding that information, such as an anonymity order under Rule 50

of the Employment Tribunal Rules of Procedure. However, the claimant did not make any such application when she requested written reasons.

CLAIMS AND ISSUES

10. The list of issues was discussed with the parties in detail at the start of the hearing. The revised list of issues that the Tribunal considered in reaching its conclusions on this claim is set out below.

11. The claimant brought the following complaints of disability discrimination the Equality Act 2010 ("**EQA**"):

    11.1 Direct discrimination;

    11.2 Discrimination arising from disability; and

    11.3 Harassment.

LIST OF ISSUES

12. I provided the parties with a draft list of issues at the start of the hearing, which was based on the list prepared by Employment Judge Morgan. We discussed various points at the start of the hearing and the respondent conceded some of the issues listed. The agreed list of issues is set out below.

DISABILITY DISCRIMINATION – EQUALITY ACT 2010 ("EQA")

The Tribunal concluded at a Preliminary Hearing on 23 September 2020, that the symptoms set out below arising from the claimant's conditions of:

a) Ehlers Danfoss Syndrome; and
b) Mild Cognitive Impairment;

amount to a disability for the purposes of s6 of the EQA.

The claimant's impairments consist of:

a) joint and back pain;
b) fatigue;
c) short term memory loss; and
d) temporary disruption of cognitive function.

TIME LIMITS (S123 EQA)

1. Were the claimant's complaints submitted to the Tribunal within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

    1.1. Was the claim made to the Tribunal within three months (plus any ACAS early conciliation extension) of the act to which the complaint relates?

1.2. If not, was there conduct extending over a period?

1.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.4.1. Why were the complaints not made to the Tribunal in time?

1.4.2. In any event, is it just and equitable in all the circumstances to extend time?

DIRECT DISCRIMINATION – DISABILITY (S13 EQA)

2. Did the respondent do the things set out at Table A and labelled 'direct discrimination'?

3. If so, was that less favourable treatment?

The claimant has not named any comparators and relies on hypothetical comparators. The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's circumstances. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

4. If so, was it because of the claimant's disability?

DISCRIMINATION ARISING FROM DISABILITY (S15 EQA)

5. Did the respondent treat the claimant unfavourably by doing the things set out at Table A and labelled 'discrimination arising from disability'?

6. *The respondent accepts that the following things arose in consequence of the claimant's disability: difficulties of recollection, recall and memory.*

7. If the respondent did treat the Claimant unfavourably (as set out above), was this because of 'something arising' in consequence of the claimant's disability (as set out above)?

8. Was the treatment a proportionate means of achieving a legitimate aim? *The Respondent says that its aims were:*

8.1. to secure the safety of service users and staff (including the claimant); and

8.2. to ensure the efficient/effective running of the social work team.

9. The Tribunal will decide in particular:

9.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;

9.2. could something less discriminatory have been done instead;

9.3. how should the needs of the claimant and the respondent be balanced?

10. *The respondent accepts that they had knowledge of the claimant's disability by 31 January 2019.*

FAILURE TO MAKE REASONABLE ADJUSTMENTS (S20 & 21 EQA)

11. *A "**PCP**" is a provision, criterion or practice. The respondent accepts that they operated a PCP of requiring the claimant to carry out duties within the post to which she had previously been allocated in respect of the complaints labelled 'failure to make reasonable adjustments at Table A.*

12. *The respondent accepts that the PCP put the claimant at a 'substantial disadvantage' compared to those who do not suffer from the claimant's disability, in that the claimant's difficulties of recollection, recall and memory meant that she found it more difficult to:*

12.1. *cope with a diverse role;*

12.2. *carry out multi-tasking; and/or*

12.3. *deal with different and unfamiliar processes and systems.*

13. What steps could have been taken to avoid the disadvantage? The c**l**aimant suggests:

13.1. that she should have been transferred or migrated to an alternative post with which she was familiar and in which she was experience.

14. Was it reasonable for the respondent to take those steps (and, if so, from what date)?

15. If so, did the respondent fail to take those steps?

HARASSMENT – DISABILITY (S26 EQA)

16. Did the respondent do the things set out at Table A labelled 'harassment'?

17. If so, was that conduct unwanted?

18. Did that conduct have the purpose or effect (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) of:

18.1. violating the claimant's dignity; or

18.2. creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

19. If so, was that conduct related to the claimant's disability?

TABLE A – FACTUAL ALLEGATIONS			
Date	**People involved**	**Claimant's allegations**	**Type of complaint**
1. 31 January 2019	Sara Clark and Kelly Wilkes	The decision on or before 31 January 2019 to require her to attend a meeting of concern in a letter which was intimidating and sounded as if it was a punitive measure.	Direct discrimination Discrimination arising from disability
2. 11 February 2019	Sara Clark and Katy Hogden	Having the Claimant attend a routine supervision which included the intimidating presence of an unexplained second manager.	Direct discrimination Discrimination arising from disability
3. On or around 18 February 2019	Sara Clark, Katy Hogden and Katherine Purton	The decision, communicated on or around 18 February 2019, to place the Claimant on a performance improvement plan.	Direct discrimination Discrimination arising from disability
4. 20 February 2019	Debbie Crohn (former Head of Service)	The decision communicated on 20 February 2019 to refuse the Claimant permission to return to working on the Adult Social Work East Team.	Failure to make reasonable adjustments
5. 2 September 2019	Sara Clark	The sending to the Claimant on 2 September 2019 (which the claimant states that she received on 18 September 2019) a threatening and intimidating letter which included the requirement to attend a meeting at short notice with two senior HR officers.	Discrimination arising from disability Harassment
6. October 2019	Claire Warren (Head of Service	The refusal to transfer the Claimant back to the East Team in October 2019 instead requiring her to apply 'externally' for the vacancy.	Direct discrimination Discrimination arising from disability Failure to make reasonable adjustments

RELEVANT LAW

20. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' pleadings and the respondent's written submissions.

Direct discrimination (s13 EQA)

13. Direct discrimination and harassment is defined by the EQA as follows:

> **13 Direct discrimination**
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
> …

14. In addition, s23 of the EQA states in relation to comparators for direct discrimination cases that:

> **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.

15. There are two key questions that the Tribunal must consider when dealing with claims of direct discrimination:

    15.1 was the treatment alleged 'less favourable treatment', i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances;

    15.2 if so, was such less favourable treatment because of the claimant's protected characteristic?

16. However, the Tribunal can, in appropriate cases, consider postponing the question of less favourable treatment until after they have decided the 'reason why' the claimant was treated in a particular way (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 HL).

17. In relation to less favourable treatment, the Tribunal notes that:

    17.1 the test for direct discrimination requires a claimant to show more than simply different treatment (*Chief Constable of West Yorkshire Policy v Khan* 2001 ECR 1065 HL);

    17.2 a claimant does not have to experience actual disadvantage for the treatment to be less favourable. It is sufficient that a claimant can reasonably say that they would have preferred not to be treated differently from the way the respondent treated or would have treated another person (cf paragraph 3.5 of the EHRC Employment Code); and

    17.3 unreasonable treatment in itself is not sufficient. For example, in *CC of Kent Constabulary v Bowler* EAT 0214/16, the EAT observed that: *"merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment*

is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic";

17.4 the motive and/or beliefs of the parties are relevant to the following extent:

17.4.1 the fact that a claimant believes that she has been treated less favourably does not of itself establish that there has been less favourable treatment (see, for example, *Shamoon*);

17.4.2 in cases where the conduct is not inherently discriminatory, the conscious or unconscious 'mental process' of the alleged discriminator is relevant (see, for example, *Amnesty International v Ahmed* 2009 ICR 1450 EAT); and

17.4.3 for direct discrimination to be established, the claimant's protected characteristic must have had a *'significant influence'* on the conduct of which she complains (*Nagarajan v London Regional Transport* 1999 ICR 877 HL).

18. The Tribunal also notes that if an employer treats all employees equally unreasonably, it is not appropriate to infer discrimination (see, for example, *Laing v Manchester City Council & another* 2006 ICR 1519 EAT and *Madarassy v Nomura International plc* 2007 ICR 867 CA). Lord Justice Mummery in *Madarassy* stated that:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

19. Lord Justice Sedley in *Deman v Commission for Equality and Human Rights & ors* 2010 EWCA Civ 1279 CA qualified this by stating that: *"…the "more" which is needed to create a claim requiring an answer need not be a great deal…it may be furnished by the context in which the act has allegedly occurred"*. For example, in *Veolia Environmental Services UK v Gumbs* EAT 0487/12, the EAT held that a tribunal was entitled to take into account the fact that the employer had given inconsistent explanations for its conduct (whilst excluding consideration of the substance and quality of those explanations at the first stage of the test for direct discrimination).

Discrimination arising from disability (s15 EQA)

20. The right not to suffer discrimination arising from disability is set out at s15 of the EQA:

15 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.

(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.

Something arising from disability

21. The EAT in *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090 (paragraph 96) held that s15 requires the Tribunal to consider "two distinct causative issues" when considering whether the 'something' alleged arose in consequence of B's disability. The EAT set out the issues as follows:

    "(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."

Proportionate means of achieving a legitimate aim

22. The Tribunal must apply an objective test when considering whether there was a proportionate means of achieving a legitimate aim, having regard to the respondent's workplace practices and organisation needs (see, for example, the EAT's decision in *City of York Council v Grosset* (UKEAT/0015/16), as approved by the Court of Appeal ([2018] EWCA Civ 1105). We note that the Tribunal must make its own assessment as to whether 'proportionate means' have been used to achieve a legitimate aim.

Failure to make reasonable adjustments (s20 and 21 EQA)

23. The legislation relating to a claim for failure to make reasonable adjustments is set out at sections 20 and 21 of the EQA:

20 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) The duty comprises the following three requirements.

(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.

…

21 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.

…

24. We also note that 'substantial' in the context of 'substantial disadvantage' is defined at s212(1) of the EQA as: *"more than minor or trivial"*.

25. The public policy behind the reasonable adjustments legislation is to enable employees to remain in employment, or to have access to employment. The Tribunal has to carry out an objective assessment to consider whether any proposed adjustment would avoid the 'substantial disadvantage' to the employee caused by the PCP (*Royal Bank of Scotland v Ashton* [2011] ICR 632).

26. In addition, the Tribunal needs to consider the implications of any proposed adjustments on a respondent's wider operation (*Lincolnshire Police v Weaver* [2008] AER 291, decided under the former Disability Discrimination Act 1995).

Harassment

27. The provisions relating to harassment are set out at s26 of the EQA:

26 Harassment

(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 in subsection (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.

(5) The relevant protected characteristics are – …disability;

…

28. There are three elements to the definition of harassment:

28.1 unwanted conduct;

28.2 the specified purpose or effect (as set out in s26 EQA); and

28.3 that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336.

29. A single act can constitute harassment, if it is sufficiently 'serious' (cf paragraph 7.8 of the EHRC Code).

30. The burden of proof provisions apply (see below). When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of a protected characteristic (such as disability), it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of that characteristic. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of that characteristic. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see *Nazir v Asim & Nottinghamshire Black Partnership* [2010] IRLR 336 EAT.

31. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant.

32. In *Dhaliwal*, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

"while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."

33. The EAT in *Dhaliwal* also stated that:

"Not every…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".

34. The EAT in *Weeks v Newham College of Further Education* (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

"…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that

a single act is in itself necessarily sufficient and requires such a finding….An 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."

Burden of proof

35. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

> **136 Burden of proof**
> …
> (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.
> …
> (6) A reference to the court includes a reference to -
> (a) an employment tribunal;
> …

36. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

FINDINGS OF FACT

Context

37. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

38. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:

    "Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

39. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

40. The respondent is a local authority, with responsibility for social care for its residents. The respondent divides its Adult Social Care Services into four teams:

    40.1 East Team (where the claimant was based initially);

    40.2 North Team (to which the claimant transferred in December 2018);

    40.3 South Team; and

    40.4 Central Team.

41. The four teams have a similar management structure, which consists of:

    41.1 Advanced Practitioners, who supervise team members; and

    41.2 a Team Leader, who is responsible for strategic matters.

42. The Teams reported into a Head of Services. This role was initially performed by Ms Debbie Crohn on the claimant's appointment. Ms Claire Warren took over this role in September 2019.

43. The claimant has worked in social care throughout her working life, mainly in residential settings. She qualified as a social worker during 2015 and applied for the role of Adult Social Worker with the respondent in May 2018. All newly qualified social workers are subject to additional support during their first year of qualified experience, known as "Assessed and Supported Year in Employment" ("**AYSE"**).

44. The claimant was appointed as an Adult Services Social Worker, working full time (37 hours per week over 5 days) in the respondent's East Team from July 2018. She was supervised by Andrea Meredith (Advanced Practitioner), who reported into Faye Mackenzie (Team Leader).

45. The claimant underwent eye surgery relating to a detached retina at the time that she was supposed to join the respondent. She had an occupational health review on 26 July 2018, which stated that she could resume her normal duties. The occupational health report did not refer to any other medical conditions that the claimant had at that time.

46. The claimant met with Ms Meredith on 23 August 2018 and discussed her induction arrangements. The claimant mentioned that she had health issues relating to hypermobility and other conditions. The claimant asked to take a day off each week

to attend her Pilates class. Ms Meredith agreed that the claimant could work from home on Wednesdays and could use flexible leave to attend her class. Ms Meredith also noted:

"Victoria settled into the team, she would prefer to work part time due to health issues but feels able to continue using holidays and flexi to give her [a] *break within the week."*

47. The claimant had an episode (described as 'brain fog') whilst on annual leave in September 2018 and her symptoms continued when she returned to work. The claimant informed Ms Meredith of her symptoms on 11 October 2018. Ms Meredith referred the claimant to occupational health. She recorded in the referral:

"Victoria is stating that she is having memory problems…recently her memory has deteriorated significantly. She has been to see her GP who has sent her for blood tests and she is awaiting the results. Victoria states that she is finding it difficult to do computer work and remembering things…

…There is a concern from management about stress and she has been informed to complete necessary stress e-learning and e-questionnaire. There is also concern about how her forgetfulness impacts on her work as she is working with vulnerable adults."

48. The occupational health report dated 6 November 2018 stated that:

"She states that within work since August she has started to use a new computer system and changed clients. She does not believe she is stressed or anxious…

She tells me she tries to take care of her overall health and is reducing her hours of work when they can be accommodated…

She does still have ongoing other health issues which are being monitored and managed…

She appears to be fit to attend work and her medical professionals agree.

She has no definitive diagnosis of a neurological disorder. Her other health issues appear not [to] *be impacting on her ability to complete her tasks currently.*

She will continue to reflect on completing her work and ask for help or adjustments if and when required…"

49. The claimant also asked to reduce her hours to 4 days per week. Ms Meredith said that the East Team was unable to reduce the claimant's hours of work because they would not be able to recruit another social worker to provide the other seven hours' work. However, Ms Meredith was aware of a part-time role in the North Team due to a social worker in that team seeking a full-time role. Ms Meredith called Mrs Kelly Wilks (HR Business Manager) before the transfer to check whether this would be possible. Mrs Wilks advised that the transfer could take place and the claimant agreed to the transfer.

Claimant's transfer to the North Team

50. The claimant transferred to the North Team on 10 December 2018. The management structure in the East Team at that time consisted of:

    50.1 Advanced Practitioners – Ms Katy Hogden (the claimant's supervisor) and Mrs Sara Clark; and

    50.2 Team Leader – Ms Katherine Purton.

51. Ms Hogden and Ms Purton are still employed by the respondent, but they were not called to give evidence at this hearing.

52. Ms Hogden and Mrs Clark dealt with any day to day management issues on a joint basis. Each of them was responsible for supervising nominated team members, for example when carrying out Personal Development Reviews. However, they were both responsible for allocating and managing casework within the team. We also note that Ms Hogden was pregnant at that time and was due to go on maternity leave in the Spring of 2019.

53. The services that the claimant performed in the East Team from 8 October 2018 onwards was that of Discharge to Assess Social Worker (known as a "**D2A role**"). The D2A role was funded by the Care Commissioning Group and related to adults in nursing homes. We accept the claimant's evidence that the role involved:

    53.1 working with a multi-disciplinary team (including health professionals) to assess a person's needs to see if they should remain in a nursing home or whether they could be discharged;

    53.2 completing assessments and support plans set out in the D2A procedure, via computer and workflow processes; and

    53.3 handling a lower volume of cases with higher turnover rate, compared to a Community Social Worker's caseload.

54. The claimant's role in the North Team was that of a Community Social Worker, funded directly by the respondent. This role involved:

    54.1 dealing with a higher volume of cases, compared to the D2A role, relating to any vulnerable adults within the community and at residential homes;

    54.2 performing home visits and working autonomously;

    54.3 completing end to end assessments as part of the respondent's "CareFirst" system;

    54.4 considering direct payment issues (for people who employed their own care assistants);

    54.5 performing duty work on a rota basis; and

    54.6 carrying out carer assessments at the hub.

55. The claimant also continued working on her existing East Team cases when she transferred to the North Team.

Claimant's email highlighting health concerns

56. There was a lack of communication between the East Team and the North Team managers on the claimant's transfer. The North Team managers were unaware of the claimant's health concerns until the claimant mentioned these to Ms Purton on 11 January 2019. The North Team managers were also unaware that the claimant had continued working on some of her East Team cases. The respondent acknowledges that the claimant's transfer should have been better handled.

57. The claimant took some leave in early January 2019 and returned to work on 9 January 2019. The claimant's email of 11 January 2019 stated:

"I have Hypermobility Spectrum Disorder which was diagnosed in October 2016 and I have been experiencing 'memory issues' which presents as 'brain fog'. I don't know if the brain fog is connected to HSD, however, I also didn't realise that you wasn't aware.

I've been back to the GP in the last couple of weeks as I'm still experiencing symptoms and explained that irrespective of the cause, I need to know how to manage them at work…

I've spoken with Cherry from O/Health and she advised that I forward you her report."

58. Ms Hogden had a catch-up meeting with the claimant on 16 January 2019 during which they discussed the claimant's health concerns.

59. Mrs Clark and the claimant exchanged emails on 21 and 22 January 2019 regarding the claimant's health concerns. Mrs Clark asked the claimant about any symptoms that she may have which might affect her work. Mrs Clark said:

"I meant how does it affect you at work so that Katy and Katherine and I are aware of when you are experiencing particular problems how we support you, for example, working from home by prior agreement etc."

Meeting on 24 January 2019

60. The claimant was unhappy in her new role with the North Team. She said that she had difficulty with the diverse nature of her duties. She also struggled to become familiar with the systems and processes required by that role.

61. Around that time, the claimant heard that there was a part-time vacancy in the East Team. The claimant said that she believed she should have been offered that vacancy, rather than moving teams. The claimant contacted Ms Purton regarding that vacancy on 23 January 2019. Ms Purton was not at work at that time and suggested that the claimant speak to Ms Hogden or Mrs Clark.

62. In the meantime, Mrs Clark had become increasingly concerned about the lack of response from the claimant in relation to emails that she had sent to the claimant allocating new cases. Mrs Clark raised these concerns in emails with Ms Sharon White (AYSE officer), Ms Debbie Crohn and Mrs Wilks.

63. The claimant and Mrs Clark had a brief discussion in the office and then went to a meeting room. There was no dispute that the claimant said that she wanted to return to the East Team. We find that:

    63.1 Mrs Clark responded saying that she wasn't expecting that, "you've thrown me a curveball". Mrs Clark said she would look at this separately;

    63.2 Mrs Clark then said to the claimant that she would have expected the claimant to reply to acknowledge the emails allocating her cases. The claimant explained her difficulties with memory and processing to Mrs Clark;

    63.3 the claimant became increasingly frustrated at Mrs Clark's lack of knowledge of her health condition, she became agitated and she raised her voice; and

    63.4 Mrs Clark decided that it would be best to terminate the meeting.

64. Mrs Clark was very concerned about the discussions during that meeting and emailed Mrs Wilks that afternoon, stating:

    "I really need to meet with you asap. Just had an impromptu meeting with [the claimant] *re: cases I sent her and she has just lied to me in the space of a 20min meeting. It was very challenging and I had to ask her to calm down and not speak to me in such a manner.*

    …From how she was presenting and her difficulties she has with processing information and said I was a bit concerned how she would manage these new cases…An unproductive discussion ensued in which she told me some of her health difficulties, that she wants to return to east and lots of other stuff which was 'all over the place' and then she suddenly said she'd booked a visit with one of the cases I'd sent her completely flooring me as she had just spent 20 mins telling me she had not read my email, not processed my email and not done anything with them…"

65. Mrs Clark also emailed the claimant on 25 January 2019 stating that:

    "Following our meeting yesterday I thought it might be an idea to get together with HR to discuss your health difficulties, how we can best support you and your request to return to East Team. As you know I had some concerns about how your memory loss is affecting you and the impact on your job and you mentioned feeling anxious so I think it's important we take some advice. We will be sent a calendar invite."

66. The claimant described Mrs Clark's email to her as 'supportive'.

Allegation 1 - 'Health concerns' meeting – 7 February 2019

67. Mrs Clark asked Mrs Wilks for advice and was provided with a template letter from the respondent's 'Managing Absence' policy. Mrs Clark wrote to the claimant in a letter dated 25 January 2019, stating:

    "Dear Victoria

    Concerns at Work with regards to Health

Following the discussion held on Thursday 24th January 2019 I was really concerned with regards to some of the comments made by you. I therefore propose a meeting to formally consider some of the issues raised, which you are required to attend….

…I will be conducting the meeting with Katy Hogden and Kelly Wilks (Senior HR Officer) will also be in attendance.

You have the right to be accompanied by either a Trade Union Representative or a work colleague…"

68. We consider that the wording of the letter was not appropriate to the claimant's circumstances. In particular:

    68.1 the language of the heading "Concerns at Work" suggests some element of disciplinary or performance procedure, rather than a meeting to discuss the claimant's health;

    68.2 the wording 'to formally consider' the issues and the unexplained reference to two managers attending the meeting suggested a level of escalation that was not appropriate for an initial discussion regarding the claimant's health; and

    68.3 we accept that the offer that the claimant could be accompanied was intended to support her, however the wording was reminiscent of a disciplinary hearing.

69. The claimant did not receive the initial copy of the letter that was posted to her on or around 25 January 2019. Mrs Clark called the claimant on 31 January 2019 because she did not attend the meeting and emailed a further version, stating that she had been advised to send the letters by HR. Mrs Clark also sent a separate letter by email on the same date which reiterated the contents of the previous letter and stated:

    "Following my letter dated 25th January 2019 I am disappointed that you did not attend or give any explanation for not attending.

    You are aware that I am really concerned with regards to some of the comments made by you and your reported health difficulties…

    I have therefore re-arranged the meeting…please ensure you attend this meeting, failure to do so could lead to disciplinary action…"

70. We accept the claimant's evidence that she thought that the wording of these letters was intimidating and that the letters suggested that punitive measures could be taken as a result of the meeting.

71. The claimant spoke to her union representative and went to see Mrs Wilks at lunchtime on 31 January 2019. Mrs Wilks explained the purpose of the meeting. Neither the claimant nor her union representative objected to the meeting proceeding.

72. The meeting was rearranged and took place on 7 February 2019 between Mrs Clark, Ms Purton, Mrs Wilks and Ms Fairburn (the claimant's union representative). During that meeting:

    72.1 Mrs Clark raised the issue around lack of responses to emails allocating cases;

    72.2 they discussed the claimant's health concerns and the impact of these on her work;

    72.3 the claimant said that she had not done carers assessments, but had only dealt with D2A procedures. She said that she assumed that the processes for the North Team would be the same as the East Team and that she did not have experience of the relevant systems and processes; and

    72.4 it was decided that the claimant needed to go 'back to the beginning'. They agreed to put in place a 'development plan' to cover the 'basics' of the Social Worker role, which would include details of the training and support that the claimant required.

Allegations 2 and 3 - Supervision meeting and next steps – 11 February 2019

73. Following the meeting on 7 February 2019, Ms Hogden arranged a supervision meeting with the claimant to discuss her cases on 11 February 2019. Mrs Clark also attended the meeting, partly because of her joint management responsibilities with Ms Hogden and partly because of their concerns about the claimant's behaviour at the meeting on 24 January 2019. However, neither manager explained the reasons for their joint attendance to the claimant at the time.

74. At that meeting, they discussed:

    74.1 the status of each of the claimant's existing East Team and North Team cases in detail and the progress required for these cases; and

    74.2 personal development targets for the claimant, including working towards her 9 month review of her ASYE portfolio and the need for the claimant to become familiar with Carefirst and the process to assess individuals for personal budgets.

75. We find that the claimant was not intimidated by the presence of both managers at the meeting. The supervision form notes suggest that the claimant could give full details of her current caseload and to raise any concerns that she may have, for example regarding annual leave bookings. We note that the claimant did not explain in her witness statement or during her oral evidence why she felt 'intimidated' by the presence of two managers. Instead, she focussed on the plan that was developed after the meeting.

76. Ms Hogden completed a supervision form after the meeting, which she emailed to the claimant at her request on 18 February 2019. She also prepared a document headed "Performance Improvement Plan". Ms Hogden completed the box regarding 'action that needs to be taken before your next supervision meeting' stating:

"Please refer to Performance Improvement Plan."

77. She also summarised the next steps at the supervision form recording the meeting that:

"I have advised [the claimant] *that following the meeting last week with HR, a formal plan shall be implemented in order to support her and identify her learning and development needs. The plan shall be reviewed in 3 week*[s'] *time to ensure targets have been achieved and further targets can be identified."*

78. The plan document headed 'performance improvement plan' was not sent to the claimant, as noted in the claimant's email of 27 August 2019.

79. We find that Ms Hogden and Mrs Clark had decided to place the claimant on a performance improvement plan. However, Ms Hogden, Mrs Clark and Mrs Wilks used the terms 'development plan', 'formal plan' and 'performance improvement plan' inter-changeably. We accept Mrs Clark and Mrs Wilks' evidence that the intention was to deal with the claimant's training and development needs on an informal basis and that there would be no consequences for the claimant if she did not achieve the targets at this stage. They had arranged a follow up meeting with the claimant in early March 2019 to discuss the plan. This meeting did not take place because the claimant was absent on sick leave from 6 March 2019.

80. We note that the respondent's own "managing performance" policy does refer to a 'performance improvement plan' being used if required as part of supervision meetings. The policy also makes a distinction between supervision meetings and the respondent's formal performance improvement process. We have concluded that the use of the words 'performance improvement plan' misled the claimant into thinking that she would be subject to a formal performance improvement process, but that this was not in fact Ms Hogden and Mrs Clark's intention.

Meeting on 18 February 2019

81. Ms Fairburn (the claimant's union representative) had a separate meeting with Ms Purton and Mrs Wilks on 18 February 2019, which the claimant did not attend. Ms Fairburn summarised the next steps as follows in her email dated 18 February 2019:

"1) Victoria to send details of existing case load (P numbers) to Katherine

2) Katherine to review Victoria's caseload with a view to returning the East cases back to the East team

3) Kelly to investigate access to work

4) A workplace assessment to be undertaken with a view to Victoria having a fixed desk in a quiet area adapted to meet her needs

5) To consider Victoria's request to work from home if needed in order for her to better manage her condition and continue to be a productive team member."

82. As stated above, Ms Purton emailed the claimant a copy of her supervision form on 18 February 2019. The claimant emailed Ms Purton and Mrs Wilks querying

whether she was being placed on a performance improvement plan and, if so, why that was the case.

83. Mrs Wilks responded on 19 February 2019 stating that:

"During your short time in the North Team there have been some issues that have been discussed during the last 2 meetings and it was agreed that a development plan (or performance improvement plan) would be in put in place to assist you in the role of Social Worker including looking at your health issues…".

84. We accept Mrs Wilks' evidence that the claimant's health concerns would be discussed, along with the draft performance improvement plan, at the meeting in early March 2019 that did not take place. We note at that time that the claimant did not have a formal diagnosis of her condition and the previous occupational health review had not recommended any specific adjustments to her role or duties.

Allegation 4 - Claimant's emails with Ms Crohn re request to return to East Team

85. Mrs Wilks' email of 19 February 2019 also rejected with the claimant's request to return to the East Team, stating:

"Since your transfer you have been made aware of a part time vacancy back in the East Team that has gone out to advert and you have requested to simply transfer back, however, in light of the above it has been agreed that this is not appropriate at this current time and the post at East is in the process of being recruited to."

86. The claimant emailed Ms Crohn on 20 February 2019. She summarised the circumstances that had led to her transfer to the North Team:

86.1 the claimant said that she had always wanted to remain in the East Team performing the D2A role, but that she had understood this was not possible because of her working hours; and

86.2 she said that she believed that a return to the East team would be a 'reasonable request' and did not understand why her request had been refused.

87. Ms Crohn responded on 20 February 2019, stating:

"…the reason that I cannot agree to you transferring back to East is that we are in the process of recruiting to the vacancy, therefore it would be unfair to simply "transfer" you back to the East team. As outlined in DMBC's recruitment and selection process we must offer equality of opportunity for all. Additionally, there are 2 social worker posts vacant in East and the full time post is to cover D2A, if you were to return to East there would be no guarantee that you would be working on D2A cases."

88. The claimant responded stating that she would prefer to return on a full-time basis to the East team, rather than remain in the North team.

89. Ms Crohn was no longer employed by the respondent as at the date of this hearing and was not called as a witness.

90. We find that the respondent was recruiting for a full time post in the East Team to cover the D2A services as at 20 February 2019. The key reasons why the claimant was not considered for this role was because:

    90.1 the claimant was not in the redeployment pool at that time;

    90.2 the respondent was recruiting for the roles in accordance with its recruitment policy and could not place the process on hold; and

    90.3 it would not be appropriate for the claimant to return to the East Team because she had only worked in the North Team for around 2 weeks (having taken annual leave) and the respondent needed to consider the claimant's health and development needs in more detail.

Claimant's sickness absence

91. The claimant was absent on sick leave from 6 March 2019 and did not return to work until April 2020.

92. The claimant attended an occupational health review on 30 May 2019. The review noted that the claimant was found to have a cerebral aneurysm and other health concerns. The report stated that:

    "…it is likely that Miss Woodhouse has been experiencing difficulties at work associated with the cerebral changes including reduced short term memory, reduced working memory and higher cognitive dysfunction relating to tasks such as decision making and problem solving.

    Miss Woodhouse is currently unfit for work and is undergoing investigations for multiple specialities at this time."

93. The claimant was diagnosed by her medical advisers as having a Mild Cognitive Disorder in July 2019.

94. The claimant had a further appointment with occupational health on 1 August 2019 and the report noted that she remained unfit for work at that time. The report also stated:

    "She is still awaiting her results for some further investigations…at this time, there is no immediately foreseeable prospect of a return to work in her role as a social worker."

Allegation 5 – sickness absence review meetings

95. The claimant attended sickness absence review meetings with the respondent on 30 May 2019 and on 28 August 2019 (with Mrs Clark and Ms Irma Britton (HR officer). The discussions at the meeting on 28 August 2019 included:

    95.1 the claimant's current state of health and potential prognosis, including the claimant's views on the occupational health reports;

    95.2 the events that took place in February 2019 regarding the claimant's performance improvement plan document and her request to return to the East Team.

96. Following the meeting on 28 August 2019, Mrs Clark posted two letters to the claimant:

    96.1 a letter dated 2 September 2019, which summarised their discussions at the meeting on 28 August 2019;

    96.2 a letter dated 4 September 2019, which invited the claimant to attend a further sickness absence review meeting on 26 September 2019.

97. The claimant did not receive either of the posted letters and further copies of the letters were emailed to her on 18 September 2019.

98. Allegation 5 in the list of issues refers to the claimant's complaints regarding both of those letters. The claimant's complaint regarding the first letter dated 2 September 2019 related to the summary of the events in February 2019.

99. The claimant's complaint regarding the second letter dated 4 September 2019 related to the wording of that letter which stated:

    "The purpose of the meeting is to discuss your on-going absence from work…

    I will be conducting the meeting with Irma Britton and Kelly Wilks (HR Professionals).

    You have the right to be accompanied by either a Trade Union Representative or a work colleague…"

100. The claimant also complained that the delay in her receiving the letter on 18 September 2019, meant that she did not have sufficient time to prepare for the meeting on 26 September 2019. In the event, the meeting did not proceed.

101. We find that:

    101.1 **2 September letter** – this letter provided detailed summary of the meeting on 28 August 2019. We accept that the claimant disagreed with the summary of the discussions at that meeting, however, we have concluded that the wording of the letter itself was not intimidating; and

    101.2 **4 September letter** – as a matter of good practice, the respondent should have explained why two HR representatives were going to attend the meeting. However, we find that this of itself was not intimidating, given that the claimant had previously spoken with both HR representatives and was going to be accompanied to the meeting by her union representative. We note that the original invitation to the meeting was sent on 4 September 2019, for a meeting arranged on 26 September 2019, which would have provided the claimant with around 3 weeks to prepare. The second copy of the invitation was sent to the claimant on 18 September 2019, which was still over a week before the meeting was scheduled to take place.

Further medical information

102. The claimant attended a further occupational health review on 12 September 2019, which confirmed the claimant's diagnosis of mild cognitive impairment. The report noted:

"With this condition, people can function to a high level but problems with regards to short term memory and concentration can be exacerbated by fatigue or stress.

Adjustments that may be helpful in coping with her cognitive impairment would include:

- *Stability of job role where this is feasible*
- *Familiarity and routine are helpful but conversely change and new processes etc are likely to cause more difficulty than would normally be expected*
- *Careful planning of workload and clear job role/responsibilities are important and written communication is preferred to verbal…."*

103. The report also noted other conditions suffered by the claimant, including that she was awaiting surgery on bunions that was likely to take place in October/November. The report concluded:

"Review with occupational health is advised after Miss Woodhouse has had surgery on her feet but it should be feasible that Miss Woodhouse could resume work by late November/December."

104. The claimant's GP fit notes from around that time included:

104.1 a fit note for two months from 30/9/19, stating that the claimant was not fit to work due to due to neurological symptoms under investigations and bunions; and

104.2 a fit note for two months from 29/11/19, stating that claimant was not fit to work due to neurological issues (under investigation) and work-related problems.

105. The claimant had an operation on her bunions in early October 2019. She contends that she would have been fit to return to work around 6 weeks later if there had been an appropriate role for her to return to. Our findings in relation to this issue are set out below under the heading 'East Team vacancy – October 2019'.

Allegation 6 - East Team vacancy – October 2019

106. We accept Ms Warren's evidence that the level of D2A services which the claimant had previously performed in the East Team during Autumn 2018 had been reduced by September 2019. This was due to a reduction in external funding for that role. We also accept Ms Warren's evidence (which was not challenged) that:

106.1 no one had been recruited to replace the claimant in that role;

106.2 the two individuals performing D2A services were the same two individuals who had held those posts at the time the claimant had transferred to the North Team; and

106.3 if there had been a vacancy, Ms Warren would have sought to fill it as soon as possible to ensure service needs could be met.

107. The claimant saw a vacancy advertised for a full time Social Worker role in the East Team on 14 October 2019, which was the closing date for that role. She contacted Ms Britton, asking if she could be transferred to that role as a reasonable adjustment.

108. We did not hear evidence from Ms Britton or from Ms Susan Sones (recruiting manager for that role), although both are still employed by the respondent. We have seen emails between the claimant and Ms Britton, which were copied to Ms Sones. These included emails in which:

108.1 Ms Britton stated that the claimant was not in the redeployment pool. She said that the claimant would have to apply for the role in the same way as any other candidate;

108.2 Ms Britton suggested that the claimant contact Ms Sones about the recruitment process. Ms Sones said that she would be happy to extend the deadline for the claimant's application until lunchtime on 16 October 2019.

109. However, the claimant did not complete an application form for that role. We accept that the claimant was unhappy that she was being asked to complete a further application form, particularly because her original application form was no longer held on the respondent's system so she would have had to start the form afresh.

110. Ms Warren's evidence as to why the claimant was not transferred to the role differed in some respects from Ms Britton and Ms Sones' emails. Ms Warren stated that:

110.1 the role been advertised externally and interviews for candidates had already been arranged;

110.2 she was concerned that the claimant would struggle to meet the demands of the post. Ms Warren noted that the claimant had previously asked to transfer to a part time role due to health reasons which were still under investigation and that the October 2019 role in the East Team was a full time role; and

110.3 at the time of the claimant's application, she was still on long term sick leave and there was no certainty around when she may be able to return to work. The respondent needed to fill role as soon as possible, otherwise that would reduce their capacity to respond to the needs of vulnerable adults.

111. We find that the reason why the respondent refused to transfer the claimant to the full time East team role in October 2019 was a combination of both reasons given by Ms Britton and by Ms Warren:

111.1 the role had been advertised and an external recruitment process was underway. The claimant was not given any 'priority status' for this vacancy because she was not in the respondent's redeployment pool; and

111.2 the respondent was concerned about the claimant's capability to fulfil the role, given the issues noted by Ms Warren in her evidence (as set out above).

Claimant's grievance and grievance appeal

112. The claimant raised a grievance in October 2019. The claimant's claim does not refer to her grievance or appeal which took place after the claimant submitted her claim form.

113. We have therefore not made any findings of fact regarding the claimant's grievance and her appeal.

Claimant's sick leave after October 2019

114. The claimant remained on sick leave as at date of submitting this claim in January 2020. The claimant returned to work in April 2020 in an interim role, based in a local hospital which dealt with Covid discharge patients. She then went on sick leave again and remained on sick leave as at the date of this hearing.

APPLICATION OF THE LAW TO THE FACTS

115. We will now apply the law to our findings of fact.

Claimant's direct discrimination complaints

116. We will first consider the claimant's complaints of direct discrimination which relate to Allegations 1, 2, 3 and 6. The claimant has failed to present any evidence that any less favourable treatment in relation to each allegation occurred was due to her disability, as opposed to the symptoms or effect of her disability. In particular:

116.1 **Allegation 1 –** we found that the wording of the two letters sent to the claimant in late January 2019 were intimidating and did sound as if the meeting being arranged was a punitive measure. However, there is no evidence to suggest that the meeting was arranged because of the claimant's disability. Rather, it was arranged due to Mrs Clark's concerns about the claimant's performance and the impact of the claimant's medical condition on her ability to perform her role.

116.2 **Allegation 2** – we found that the respondent should have told the claimant in advance why a second manager was attending the meeting as a matter of good practice, but that this was not 'intimidating' given the team's working practices. In any event, there is no evidence to suggest that the reason for a second manager's presence was due to the claimant's disability. Instead, it was due to the joint management of the team by Mrs Clark and Ms Hogden and Ms Hogden's pending maternity leave.

116.3 **Allegation 3** – we found that the respondent's policy includes provision for performance improvement plans as part of supervision meetings and that

the existence of such plan did mean that the claimant was being subject to any formal performance improvement process. We accepted that the reason for the proposed plan was to support the claimant's development, given the support and training needs identified, and was not due to the claimant's disability.

116.4 **Allegation 6** – we concluded that the refusal to transfer the claimant back to the full time East Team role in October 2019 was not due to the claimant's disability. Rather, it was due to a combination of reasons including that the claimant was not in the respondent's redeployment pool, the role had already been advertised externally and applications had been received, the claimant was on long term sick leave without a fixed return date and the claimant had struggled with a part time role before commencing sick leave.

Claimant's complaints of discrimination arising from disability and failure to make reasonable adjustments

117. We will now turn to the claimant's complaints of:

117.1 discrimination arising from disability (relating to Allegations 1, 2, 3, 5 and 6); and

117.2 failure to make reasonable adjustments (relating to Allegations 4 and 6).

Allegation 1 (discrimination arising from disability only)

118. We found that the wording of the two letters sent to the claimant in late January 2019 were intimidating and did sound as if the meeting being arranged was a punitive measure. We have concluded that the wording of those letters amounted to unfavourable treatment.

119. However, the reason for the wording of those letters was not because of the claimant's difficulties of recollection, recall and memory. The letters were based on the respondent's standard template letters and had not been amended in response to the circumstances of the claimant's situation. We note that the wording of the letters should have been considered more carefully and amended to reflect the claimant's situation as a matter of good practice. However, the wording of the letters was not due to something arising from the claimant's disability.

120. We therefore reject this complaint of discrimination arising from disability.

Allegation 2 (discrimination arising from disability only)

121. We found that the respondent should have told the claimant in advance why a second manager was attending the meeting, However, we concluded that the presence of a second manager was not 'intimidating' because both managers shared operational responsibility for manging the team. We have therefore concluded that there was no unfavourable treatment and must reject this complaint of discrimination arising from disability.

Allegation 3

122. We found that the respondent's policies include provision for performance improvement plans as part of supervision meeting and that they are not limited to the respondent's formal performance improvement process. As a matter of best practice, the respondent should have informed the claimant that the plan discussed at the meeting on 11 February 2019 was not part of any formal performance improvement process. However, discussion of a performance improvement plan as part of supervision meetings was in line with the respondent's policy and the respondent intended to discuss the plan in more detail with the claimant at the forthcoming meeting in March 2019. That meeting did not take place due to the claimant's sick leave. We have concluded that there was no unfavourable treatment.

123. However, even if we are wrong in that conclusion, the reason for treatment was not something arising from the claimant's disability. The reason for the treatment was the respondent's need to manage social work cases appropriately and ensure that the claimant was trained and/or supported to enable her to perform the full role of a Social Worker, taking into account her health needs.

124. In particular, we note that the claimant's medical condition and prognosis were not clear at that point in time. The Occupational Health Report in October 2018 stated that the claimant appeared to be fit to attend work, contained no definitive diagnosis of neurological disorder and simply stated that the claimant should ask for help or adjustments if and when required.

125. We have therefore concluded that there was no discrimination arising from disability in relation to this allegation.

Allegation 4 (failure to make reasonable adjustments only)

126. The respondent accepts that they applied a PCP of requiring the claimant to carry out her duties in the North Team. The respondent also accepts that the application of the PCP put the claimant at a substantial disadvantage, i.e. that she found it more difficult to cope with a diverse role, carry out multi-tasking and deal with different and unfamiliar processes and systems compared to a person who did not suffer from the claimant's disability.

127. The only question for the Tribunal to consider is whether it would have been a reasonable adjustment for the respondent to transfer the claimant back to the East Team as at 20 February 2019.

128. We have concluded that this proposed adjustment may have removed the disadvantage that the claimant suffered. This was because the claimant's D2A role was more focussed than that of a Community Social Worker and it would have reduced the amount of 'new' systems and processes that the claimant had to deal with in her new role. However, we find that the proposed adjustment was not a reasonable one for the respondent to make at that point in time because:

    128.1 the claimant's condition had not been diagnosed at that point in time and occupational health had not suggested making any adjustments;

128.2 the claimant had only been working in the North team role for a short period of time and the North team managers were still in discussion with the claimant about the support and training that she needed in February 2019; and

128.3 the respondent had already started its recruitment process for that role, which was being run in accordance with its internal policies which required roles to be advertised externally as well as internally.

Allegation 5 (discrimination arising from disability and harassment)

Discrimination arising from disability

129. We have concluded that the wording of the two letters did not amount to unfavourable treatment. The purpose of the letters was to summarise the discussions that took place during the 28 August 2019 meeting and make arrangements for next meeting. We do accept that it would have been good practice for the respondent to explain why both HR officers were proposing to attend the next meeting. However, this on its own is not sufficient to amount to unfavourable treatment, given that the claimant had previously met and/or spoken with both HR officers regarding her situation and had the benefit of union representation at the meeting.

Harassment

130. We found that the wording of the two letters that were sent was not threatening or intimidating. We note that the claimant regarded the contents of the two letters as 'unwanted'. However, in relation to the legal test for harassment:

130.1 the purpose of the letters was not to violate the claimant's dignity or to create the proscribed environment. The purpose of the letters was to assist the respondent to manage the claimant's sickness absence; and

130.2 the effect of the letters was not to violate the claimant's dignity or to create the proscribed environment. The claimant may have believed that the letters created a hostile or intimidating environment. However, a reasonable worker would not have found the wording of those letters to create such an environment for the reasons set out in relation to the claimant's complaint of discrimination arising from disability under this allegation.

Allegation 6 failure to make (reasonable adjustments and discrimination arising from disability)

Failure to make reasonable adjustments

131. The PCP and substantial disadvantage alleged by the claimant are the same as for Allegation 4. The question for the Tribunal to consider is whether it would have been a reasonable adjustment for the respondent to transfer the claimant back to a full time role in the East Team in October 2019.

132. We note that the claimant's circumstances in October 2019 were different to her circumstances in February 2019 when she originally asked Ms Crohn for a similar transfer. As at October 2019:

    132.1 the claimant had been on sick leave since 6 March 2019 and no fixed return to work date had been set, albeit that this was in part due to a pending operation on her bunions;

    132.2 the claimant had received a diagnosis of Mild Cognitive impairment and occupational health had provided advice on potential adjustments for any return to work;

    132.3 the recruitment process for the East Team role was already underway, the claimant could have applied for the role and Ms Sones had agreed to extend the deadline for the claimant's application. The claimant chose not to apply for the role.

133. We consider that a transfer to the East Team role may not, on its own, have removed the disadvantage suffered by the claimant. The role advertised was not the D2A role that the claimant had previously performed whilst working in the East Team in 2018. The claimant was likely to have faced similar difficulties in terms of the variety of the tasks required and the need to work with new systems/processes that she faced in her North Team role. Also, the East Team vacancy was for a full-time role and the claimant had previously struggled to work full-time hours, which led to her transfer from the East Team to the North Team in December 2018.

134. In any event, we have concluded that it was not reasonable for the respondent to transfer the claimant into the East Team role without any formal application by the claimant. The key reasons for our conclusion are:

    134.1 the respondent had already started its recruitment process for that role, which was being run in accordance with its internal policies, including external advertisement of the role;

    134.2 the claimant could have applied for the role, but chose not to despite being given a short extension of time by Ms Sones for her application; and

    134.3 we accepted Ms Warren's evidence that the respondent needed to fill any vacancies as soon as possible to meet demand from its service users. The claimant was unable to provide a definitive date for her return to work as at October 2019.

Discrimination arising from disability

135. We have concluded that the respondent's refusal to transfer the claimant may have amounted to unfavourable treatment. However, the key reasons for their refusal was not due to the things arising from her disability (i.e. her difficulties of recollection, recall and memory). Rather their reasons for their refusal were due to the requirements of their recruitment process, the need to fill vacancies as soon as possible to meet the needs of service users and the claimant's ongoing sickness absence.

Legitimate aims/proportionate means

136. We do not need to consider whether the respondent had any legitimate aims and/or used a proportionate means of achieving those aims because we have rejected the claimant's complaints of discrimination arising from disability on the basis that they do not amount to unfavourable treatment and/or such treatment did not arise because of something arising from the claimant's disability.

CONCLUSIONS

137. The claimant's complaints of disability discrimination fail and are dismissed.

Employment Judge Deeley

Employment Judge Deeley
10 May 2021