EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms E Woolley	NPS Barnsley Ltd

Heard at: **CVP** **On:** **24, 25, 26 May 2021**

Before: **Employment Judge Davies**
Ms J Lee
Ms J Rathbone

Appearances
For the Claimant: **In person**
For the Respondent: **Mr N Ashley (counsel)**

RESERVED JUDGMENT

1. The complaints of disability discrimination are not well-founded and are dismissed.

REASONS

Introduction

1. These were complaints of disability discrimination (unfavourable treatment because of something arising in consequence of disability and direct disability discrimination), brought by the Claimant, Ms E Woolley, against her former employer, NPS Barnsley Ltd. The Claimant represented herself, and the Respondent was represented by Mr N Ashley, counsel.

2. There was an agreed file of documents and everybody had a copy. We admitted a small number of additional documents by agreement during the course of the hearing.

3. The Tribunal heard evidence from the Claimant on her own behalf. For the Respondent we heard evidence from Ms K Temple (former Managing Director of the Respondent), Mr P Vozza (Managing Director of a sister company within the Norse Group) and Mr A Gray (formerly the Claimant's line manager and now Commercial Director of a sister company within the Norse Group).

4. The Claimant's witness statement was not provided until late on Thursday 20 May 2021. She had previously been legally represented. Although EJ Wedderspoon had made a clear case management order about it, the Claimant

said that she had not realised she needed to provide a witness statement for herself. She made a number of allegations in the statement that were not mentioned in her claim form or at the preliminary hearing. They related to Ms Temple, for whom a witness statement had already been provided, and Mr Gray, whom it had not been intended to call as a witness. Mr Gray therefore prepared a witness statement, which was provided to the Claimant and the Tribunal shortly before the hearing started. The Tribunal considered that his evidence was relevant to the issues in the claim and could not have been produced sooner because of the lateness of the Claimant's statement. We were satisfied that the Claimant would have time to prepare questions for Mr Gray and that it was in the interests of justice to admit his evidence.

5. We explained at the conclusion of the hearing that the first date the Tribunal panel could meet to deliberate and reach a decision was 30 June 2021, so that it would be around six weeks before this reserved judgment was prepared.

The Claims and Issues

6. The Respondent admitted that at all relevant times the Claimant had a disability within s 6 Equality Act 2010 by virtue of depression and anxiety (mental impairments). It said that it did not know and could not reasonably be expected to know that the Claimant was disabled because of the impairments at any relevant time.

7. The claims and issues were identified in EJ Wedderspoon's case management order. Since then, the Respondent has conceded that the Claimant had a disability as defined in the Equality Act 2010 at the relevant time. We agreed at the outset of the hearing that the issues to be determined were therefore:

Direct disability discrimination

7.1 The Claimant compares herself to Greg Pemberton and/or Tom Barrow and/or a hypothetical comparator.

7.2 Did the Respondent do the following things: -

- 7.2.1 Following a period of disability related sickness (from 22 July 2019) removing the Claimant's duties of bid strategy, attending meetings with the Managing Director Karen Temple about bids, bid writing, bid reports, marketing and networking;
- 7.2.2 On 16 September 2019 removing the Claimant from the Team Leader training course;
- 7.2.3 On 22 October 2019 warning the Claimant her role of Bid Manager was at risk of redundancy;
- 7.2.4 On 8 November 2019 terminating the Claimant's position;
- 7.2.5 From 22 October to 6 November 2019 (during the redundancy consultation period) not considering the Claimant for the role of Bid Writer.

7.3 Was that less favourable treatment?

- 7.3.1 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.

7.3.2 If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

7.4 If so, was it because of disability?

7.5 Did the Respondent's treatment amount to a detriment?

Discrimination arising from disability

7.6 Did the Respondent treat the Claimant unfavourably by:

7.6.1 Following a period of disability related sickness (from 22 July 2019) removing the Claimant's duties of bid strategy, attending meetings with the Managing Director, Karen Temple about bids, bid writing, bid reports, marketing and networking;

7.6.2 On 16 September 2019 removing the Claimant from the Team Leader training course;

7.6.3 On 22 October 2019 warning the Claimant her role of Bid Manager was at risk of redundancy;

7.6.4 On 8 November 2019 terminating the Claimant's position.

7.7 Did a period of disability related absence arise in consequence of the Claimant's disability?

7.8 Was the unfavourable treatment because of the Claimant's disability related absence?

7.9 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aim was to meet the business requirement of having a professional Bid Writer with the relevant skill set.

7.10 The Tribunal will decide in particular:

7.10.1 was the treatment an appropriate and reasonably necessary way to achieve that aim;

7.10.2 could something less discriminatory have been done instead; how should the needs of the Claimant and the Respondent be balanced?

7.11 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

The Facts

8. We start with some general comments about the credibility of the evidence. The Tribunal found the Claimant's evidence lacking in credibility in a number of respects, for example:

8.1 Perhaps the most striking example related to the Claimant's return to work after a period of sickness absence. In her witness statement she said that on her first day back at work Mr Pemberton, a Bid Writer from the Leeds office, "was sat at my desk." She described a conversation between them and said that she was told by one of the managers, Ms Gundill, to sit round the corner. In cross-examination, she was asked in general terms what it was that led her to conclude that she was being discriminated against by the Respondent. She referred to her first day back at work. She said, "I walked in and [Mr Pemberton] is sat at my desk. Your stomach drops. I was in a meeting with Mr Gray on the Friday and he had not mentioned that." She re-confirmed more than once that she found it upsetting to return to work and find Mr Pemberton sitting at her seat. She was then

asked if she was sure that had happened, and she answered, “You are going to say he didn’t get there until 10am and I started at 9am.” She suggested counsel was going to try and “trip her up.” She was asked why she said she was upset to find Mr Pemberton in her seat and she said, “I can’t 100% say I’m sure it was the day I arrived.” The Claimant was then shown a series of emails sent on the day of her return to work. At 8:39am, Mr Gray emailed a number of colleagues to let them know that the Claimant was returning to work that day and would sit next to Ms Roe during her phased return. He informed Mr Pemberton that the Claimant might need her laptop and that if he did not have his own laptop there were desktops that could be used. He asked everyone to keep an eye on the Claimant and make sure she settled in ok. Nine minutes later Ms Gundill emailed to say that she had moved the spare desktop onto the Claimant’s old desk so that Mr Pemberton could sit there and that the Claimant was now settled in her new desk opposite Ms Roe. The Claimant then accepted in cross-examination first, that the idea of moving her desk arose out of her own desire to move to somewhere less distracting, and, secondly, that she was present at the time the emails were sent. She then volunteered, “It took us a while to set up all the PCs. … As I recall it I was helping [Ms Gundill] with it. A few of us were.” It was put to the Claimant that there was a huge difference between saying a few people helped move a PC onto her old desk so that Mr Pemberton could use it when he arrived and saying that she arrived to find Mr Pemberton sitting at her desk. She said, “Not in terms of the emotional impact on me.” The Tribunal asked her at that point whether it was her evidence that she arrived and found Mr Pemberton sitting at her desk. She said, “No.” Thus, what she started out by describing as the very thing that led her to conclude she was being discriminated against, turned out, under cross-examination, not to have happened. The vivid description of seeing Mr Pemberton at her desk and her stomach dropping cannot have taken place.

8.2 A second example is that the Claimant gave evidence that Mr Gray had unfairly asked her about work during her sickness absence. She was therefore taken to a screenshot of the message in question. Mr Gray had written:

> “If you feel able, could you drop an email confirming current position on key schemes e.g. the EN tender. Also did you complete the PPM case study?
>
> Please don’t let this request worry you and feel free to ignore it. The last thing I want to do is make things any worse.
>
> Do you have a Doctor’s cert at the moment or are you self-certifying?
>
> I’ll need to speak to you at some point, perhaps have a coffee away from the office so we can chat things through. Only if, and when, you feel comfortable to do so though.
>
> Andy”

The Claimant's evidence was that Mr Gray's request was inappropriate. It was suggested to her that if an employer had to ask somebody who was off sick about a work issue, it could hardly have been put more nicely. The Claimant then said that the content was not all sent at the same time. It was suggested to her that this could not be right because the screen shot made clear that it was all in one bubble. She said that the texts had been sent at different times and that her iPhone had "bumped them all together." She was shown a subsequent message Mr Gray sent, and was asked if that might be what she was remembering. She insisted that the content of Mr Gray's message had come as a number of separate messages. That was simply inconsistent with the screenshot, which made clear this was one message because of its formatting supported by the fact it was signed off at the bottom.

8.3 When questioning Mr Gray, the Claimant showed him an email from Ms Foster dated 16 July 2019, in which Ms Foster asked Mr Gray to make the Claimant aware that Ms Foster would be attending their meeting on Friday 19 July 2019. She put to Mr Gray that he had not made her aware. Mr Gray was able to point immediately to a text message on Thursday 18 July 2019 in which he told the Claimant that Ms Foster would be at the meeting.

8.4 The Claimant was asked why she had not agreed to an Occupational Health ("OH") referral when the Respondent proposed it. She said that she had submitted a Stress Action Plan and Mr Gray could not even deal with those, so she could not see the point of an OH referral. She was then shown the documents from the time, which made clear that the request for her to complete the OH consent form was made *before* she submitted her Stress Action Plan.

9. These are some examples of numerous similar passages of evidence, showing why the Tribunal viewed the Claimant's evidence overall with a degree of caution. They indicated that she did not have an accurate or reliable recollection of events. That does not necessarily mean that she was deliberately being dishonest, she might have forgotten or unwittingly reconstructed events in her own mind with the passing of time, but it does mean that the Tribunal had to approach her evidence overall with care. We could not accept her account of events as a generally credible one.

10. The Respondent accepted after seeing an expert report from Dr Britto that the Claimant was disabled at all relevant times by virtue of the mental impairments of anxiety and depression. The Tribunal saw Dr Britto's report and agreed that the Claimant was disabled at the relevant times. She has a long history of anxiety and depression. However, she did not disclose that to the Respondent when her employment started, and it was clear that she was reluctant to share this personal information. She described herself as being able to function and to present a "well" front in the workplace and the Tribunal found that this was what she did until June 2019.

11. The Respondent is a joint venture company providing multidisciplinary design services and commercial multi-trade construction, repairs, maintenance and

minor works services. It was incorporated and existed primarily to service a contract with Barnsley Metropolitan Borough Council, although that contract came to an end recently. The Respondent is a part of the Norse Group. At the relevant time, Ms Temple was the Respondent's Managing Director.

12. In November 2018 the Respondent took part in a "Returners Programme" designed to help reintroduce women to the workplace after long-term breaks to have children. The Claimant was one of 2 candidates selected by Ms Temple. At around that time Ms Temple was reviewing the Respondent's structure. She wanted to enhance its local bidding resource to enable it to pursue new opportunities locally. By early 2019 the Respondent was recruiting for 3 Estimators and a Bid Manager for its new Bids and Estimating team. The role of Bid Manager was to oversee and coordinate bids and tenders, using the experience and resource of the local team and the wider Group team. The Claimant had done well on the Returners Programme, working on bid coordination, and Ms Temple supported her to apply, somewhat speculatively, for the Bid Manager position. Ms Temple's evidence was that the Claimant did not at that time have many of the required skills, experience or competencies for the role, which had been advertised as Grade D. However, nor did the other applicants and Ms Temple decided to "take a bit of a punt" on the Claimant. She and Mr Gray hoped to support and develop the Claimant into the full role over a 2 to 3 year period. They therefore offered the Claimant a modified version of the post, which they converted to a "Career Grade" post specifically for her. Ms Temple's evidence was consistent with the documents from the time and the Tribunal accepted it.

13. The Tribunal saw the Claimant's Job Profile. The accountabilities in the Profile included contributing to written proposals, along with a wide range of other accountabilities. The Claimant agreed that technical bid writing comprised approximately 20% of the Bid Manager post. We note at this stage that the Job Profile for a Bid Writer had 3 accountabilities that overlapped with the Bid Manager Job Profile. That means 16 of the accountabilities in the Bid Manager Job Profile were not in the Bid Writer Job Profile.

14. The Claimant had an appraisal in May 2019. Ms Temple made positive comments. The Claimant had made a great start. It was very early days but she was already achieving in some challenging competency areas. Ms Temple had no doubt that she would gradually grow into the role and make a huge success of it. The Claimant herself wrote that she was excited to develop into the role over the next few years. She acknowledged that she still had a long way to go but she was confident and looking forward to the challenge. The Tribunal accepted the Respondent's evidence that the Claimant was not yet the complete package. Mr Gray had some concerns about her technical bid writing skills at that stage and Ms Temple did not think she had yet developed fully into the role but had no doubt that she would. These matters were not documented, but nor would we expect them to be. They were not performance concerns, they were development areas as was to be expected given that the Claimant was to develop into her role.

15. In fact, and contrary to what she wrote in her appraisal on 22 May 2019, the Claimant was struggling with her workload in May and June 2019.

16. On 19 June 2019 she texted Mr Gray to say that she would not be in that day. She said, "I've been diagnosed with anxiety and depression and I've been having panic attacks." She said that she did not think she could do the job any more. The Claimant accepted that her text message gave the impression that this was a recent diagnosis. It did not give any hint that the Claimant had a long-standing history of anxiety and depression. We have set out above the message Mr Gray sent the Claimant asking her to let him know the situation on key schemes if she felt able to do so. The Claimant replied in an email on 20 June 2019. She thanked Mr Gray for his message and let him know that she was self-certifying. She updated him on some key work and suggested they chat the following week. On 24 June 2019 the Claimant forwarded a sick note to Mr Gray signing her off for two weeks with "Stress at work." They met on 26 June 2019. Mr Gray recorded an outline of their discussion in an email to Ms Temple and Ms Foster (HR). He noted that the Claimant's condition was improving. She felt she had been slowly deteriorating since Christmas, culminating in anxiety and panic attacks. She was now on medication for depression. There were issues with workload and some concern over the respective roles of Bid Manager and Estimator. She was not able to work productively in her current location, which was too noisy. She said she felt better for talking to Mr Gray, and would probably be in a position to return to work after she next saw the doctor. Mr Gray intended to move her to sit next to him, so that he could have oversight of her workload and to provide a quieter working environment. He asked if there was an option to provide any administrative support for her.

17. At the same time, on 20 June 2019, consultation started to remove the post of Bid Writer at a related company within the Norse Group, NPS Leeds Ltd. The post holder was Mr Pemberton. Ms Temple was notified of this by email. Mr Pemberton had previously supported the Respondent on bid writing for large Group bids. He provided some support with bid writing in the Claimant's absence and was offered a six-month fixed term contract with the Respondent in mid-July 2019. The Tribunal saw an email about this on 16 July 2019. The Respondent agreed with NPS Leeds Ltd that they would remain responsible for some of his costs and redundancy package as and when the time came. Mr Pemberton was a specialist Bid Writer with many years' experience. Ms Temple said that when Mr Pemberton started supporting the Respondent, that immediately brought into focus that the Respondent had a large skills gap in the area of professional technical bid writing. Mr Pemberton added significant value to the team, particularly to the construction qualitative bidding aspects. The Respondent was then working on two complex contract renewals, which accounted for 40% of the Respondent's construction turnover. Their successful renewal was pivotal to the future health of the business. She therefore decided to offer Mr Pemberton a six-month contract to assist with these bids. The Claimant could not have done this expert, technical work. However, the appointment was for these specific bids. That is why it was for six-months only, and why Leeds would remain responsible for some of Mr Pemberton's costs and his redundancy as and when the time

came. The Tribunal accepted Ms Temple's evidence, which was consistent with the emails at the time and the other documentary evidence. Mr Pemberton was brought in as a technical Bid Writer, primarily to work on the two key contracts. He was not brought in as a Bid Manager to share or take over the Claimant's role.

18. On 5 July 2019 the Claimant was signed off for a further two weeks with stress at work. Her fit note ran to 19 July 2019. On 15 July 2019 Mr Gray texted her to ask how she was and suggest a catch-up meeting. The Claimant replied to say that she was feeling much better, but she felt that working full-time was going to be too much at the moment and requesting to work 3 days per week. They agreed to meet on Friday 19 July 2019 at 2pm. Mr Gray consulted Ms Foster. She suggested that she attend the meeting too (as mentioned above). She mentioned an OH assessment and said that they would need to discuss the Claimant's flexible working request with her. The meeting took place on Friday as planned. The Claimant did not have a further fit-note, and was planning to return to work on Monday 22 July 2019. The Respondent's position was that the Claimant could not do her role on a part-time basis permanently, but they agreed that she would have a phased return to work over six weeks, working three days per week. It was also agreed that she would move desk to be nearer Mr Gray and in a quieter area. The Tribunal found that the Claimant knew that was going to happen and that it was to meet her concerns. She agreed with it.

19. Immediately following the meeting, Ms Foster emailed the Claimant a stress action plan and wellness plan, which they had discussed at the meeting. She also suggested they meet the following Thursday.

20. The Claimant complained to the Tribunal that she did not have a return to work meeting. However, Mr Gray was on annual leave from Monday 22 July 2019, and he and Ms Foster met the Claimant on the afternoon of the working day before her return to work. It seemed to the Tribunal that the Claimant was prioritising form over substance. There was nothing substantively different between a detailed discussion on the Friday afternoon, and any "return to work" meeting that might have taken place on the Monday morning. They discussed the Claimant's absence and health; her flexible working request and phased return to work; other measures to alleviate her stress, including a stress action plan and wellness plan; a possible OH referral; and other arrangements for her return to work. They did not tell the Claimant that Mr Pemberton had been brought in to do her job or share her job, because that had not happened. At the Tribunal hearing, the Claimant did not identify anything that she would have said or done differently if there had been a return to work meeting on the Monday. The Claimant did not make any suggestion during the meeting that she had a long history of poor mental health, nor that this was a recurrence of previous anxiety or depression. Mr Gray said that she gave the impression that it was simply the case that issues with her workload in the couple of months prior had caused this episode. The Tribunal accepted that evidence.

21. As already noted above, the Claimant did return to work on 22 July 2019. Her desk was moved, as discussed with her. She helped with the move. A PC was put on her old desk, for Mr Pemberton to use. Mr Pemberton was not there when she arrived. He arrived later in the morning.

22. First thing on Thursday, 25 July 2019, Ms Foster emailed the Claimant to let her know that she was not going to make it to Barnsley that day. She apologised and asked the Claimant to let her know if she had any queries about the documents. The Claimant replied to say that the documents looked fine.

23. On 31 July 2019 Ms Foster emailed the Claimant encouraging her to engage with OH and asking her to consent to a referral. As noted above, this pre-dated the Claimant returning the stress action plan and wellness plan. The Claimant did not consent to a referral. On 5 August 2019 she emailed completed stress action and wellness plans to Mr Gray. She suggested putting something in the diary to review them. The wellness plan identified things her manager could do to help her stay mentally healthy at work: making time for regular catch ups, providing support and advice when required, allowing her to attend medical appointments when required and allowing time off in lieu if she worked a weekend. It said that she was to start 10 weeks of CBT on 9 August 2019. The stress action plan identified two key stressors: inability to cope with workload when working on a bid, and concern about returning to work full-time. The Claimant suggested she have help from another staff member with day to day tasks and that she be allowed to reduce her hours permanently. She said that she was worried that when she came back full-time she would struggle with her "mental health" again.

24. There was a dispute between the Claimant and Mr Gray about whether they discussed these documents. Mr Gray said that they discussed them at his desk, but he acknowledged they were not signed off or completed by him. He said the actions were then implemented as far as possible. The Claimant said that they did not discuss them at all. The Tribunal preferred Mr Gray's evidence about this: the plans were discussed and measures e.g. to support the Claimant, reduce her workload and allow her time off for appointments were implemented. Not only did we find the Claimant's evidence generally to be unreliable, but there was also an inherent contradiction in the Claimant's account of events on her return to work. On the one hand she complained that measures were not taken to support her and alleviate her stress, but on the other hand she complained that work was removed from her and described this as "punishment". Of course, the Claimant was experiencing an episode of poor mental health at the time, and that may have affected her perception of events. But it seemed to the Tribunal that she had a tendency to interpret many of the Respondent's actions from this point onwards as a negative response to her poor mental health, when in fact there was a straightforward, and often supportive, explanation for them.

25. For example, we note at this stage that before her sickness absence, the Claimant had organised a Bid Strategy Development Workshop, involving the Respondent's Bids and Estimating Team, senior managers and external

consultants. The purpose of the day was to review collectively the Respondent's bidding and tendering strategy and make future plans, including to streamline the process. The workshop was organised for 19 July 2019. It had gone ahead in the Claimant's absence. Ms Temple explained that it had been difficult to coordinate everybody's diaries, and when they decided to go ahead with the workshop they did not know when the Claimant would return to work. One of the Claimant's complaints to the Tribunal was that she did not get any minutes of the workshop. Ms Temple apologised, but said that the Claimant had not asked for them. The Claimant accepted in her evidence that she had not asked for the minutes when she returned to work. She accepted that it would have been sensible, but she said that she "got the impression" Mr Pemberton was already doing the work and she had been "sidelined"; it seemed "pointless" and "another punishment." The Claimant was making negative assumptions from the outset, rather than taking the simple step of asking about minutes of the workshop. Bid strategy had not been removed from her responsibilities or accountabilities; all that had happened was that the workshop had taken place on the date planned, during her absence. One of the outcomes was the introduction of a bid go/no go strategy, with a focus on core clients rather than numerous, small bids. That would inevitably reduce the Claimant's workload.

26. In fact, the Tribunal accepted Ms Temple's evidence that question of devising bid strategy was then essentially sidelined because the Respondent was facing more significant concerns: its strategic partner Barnsley MBC had instigated a value for money benchmarking review in May and an audit of procurement practices in June 2019. This was a fraught time and Ms Temple's focus was on meetings with the joint venture team and seeking to restore confidence with the Council, while making contingency plans in case those efforts were unsuccessful. Ultimately, the Council served notice on the Respondent to terminate the contract the following July. The question of bid strategy was put to one side in that context. Further, it seemed likely to the Tribunal that during the period after her return to work, the Claimant did not attend meetings with Ms Temple about bids, which she had done prior to her sickness absence. However, that was principally because Ms Temple was not attending such meetings. It was not because any role or duty had been removed from the Claimant.

27. Another example relates to the monthly bid report or spreadsheet. When the Claimant returned to work, she emailed Ms Temple asking for details of bids submitted over the last four weeks, so she could update the spreadsheet. Ms Temple replied to say that she had been keeping the spreadsheet up to date and that the Claimant should just pick up any bids submitted that week. They could pick up when Ms Temple was back. Ms Temple's evidence was that completing this reporting template had been taking an inordinate amount of the Claimant's time before her absence. The Tribunal saw an email from the Claimant dated 2 May 2019, in which she said that one of the jobs that tended to get left behind when she was busy was updating the spreadsheet. She suggested that somebody else could be trained up to do this and other administrative tasks. Ms Temple said that she became personally involved with the spreadsheet during the Claimant's absence. She realised that the Claimant had made it very

convoluted, and it was more effective for a member of the estimating team to source the information and update the template. She instructed the Trainee Estimator to do this during the Claimant's absence. Ms Temple said that she met the Claimant on 29 July 2019 after her return to work and told her that she had decided this should continue. This was a supportive measure, which allowed the Claimant to concentrate on more important tasks. The Claimant's evidence was that when Ms Temple returned to work on 29 July 2019, the Claimant greeted her but Ms Temple completely ignored her. She said that Ms Temple did not tell her why she no longer wanted her to complete the bid report or who was doing it. She said that they did not have a discussion on 29 July 2019. However, the Tribunal noted that in a later document (as part of her redundancy appeal), the Claimant referred to a discussion with Ms Temple on 29 July 2019 about the report. In view of the Claimant's lack of credibility generally, and the inconsistency between her evidence to the Tribunal and what she said in her appeal, the Tribunal preferred Ms Temple's version of events. She did not ignore the Claimant, when she (Ms Temple) was back at work on 29 July 2019. She spoke to her specifically about the bid report and told her that the Trainee Estimator would now complete it, and why. That was not because the Claimant had poor mental health or because she had had a period of sickness absence. It was because she had realised somebody else could do the task more effectively, and this removed an administrative task from the Claimant as she had previously requested, leaving her more time to concentrate on more important aspects of her role.

28. The Claimant also said that when she returned from her sickness absence, bid writing duties were removed from her. The Tribunal saw detailed evidence, including documents relating to specific bids. It is clear that the Claimant was doing bid writing before her sickness absence. Sometimes she created content from scratch and sometimes she collated content from others. That is what bid writing entails. However, bid writing was not the totality of her role; it was one part of it. She accepted that it was about 20% of it. After she returned to work, her evidence about what happened was inconsistent. At one stage she suggested that bid writing was shared 50-50 with Mr Pemberton. At another, she suggested that 70% of her role was given to Mr Pemberton. She did not identify any document in which she was told she was no longer to do bid writing and there was no evidence to that effect. This, too, seemed very much to be about perception rather than any actual actions or discussions. The Tribunal preferred the Respondent's evidence. Mr Pemberton was brought in as a technical professional Bid Writer. He was primarily working on the two key contract renewals and could assist with other work. But that did not impact the Claimant's responsibility for bid writing at all. Nobody took anything away from her and she continued to have a responsibility for bid writing. The decision to focus on core clients rather than numerous small bids may have reduced the amount of bid writing overall, but that was not because responsibility for bid writing was removed from the Claimant.

29. The Claimant's last complaint about changes to her job role related to marketing and networking. She gave evidence that after she returned to work, Mr

Pemberton would be invited to networking events and meetings while she was ignored. She said in her oral evidence that Mr Gray told her that Ms Temple did not want her leaving the office. That had never been said before. She produced emails showing marketing or networking events she had attended or been invited to before her sickness absence. She had attended approximately one event per month. She said that she had not been invited to any events after her sickness absence. In cross-examination, Ms Temple said that she did not tell Mr Gray that she did not want the Claimant to leave the office. She did not remove the Claimant from any event. Invitations would come from the forums not Ms Temple; it was not in her control. She had shared her network with the Claimant when the Claimant initially started in her role, but then it was up to the Claimant to develop the network. She had taken the Claimant to events with her before her sickness absence. She was not attending such events herself after the Claimant's return to work, because of the difficulties with the Council that she was addressing. In his cross-examination, Mr Gray said that Ms Temple had not told him she no longer wanted the Claimant to leave the office and he did not have that discussion with the Claimant. He did not intervene to prevent any invitation or to have the Claimant removed from any guest list. He did not know why the Claimant's membership of the "Third Thursday Club" had not progressed. The Tribunal noted that on 13 June 2019 the Claimant had emailed a Ms Lowe to say that Mr Gray had authorised her to join that club at a cost of £40 and asking for payment to be made. There was no evidence about what happened after that. The Tribunal preferred Ms Temple's and Mr Gray's evidence. Nobody gave any instruction that the Claimant should not leave the office or attend networking events. That remained part of her role, but it was for her to manage that, not Ms Temple. If there was a reduction in invitations from Ms Temple, it was because Ms Temple expected the Claimant to be on mailing lists now and invited in her own right, and because Ms Temple herself was not attending such events. It was nothing to do with the fact that the Claimant had an episode of mental ill health nor that she had four weeks' sickness absence.

30. As noted above, it seemed to the Tribunal that the Claimant's approach changed when she returned to work from her sickness absence. She appeared to assume that her poor mental health would be viewed negatively and to view events through that lens. On the evidence before the Tribunal, the only specific change to her job role, which she was told about, was the removal of the administrative task of updating the bids spreadsheet. That was to help reduce her workload. The Claimant no doubt perceived that her job role had substantially changed. The Tribunal was shown an email from her to Ms Temple and Mr Gray on 5 September 2019 requesting a meeting to discuss her objectives/job role and what they wanted her to prioritise. There was a reminder when they had not responded on 10 September 2019. It does not appear that they did formally respond. They should have done (although both had desks very close to the Claimant's, and were at pains to point out that they could and did speak to her regularly rather than scheduling formal meetings). The Tribunal also noted that, while the Claimant wrongly thought her job role had been significantly changed, from the perspective of Ms Temple and Mr Gray it had not. That would have affected their view of the urgency of meeting the Claimant to discuss her role.

The Claimant also commented in her evidence on the substantial reduction in the volume of emails she received from Ms Temple. Ms Temple's evidence was that she was trying to give the Claimant space and time to integrate back into the workplace and be happy. She did not want to barrage her with requests. Ms Temple said that she could not win either way: if she had continued to send the Claimant the same volume of emails, that could have been detrimental. The Claimant appeared not to see the Respondent's perspective. She did not tell the Respondent that she had a history of anxiety and depression and she declined to be referred to OH. She told them she had been off for four weeks because of work-related stress and her sick notes supported that. She made clear that issues with workload were a key part of the problem. She asked for a reduction in her working hours, and it was agreed that she would go down to 3 days per week for six weeks. For the Respondent it was vital to take action to address the issues as it understood them, by reducing the Claimant's workload, moving her desk to a quieter location, and minimising stress and pressure on her. If it had not taken action, or had bombarded the Claimant with emails, job tasks, meetings and events during her phased return, she would legitimately have complained. The Claimant did not seem to recognise that the Respondent's actions took place in that context.

31. We turn next to issues relating to a leadership/management apprenticeship course run by the Norse group. The Claimant applied to participate in this course before her sickness absence. On 13 June 2019 the course team emailed her asking for information about how she was going to meet the requirements of the course. The Claimant evidently filled in the form, and on 25 June 2019, when she was off sick, the team emailed her again about one of her answers. One of the requirements of the apprenticeship was that the Claimant allocate 20% of her working time to the programme and she had been asked how she would ensure this could be achieved. She had written that she would work with her line manager to agree priorities and delegate tasks if required, and would work overtime and weekends to meet critical work or study deadlines. She was asked for clarification about how she would meet the 20% requirement within her paid working time. The Claimant replied on 22 July 2019 to say that she acknowledged the 20% must not be done in her own time. That was, of course, at the same time that the Claimant had been experiencing ill health because of her workload, and was requesting to reduce her hours permanently to 3 days per week.

32. On 29 July 2019, as noted above, the Claimant had a discussion with Ms Temple. On the same day, Ms Temple emailed a Ms Page at Norse Group asking for the Claimant to be removed from the course. She said that Ms Foster would explain why and that she, Ms Temple, would discuss it with the Claimant locally. She did not do so. The Claimant was not told that she had been removed from the course until she heard from other people in September that it was starting and raised this with the course team. Ms Page then emailed Ms Temple on 16 September 2019 to let her know, and Ms Temple spoke to the Claimant the same day. That was clearly a very difficult discussion during which the Claimant was at one stage crying uncontrollably. Ms Temple wrote an email to

Ms Foster about it afterwards by way of record. She said that she had explained to the Claimant that she had taken the decision to remove her from the course. She was on long-term sick through stress and subsequently returned to work on a phased basis, saying that she did not want to work full-time, was not sure she could do the job and needed a stress management action plan in place. In those circumstances, Ms Temple felt they would be expecting too much of the Claimant to deal with the requirements of the course and her return to work. She felt she needed time and support rather than additional pressure. Ms Temple said that the Claimant agreed. At that point she broke down crying. She expressed concerns that she had not yet completed her 6 month probationary period. Ms Temple reassured her that she had. Once the Claimant had calmed down she returned to her desk. In cross-examination Ms Temple said that she had not removed the Claimant from the course because she had a mental health disability or because she had had 4 weeks' absence. She gave the Claimant her commitment that she would be on the course in future. She was asked about the reference in her email to the Claimant having been on long-term sickness absence. She said that she was simply setting the context. The Claimant being off work for 4 weeks did not come into it. It was about the fact that the Claimant was stressed, so Ms Temple's view was that putting her on an intense management course would be negligent.

33. The Tribunal considered that this was an example of extremely poor management and communication by Ms Temple. Regardless of other pressures, she should have told the Claimant in July that she had been removed from the course and why. However, the Tribunal accepted Ms Temple's explanation of why she took that decision. It was not because the Claimant had had 4 weeks off sick nor because she thought the Claimant had a mental health disability. It was because she considered it would be inappropriate for someone who had been experiencing work-related stress and issues with her workload, to the extent that she had concerns about her ability to do the job and wanted to reduce her working hours, to take on this onerous additional commitment occupying 20% of her paid working time over a lengthy period.

34. During their conversation on 16 September 2019 the Claimant told Ms Temple that she was on medication and undergoing therapy. She did not mention she had any history of poor mental health, but she was visibly extremely upset for parts of the discussion. The Claimant had not had any further sickness absence since her return to work and appeared generally to be settling back in.

35. During the conversation, Ms Temple also mentioned that she was rethinking the Claimant's role in the context that there were 2 people doing this area of work. Her evidence to the Tribunal was that at around this time with Mr Pemberton doing technical bid writing it became clear that having a Bid Manager was not justified. Ms Temple prepared a written review of the Bid Manager post. She noted that the Respondent's tender and estimating team had been established 6 months ago. It had now become apparent that significant aspects of the Bid Manager position were either no longer required or better accommodated using the wider Group resources. She identified a number of elements that could be

carried out at group level. She noted that following the bid strategy workshop in July a bid go/no-go process had been established which had significantly reduced the amount of time devoted to emerging opportunities. She said that the Respondent lacked the skills of a technical Bid Writer and that a professional Bid Writer was needed to take ownership of all technical response content and compile high-quality technical responses that required professional or technical staff input by exception only. She therefore proposed to remove the Bid Manager post and replace it with a professional Bid Writer position.

36. There were emails with senior managers in the Norse group about the proposal. On 27 September 2019 an email to Mr Hersey referred to a proposal to remove the Bid Manager post at the Respondent and make permanent a Bid Writer post. Mr Hersey asked a number of questions, including whether it was intended that the Bid Writer would simply move into the permanent role. Ms Temple replied to say both people would be permitted to apply for the position, given that there were aspects of bid writing contained in the Bid Manager role profile. Mr Hersey also asked whether given the current joint venture dynamics and other matters it would be better to consider a further short extension to the Bid Writer position while progressing the Bid Manager post to consultation. After further exchanges and exploration of Mr Pemberton's precise terms, Ms Foster sent an email on 11 October 2019 asking whether a "2-to-1 scenario" was still felt appropriate given that they were removing one post and not making the other permanent. That evidently led to a decision not to invite the Claimant to apply for the Bid Writer role. The proposal was no longer to create one permanent role. It was to extend the Bid Writer role for 3 to 6 months while medium-term strategy was developed and to remove the Bid Manager role. Therefore, it was only the Claimant who was put at risk of redundancy. That happened at a meeting with Ms Temple on 22 October 2019, after which Ms Foster confirmed the position in writing and provided a detailed consultation paper explaining the proposal and the reasons behind it.

37. Ms Temple gave evidence to the Tribunal about her decision to put the Claimant at risk of redundancy. Fundamentally, it seemed to the Tribunal that having worked with Mr Pemberton for a period, Ms Temple formed the view that a skilled and experienced technical Bid Writer brought significant value to the business and that it was better to have a technical Bid Writer than a Bid Manager. That is what led to the proposal to remove the Bid Manager role. It was originally intended that the Claimant would be invited to apply for the Bid Writer role, and that only changed when a decision was taken simply to extend that role for a short period rather than making it permanent. That was only possible because Mr Pemberton was already on a fixed term contract. The Claimant was not. However, it did seem to the Tribunal that in any event Ms Temple regarded Mr Pemberton as the right candidate for the Bid Writer job. That was because he had decades of experience in the role and she saw the value he brought to the business as an individual. That was no doubt part of the decision-making process. The Tribunal had no hesitation in accepting Ms Temple's evidence that the Claimant's mental ill health and her four-week sickness absence played no part in the decision to put her at risk of redundancy.

She was not doing the same job as Mr Pemberton and their situations were not comparable. Only about 20% of her role was writing bids and only 3 of her numerous accountabilities were shared with the Bid Writer role profile. There was some limited overlap in their jobs, but they were fundamentally different roles. Mr Pemberton had been doing the role for many years; the Claimant was developing into it.

38. The Claimant produced a detailed written response to the redundancy consultation paper. She argued that there was no real difference between the Bid Manager and Bid Writer roles, and made many of the points that she went on to make in these proceedings. Many of them appear to have been based on her misperception about changes to her own role and the nature of Mr Pemberton's. She also alleged that the redundancy had been engineered because of her mental ill health and sickness absence, and she said that it was discriminatory. In a section dealing with her return to work, she wrote that she had returned to work on 22 July after four weeks' sick leave with "anxiety, depression and panic attacks." She went on to say that she had been prescribed anti-depressants, 12 weeks of CBT and a six-week stress PAC course. She added that she knew that returning to work was an important part of her recovery "due to past experience dealing with my underlying condition."

39. On 6 November 2019 Ms Foster wrote to her to tell her that the consultation process had ended and that her post was confirmed as redundant. She was invited to an individual outcome meeting the following day, which she attended. A written response to the Claimant's own consultation response was attached to Ms Foster's letter. It had been prepared by Ms Temple. It comes across as more an exercise in justifying the decision make her redundant, than an open-minded consideration of alternatives to redundancy. It seemed to the Tribunal that once the Claimant had been put at risk of redundancy, Ms Temple's view was very unlikely to change. However, this is not an unfair dismissal claim. As far as discrimination was concerned, the Tribunal found that Ms Temple's view was unlikely to change fundamentally because she wanted Mr Pemberton's skill and expertise as a Bid Writer in the business, not because of the Claimant's mental ill health or sickness absence. In this document, as in other communications between them, Ms Temple's tone was not one of empathy or understanding. The Tribunal could understand how that may not have helped the situation. However, again, the Tribunal found that this had nothing to do with the Claimant's mental health disability, it was simply Ms Temple's way. It was reflected in the way she gave her evidence to the Tribunal.

40. Following the meeting on 7 November 2019, Ms Foster wrote again to the Claimant confirming her dismissal by reason of redundancy with 8 weeks' notice on garden leave, her financial entitlements and her right of appeal.

41. The Claimant appealed on 19 November 2019. She said that her dismissal was discriminatory because of her disability of anxiety and depression. The Respondent had made her position redundant by transferring her responsibilities for bid writing, marketing, bid strategy and networking to the fixed term Bid

Writer. Mr Vozza was appointed to deal with the appeal. He has been Managing Director of NPS Humber Ltd, a sister company of the Respondent, since 2008. He was provided with a detailed management case for the appeal, along with a detailed written submission from the Claimant supported by a number of appendices. He reviewed the documents carefully in advance of the appeal hearing on 10 January 2020.

42. Mr Vozza came across as a careful, caring and thorough decision-maker. He rejected the Claimant's appeal but he commented that there were aspects of the process and communications that he was unhappy with. That related to occasions where the Claimant had asked for meetings or information which had not been provided. He considered that this should have been given time and answered, even though the office was under strain.

43. Mr Vozza confirmed his decision in a letter dated 23 January 2020. He explained that the centralisation of bid management and a number of support roles was a genuine strategic approach of the Norse group going forward and that this was an overriding factor that supported and validated the business case for redundancy of this localised role. No other offices within the group had local Bid Manager positions. Mr Vozza rejected the Claimant's argument that redundancy was used to exit her from the business rather than manage her disability. He found that the bid strategy workshop had gone ahead in the Claimant's absence because it could not be rearranged due to the number of parties involved, including an external facilitator who had been booked and paid for. One of the outcomes was to move away from numerous small bids and focus on core clients. This diminished the Bid Manager role. Mr Vozza did not agree with the Claimant's contention that the Bid Writer and Bid Manager roles were fundamentally the same. In his view the roles were fundamentally different. Mr Vozza questioned whether the Respondent should have identified a four-week sickness absence for work related stress as a disability under the Equality Act, but nonetheless he went on to consider whether the Claimant's absence was a factor in her dismissal. He found that it was not.

44. It was suggested to Mr Vozza in cross-examination that he did not look into the Claimant's appeal in great detail because of her disability, or that his professional opinion was influenced by the fact she had a mental health disability or had had four weeks' sickness absence. He disagreed. He said that he gave careful consideration to the detailed information provided in writing and at the hearing, but it was not his role to carry out an investigation. His role in a redundancy appeal was to come to a professional opinion, which he did. The Tribunal accepted his evidence. Mr Vozza placed considerable weight on his own knowledge and experience as manager of a sister company in concluding that a local Bid Manager was not required, and that the roles of Bid Manager and Bid Writer were fundamentally different.

45. The Tribunal did not hear any evidence about Mr Barrow, or why he was in a comparable position to the Claimant in any respect.

Legal principles

46. Claims of discrimination are governed by the Equality Act 2010, s 4 of which provides disability is a protected characteristic. Direct discrimination is governed by s 13 and unfavourable treatment because of something arising in consequence of disability by s 15 of the Act. Section 15(2) provides a defence to a complaint of unfavourable treatment if the employer does not know and could not reasonably be expected to know that the employee has a disability.

> **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.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> …
>
> **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.

47. The burden of proof is dealt with by s 136 of the Equality Act 2010. The Claimant has the initial burden of proving facts from which the Tribunal could infer, in the absence of an adequate explanation, that unlawful discrimination has taken place. If she does so, then it is for the Respondent to provide that it did not discriminate. The court in *Igen Ltd v Wong* [2005] ICR 931 gave authoritative guidance as to the application of the equivalent burden of proof provisions under the Sex Discrimination Act 1975. That guidance remains applicable: see *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913.

48. The Supreme Court made clear in *Hewage v Grampian Health Board* [2012] ICR 1054 that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

49. So far as a claim under s 15 is concerned, the first element is 'unfavourable' treatment of the employee. Unfavourable treatment does not require a comparator. It is to be measured against an objective sense of that which is adverse compared with that which is beneficial: see e.g. *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2015] IRLR 885. The EHRC Employment Code advises that this means that the disabled person "must have been put at a disadvantage". The well-established principles applied in

considering whether an individual has been subjected to a "detriment" are relevant to this question.

50. If there is unfavourable treatment, it must be done because of something arising in consequence of the person's disability. There are two elements. First, there must be something arising in consequence of the disability; secondly, the unfavourable treatment must be because of that something. The unfavourable treatment will be "because of" the something, if the something is a significant influence on the unfavourable treatment; a cause which is not the main or sole cause but is nonetheless an effective cause of the unfavourable treatment: see e.g. *Charlesworth v Dransfields Engineering Services Ltd* [2017] UKEAT 0197_16_1201.

51. As regards the employer's knowledge, the Tribunal should consider first, whether the employer knew that the employee was disabled and if not, secondly, whether it ought to have known: see *Secretary of State for Work and Pensions v Alam* [2010] ICR 665 EAT. Employers must do all they can reasonably be expected to do to find out whether an employee has a disability. That includes making reasonable enquiries based on the information given to them: see e.g. *Alam* and the EHRC Code.

Application of the Law to the Facts

52. Applying those principles to the detailed findings of fact, the Tribunal's conclusions on the issues were as follows. In many respects the claims turn on the detailed findings of fact, so the conclusions can be more briefly stated.

53. We start with the direct discrimination complaint. As noted, the Tribunal did not hear any evidence about Mr Barrow or why the Claimant's treatment should be compared with his in any respect. The Tribunal did not consider that Mr Pemberton was in materially the same circumstances as the Claimant. As explained above, he was an experienced Bid Writer of many years' standing; he was not doing the Bid Manager role he was doing the Bid Writer role; and he was on a fixed-term contract. Where relevant, it was therefore appropriate to compare the Claimant's treatment with a hypothetical comparator.

54. As explained above, after her return to work on 22 July 2019:
    54.1 The Claimant's responsibility for bid strategy was not removed from her. The bid strategy workshop had gone ahead in her absence for logistical reasons, and the question of bid strategy was put to one side after that because of the pressing issues with the Council, but responsibility for it was not removed from the Claimant.
    54.2 The Claimant was not stopped or removed from attending meetings with Ms Temple about bids. Ms Temple herself was focusing on the joint venture issues.
    54.3 The Claimant's responsibility for bid writing was not removed. She continued to have that responsibility. Mr Pemberton was also doing bid writing, primarily on the two key contracts, but that did not change the Claimant's responsibility. It had formed about 20% of her role before her sickness absence. Nothing was said or done to change that.

54.4 The Claimant's responsibility for bid reporting (updating the spreadsheet) was removed from her and given to the Trainee Estimator. However, there were no facts from which the Tribunal could infer that this was less favourable treatment because of disability. In any event, we accepted Ms Temple's evidence that it was because the Trainee Estimator could do the role effectively and it was therefore removed from the Claimant to reduce her workload, help with her work-related stress and enable her to concentrate on more important tasks. It was something the Claimant herself had asked for help with before her sickness absence.

54.5 The Claimant's responsibility for marketing and networking was not removed from her. She continued to have that responsibility, but it was for her to manage and control. Ms Temple did not give an instruction that she should not leave the office. Nobody removed her from invitation lists or guest lists.

55. The Claimant was removed from the training course. That happened on 29 July 2019 not 16 September 2019. There were no facts from which the Tribunal could infer that this was less favourable treatment because of disability. In any event, we accepted Ms Temple's evidence that it was not because of disability; it was because the Claimant had concerns about her workload, which had led to work-related stress; had concerns about her ability to do the job; and wanted to reduce her working days to three per week. Ms Temple thought it would be inappropriate and negligent for her to take on the onerous commitment of the training course, taking up 20% of her working time over a significant time period at that time. Anybody in that situation, regardless of disability, would have been removed from the course.

56. The Claimant was put at risk of redundancy on 22 October 2019, dismissed with notice on 8 November 2019 and not considered for the role of Bid Writer during the consultation period. However, there were no facts from which the Tribunal could infer that this was less favourable treatment because of disability. As explained above, we found that the reasons the Claimant was made redundant and was not considered for the Bid Writer role were: the Bid Writer role and the Bid Manager role were fundamentally different; bid writing was only 20% of the Bid Manager role; Ms Temple realised from working with Mr Pemberton the value an experienced and skills Bid Writer in general, and Mr Pemberton in particular, brought to the business; for this reason she concluded that it was better to have a Bid Writer of that calibre than a Bid Manager; the Claimant was not considered for the Bid Writer role because Mr Pemberton had a fixed term contract and was to be offered only a short-term extension and, in any event, the Claimant did not have the skills and experience in bid writing that Mr Pemberton had. None of that was to do with her disability.

57. The complaints of discrimination arising from disability overlap with the direct discrimination complaints. Here, the Tribunal started with the question of knowledge.

58. We found that the Respondent did not know that the Claimant had the disability of anxiety and depression when she went off sick and could not reasonably have been expected to know that. There had been no indication prior to her absence that she had any mental health issue. As she told the Tribunal, she evidently

presented as “well” even when she was struggling. When she did go off sick on 19 June 2019, she accepted that she gave the impression she had just been diagnosed; there was no hint of a long history of anxiety and depression. Although her initial text message to Mr Gray referred to “depression” in fact the only two fit notes that were then provided, covering 4 weeks, referred to “stress at work.” Nothing the Claimant told Mr Gray on 26 June 2019 painted a different picture. She referred to things gradually getting worse since Christmas, but not to her experiencing anxiety and depression since Christmas. The inference was that anxiety and panic attacks were recent, as was being put on medication. The Claimant was fit to return on a phased part-time basis four weeks later. At the meeting on 19 July 2019, again she made no mention of her long history of poor mental health. She did not say that she was requesting part-time working hours because of any such history or long-standing issue. The Respondent certainly did not know at that stage that she had depression and anxiety that was “long-term”. Knowing that she had recently been diagnosed with depression is not enough for it to know that she had a disability. Nor did the Tribunal consider that the information available to the Respondent ought to have put it on notice about the Claimant’s condition or ought reasonably to have asked further questions about that. The information was all consistent with the picture the Claimant was seeking to portray, that this was a recent, one-off occurrence, caused by excess workload and work-related issues.

59. The Tribunal did not consider that this changed until late October/early November 2019. The reference in the Claimant’s Stress Action Plan to her “mental health” was consistent with the understanding that this was a recent, isolated episode of poor mental health, and so too was the fact that she had been referred for a course of CBT. The Respondent also asked her to consent to an OH referral, but she declined. That, of course, affects the question what the Respondent could *reasonably* be expected to know. The Claimant did not have any further sickness absence after she returned to work and appeared to be happy and settled. The only other relevant matter was the meeting with Ms Temple on 16 September 2019, when the Claimant was evidently very upset. She also told Ms Temple that she was on medication and receiving therapy. However, she still did not tell her anything of her history of poor mental health. It was still just three months since the initial diagnosis and sickness absence and there was a specific reason for the Claimant’s upset on the day – the discovery that she had been removed from the management course. None of these matters were such as reasonably to put the Respondent on notice that the Claimant might have a “long-term” mental health disability. From the Respondent’s perspective, it had lasted about three months, the Claimant was improving and there was nothing to suggest it had lasted longer or was likely to last 12 months or to recur.

60. The position changed in late October/early November 2019, when the Claimant provided her written response to the redundancy consultation paper. In that written response she wrote explicitly about her past experience and her underlying condition. She knew that returning to work was important from her previous experience. That written response was provided to the managing director and the HR manager. It should have alerted them to the fact that the Claimant had a history of poor mental health, not just a recent, isolated episode.

At that stage they knew, or ought reasonably to have been expected to know, that the Claimant had the disability.

61. That means the Claimant's complaints of unfavourable treatment relating to removing duties from her when she returned to work on 22 July 2019 do not succeed because, at the relevant time, the Respondent did know and could not reasonably be expected to know that she had the disability.

62. In any event, for the reasons set out in relation to direct discrimination above, most of those duties were not removed from her. The unfavourable treatment complained of did not happen and the complaints would have failed for that reason. One duty was removed from her – bid reports/updating the spreadsheet - but the Tribunal did not consider that this was unfavourable treatment. It was something the Claimant herself had requested before her sick leave, it was designed to remove an administrative task that was burdensome so that she could focus on other tasks, it was done in the context that she was expressing concerns about her workload, and it was explained to the Claimant.

63. The Claimant was removed from the Team Leader training course, but that happened on 29 July 2019 not 16 September 2019. At that time the Respondent did not know and could not reasonably be expected to know about the disability, so the claim fails for that reason. If it had not, the Tribunal would have accepted that removing the Claimant from the course was unfavourable treatment according to the established principles, and that her four-week absence arose from her disability. However, the Claimant was not removed from the training course because she had had a four-week absence. She was removed from it because she had concerns about her workload, which had led to work-related stress; she had concerns about her ability to do the job; and she wanted to reduce her working days to three per week. Ms Temple thought it would be inappropriate and negligent for her to take on the onerous commitment of the training course, taking up 20% of her working time over a significant time period at that time.

64. The Claimant was put at risk of redundancy on 22 October 2019 and dismissed for that reason on 8 November 2019. That was unfavourable treatment. However, it was not because of her disability-related absence. It was for the reasons set out in relation to direct discrimination above.

Employment Judge Davies
8 July 2021