EMPLOYMENT TRIBUNALS

Claimant: C Wright

Respondent: The Royal British Legion Poppy Factory Limited

RESERVED JUDGMENT
OF THE EMPLOYMENT TRIBUNAL

HELD AT: Manchester [by video platform] **ON:** 12 – 16 April 2021
+ in chambers on
25 May 2021

BEFORE: Employment Judge Batten
R Cunningham
M Plimley

Representation
For the Claimant: In person
For the Respondent: Z Malik, Solicitor

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the claim of disability discrimination fails and is dismissed.

REASONS

1. By a claim form dated 19 February 2019, the claimant presented a claim of disability discrimination comprising complaints of direct discrimination, a failure to make reasonable adjustments, harassment and discrimination

arising from disability. On 8 April 2019, the respondent submitted a response to the claim. The respondent accepted that the claimant was disabled within the definition in the Equality Act 2010 ("EqA") at the material time by reason of a mental impairment, namely PTSD.

2. A case management preliminary hearing took place on 8 January 2020 before Employment Judge Dunlop following which the claimant filed further and better particulars of her claim on 11 September 2020. A further case management preliminary hearing took place on 16 September 2020 before Employment Judge Buzzard who refused the claimant's application to increase the harassment allegations.

3. The hearing of the evidence took place over 5 days. The oral evidence and submissions were completed on the fifth hearing day and the Tribunal commenced its deliberations, which were not completed at the end of the day and so the Tribunal reserved its judgment, meeting in chambers to deliberate further and reach its judgment. The claimant represented herself at the hearing and the Tribunal considered that she demonstrated considerable courage in bringing a difficult case on her own. In the course of the hearing, the claimant at times became distressed and breaks were taken wherever appropriate or necessary.

Evidence

4. A bundle of documents was presented at the commencement of the hearing in accordance with the case management Orders. The respondent also tendered a supplemental bundle of further documents which were added to the back of the main bundle. The claimant initially suggested that her documents were not in the bundle prepared by the respondent. The documents concerned were checked and were found to be in the bundle. In any event, a number of further documents were added to the bundle in the course of the hearing. References to page numbers in these Reasons are references to the page numbers in the main bundle.

5. The claimant gave evidence from a written witness statement. In addition, the claimant called Wendy Edge from the Brain and Spinal Injury Centre ("BASIC"), and Carole-Anne Jones, an employment consultant at the respondent to give evidence in support of her claim. The respondent called 6 witnesses, being: Charlotte Dymock, an HR business partner; Keren Rowlands, a senior HR business partner; Sarah Casemore, the respondent's director of operations; Mark Louw, the respondent's finance director; and Deirdre Mills, the respondent's chief executive. All of the parties' witnesses gave evidence from witness statements and were subject to cross-examination.

6. The respondent also tendered a witness statement from Adam Green, the claimant's line manager. Mr Green was absent on a family holiday at the time of the hearing and was also unable to attend to give evidence by video platform. The respondent intimated that it might seek a witness order to compel his attendance, however, after discussion with the Tribunal as to the relevance of his evidence, the application was not pursued.

7. In addition, the Tribunal was provided with a chronology prepared by the respondent, which the claimant agreed after consideration of it. In the course of the hearing, the claimant filed an updated schedule of loss.

Issues to be determined

8. The Tribunal noted that a draft list of issues had been prepared at the case management preliminary hearing before Employment Judge Dunlop. At the outset of the hearing, the Tribunal discussed the draft list of issues with the parties. After amendments including the addition of a named comparator and the respondent's legitimate aim, it was agreed that the issues to be determined by the Tribunal were as follows:

1. <u>Return to Work – Direct discrimination</u>

1.1 Did the respondent subject the claimant to less favourable treatment in subjecting her to a return to work that was less supported and less well managed than an employee returning from ill health absence with a physical condition?

1.2 If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

1.3 The claimant relies on a real comparator, specifically Carol Anne Jones, or alternatively a hypothetical comparator, being an employee returning from an absence of the same length as the claimant having suffered from a physical impairment.

2. <u>Return to Work – Reasonable adjustments</u>

2.1 Did the respondent's remote management arrangements for employees in the claimant's position constitute a provision, criterion or practice ("PCP")?

2.2 If so, did that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

2.3 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at such disadvantage?

2.4 If so, were there steps that could have been taken by the respondent to avoid such disadvantage? The claimant alleges that the following steps should have been taken, namely holding regular one-to-ones with the claimant at a private venue which was known to the claimant.

2.5 Did the respondent's arrangements for the claimant to return to work without prior agreement of her hours constitute a PCP?

2.6 If so, did that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

2.7 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at such disadvantage?

2.8 If so, were there steps that could have been taken by the respondent to avoid such disadvantage? The claimant alleges that the following steps should have been taken, namely communicating with the claimant as regards proposed hours for a phased return and agreeing the hours of a phased return before her return to work.

3. <u>HR Emails – Direct discrimination and Harassment</u>

3.1 Did the respondent engage in conduct as follows:

3.1.1 sending large numbers of emails to the claimant whilst she was signed off sick asking for dates and times for her private therapeutic appointments?

3.1.2 Charlotte Dymock telephoning Wendy Edge and inform her that the claimant had "behavioural difficulties"?

3.2 Did that conduct amount to less favourable treatment of the claimant?

3.3 If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

3.4 The claimant relies on a hypothetical comparator.

3.5 Alternatively, did that conduct constitute unwanted conduct related to the claimant's disability?

3.6 Did that conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4. <u>The "Get Yourself Back to Work Service" - Direct discrimination and/or Discrimination arising from disability</u>

4.1 It is agreed that the claimant applied for support from the respondent as a service user in relation to this scheme, and that she was rejected.

4.2 Did that rejection amount to less favourable treatment? The claimant believed that she met the criteria because she was at risk of redundancy whilst the respondent contended that the criteria had changed.

4.3 If so, was this rejection because of the claimant's disability and/or because of the protected characteristic of disability more generally?

4.4 The claimant relies on a hypothetical comparator of a sick and/or injured ex-service person with a health condition, and also an actual comparator, David Jackson-Harlem.

4.5 Did that rejection amount to discrimination arising from disability within section 15 of EqA?

4.6 The claimant contended that the something arising from disability was that her ability to communicate was impaired and that she employed coping mechanisms such that she avoided conflict and became disengaged.

4.7 If the rejection is found to be unfavourable treatment of the claimant, which is denied, the respondent contends that such was a proportionate means of achieving a legitimate aim, namely the prioritisation of those veterans in most need against a backdrop of an increase in clients/beneficiaries and a decrease in funding, where it was decided that the best use of charitable funds was to focus on those veterans most in need, being those without employment or within their notice period.

5. <u>Suspension and related matters - Harassment</u>

5.1 Did the respondent engage in conduct as follows:

5.1.1 Suspending the claimant on 18 October 2018;

5.1.2 Revoking her IT access as part of that suspension;

5.1.3 Informing her that she was not permitted to speak to anyone in her team as part of that suspension?

5.2 If so, did that conduct constitute unwanted conduct related to the claimant's disability?

5.3 Did that conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6. <u>One-to-Ones – Reasonable adjustments</u>

6.1 Did the respondent apply a PCP of managing the claimant remotely?

6.2 Did that PCP put the claimant at a substantial disadvantage in comparison with persons who were not disabled?

6.3 If so, did the respondent know or could it reasonably have been expected to know that the claimant was placed at such a disadvantage?

6.4 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The claimant alleges that the following steps should have been taken, namely ensuring that her one-to-one meetings took place regularly – the claimant alleges that those meetings failed to take place in March, April and May 2018.

Findings of fact

9. Having considered all the evidence, the Tribunal made the following findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them, if any, for the purpose of making further findings of fact. The Tribunal have not simply considered each particular allegation, but have also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

10. The findings of fact relevant to the issues which have been determined are as follows.

11. Prior to her employment with the respondent, the claimant had been registered as a client of the respondent through the respondent's 'Get Yourself Back to Work' ("GYBTW") scheme. The claimant is a forces veteran who suffers from PTSD (diagnosed in 2017) and complex PTSD (diagnosed in 2018) arising from her previous military service/emergency work, affecting her mental and physical health.

12. The claimant was employed by the respondent from 3 January 2017, initially as an Employment and Engagement Advisor. In May 2018, the claimant's role increased to include that of Referrals and Engagement Co-ordinator for the north of England and Wales, working from home. The

claimant's job involved working online and by email, dealing with clients of the respondent largely through telephone communications rather than face to face or in person.

13. Between 29 November 2017 and 19 September 2018, the claimant received treatment from a Psychotherapist, Wendy Edge, at BASIC. The claimant also underwent Eye Movement Desensitization Reprocessing ("EMDR") treatment from November 2017. Appointments for the claimant's treatments had at first taken place in the morning. This was soon changed, by agreement with the claimant's then line manager, to Wednesday afternoons such that 2.5 hours was booked in the claimant's diary, to cover the duration of a treatment appointment and also travel time. The claimant suffered no loss of pay for the time taken during working hours to attend these appointments. The respondent considered this to be a reasonable adjustment.

14. In early 2018, the claimant's line manager changed to Adam Green. On 10 April 2018, during a 1-2-1 meeting, Mr Green asked about the claimant's counselling. The record of the meeting shows that the claimant told him that she thought it had helped and that she had 2 sessions left (Bundle page 315).

15. At the beginning of June 2018, Mr Green had another conversation with the claimant during which the claimant told him that she was still receiving therapy and that the sessions would continue for as long as she needed them. This prompted Mr Green, on 7 June 2018, to raise the issue of the claimant's counselling with the respondent's HR team because, based on the information given to him by the claimant, in April 2018, he had expected the sessions to have ended and the situation appeared to have changed (Bundle page 127).

16. As a result, Charlotte Dymock from HR asked the claimant about her counselling sessions. The claimant told Ms Dymock that she was finding them really helpful and that she wanted them to continue. The claimant went on to say that she usually made up the time elsewhere in the week; the implication being that the claimant's therapy was ongoing. Ms Dymock suggested formalising the arrangements by putting them in writing, together with regular "check-ins" (Bundle page 128).

17. On 12 July 2018, Mr Green raised issues around the claimant's behaviour during a recent 1-2-1, when he suggested a referral to occupational health. The claimant had told him that she "was trying desperately not to go off sick" amongst other things. The call had ended with the claimant telling her manager to "leave her alone" and ending the call. It was agreed that the claimant and the respondent might benefit from external support and advice. Mr Green emailed Ms Dymock to report the telephone call and

he opined that, with any other employee, the behaviour exhibited would have resulted in formal action (Bundle page 129).

18. As a result, the respondent asked the claimant to undergo an occupational health assessment and it asked for clarification of the dates of the claimant's treatment.

19. On 23 July 2018, the claimant was signed off work, sick. Her sick note expired on 6 August 2018. The following day, 24 July 2018, the claimant emailed Ms Dymock asking to be left in peace and the claimant said that she gave permission for the respondent to approach her psychotherapist, Wendy Edge, to discuss her diagnosis and further treatment required.

20. Ms Dymock replied, the same day, in a professional manner, to clarify why the respondent sought an occupational health report, to reassure the claimant that the respondent was not seeking a second opinion or to duplicate treatment. Ms Dymock explained that the occupational health referral would enable the respondent to understand how the claimant's condition affected her so that the respondent could effectively support the claimant at work. Ms Dymock proposed to put the occupational health referral on hold for 2 weeks until the claimant returned to work upon the expiry of her sick note (Bundle page 132).

21. On 7 August 2018, Charlotte Dymock spoke to Wendy Edge by telephone and Ms Edge advised on PTSD symptoms in general.

22. Subsequently, Ms Edge told the claimant that Ms Dymock had described the claimant, during the call on 7 August 2018, as having "behavioural difficulties". The claimant was shocked and upset. There was a conflict of evidence as to what was in fact said, during the telephone call between Ms Dymock and Ms Edge, as opposed to what Ms Edge reported to the claimant. On this point, the Tribunal preferred the evidence of Ms Dymock who explained that she had been mindful not to label the claimant and so had described the conduct the claimant had exhibited and said that it had become difficult to manage. The Tribunal considered that Ms Dymock's description had been, inadvertently, transposed into "behavioural difficulties" in Ms Edge's notes and that the note was then relayed, incorrectly as such, to the claimant.

23. On 13 August 2018, having not heard from the claimant who had been expected to return to work, Ms Dymock emailed the claimant as her sick note had run out. The claimant replied, later that day, to say that she had an appointment with her GP at 4pm. Later, the claimant emailed to say that she had been signed off until 31 August 2018 and that she was also undergoing a second set of EMDR therapy through BASIC. Ms. Dymock asked the claimant to provide a letter from BASIC to confirm the EMDR therapy (Bundle page 137). The claimant replied with a brief email, asking

the respondent to ask Wendy Edge directly for a letter. The claimant also commented that she did not have to disclose anything to the respondent and said "*It feels like I am not trusted*". Ms Dymock confirmed that she would contact Wendy Edge directly and said that her request was not about trust but about making sure the respondent had full and complete records, to help it to best support the claimant at work.

24. On 14 August 2018, Charlotte Dymock requested treatment dates from Ms Edge but received no reply and so, on 24 August 2018, she chased Ms Edge. On 28 August 2018, Ms Edge replied that she wanted to speak to the claimant first. Ms Edge decided not to reply to the respondent thereafter. On 4 September 2018, Ms Dymock continued to chase Wendy Edge by email for the details of the claimant's treatment but received no reply.

25. On 10 September 2018, the claimant contacted the respondent to say that she was hoping to return to work before 21 September 2018, because her sick pay was due to reduce to half pay. The claimant said she could not afford this.

26. The respondent's approach was to seek confirmation that the claimant was in fact fit to return to work. On 18 September 2018, Ms Dymock again chased Ms Edge for information saying that it would assist, because the claimant was wanting to return to work. Ms Dymock said that, if Ms Edge was unable to provide the information requested for any reason, to please let her know (Bundle page 141). She again received no reply from Ms Edge.

27. At the same time, Ms Dymock emailed the claimant setting out possible work appointments and meetings in the following week, in case the claimant returned to work. On 20 September 2018, Ms Dymock emailed the claimant to propose initial working hours of 10am – 3pm as part of the claimant's phased return to work, with arrangements to be reviewed when an occupational health report was received. The claimant did not reply and did not dispute the working hours proposed (Bundle page 143). Instead, the next day, 21 September 2018, the claimant asked to take annual leave for the next week. The claimant pointed out that she already had a week's leave booked for the week after that, and that this would mean she would return to work on 8 October 2018. Ms Dymock replied agreeing to the claimant's request for annual leave and repeated her request for confirmation from the claimant of the dates of her treatment with BASIC, both for the previous course of treatment and for upcoming sessions. Ms Dymock pointed out that she had approached Ms Edge for this information but Ms Edge had been unable to provide the confirmation directly (Bundle page 149).

28. The claimant replied by email, refusing, and saying "*I will not be providing dates of treatment. This is my personal treatment. The fact that I have disclosed this should be enough*" (Bundle page 149).

29. In her reply, Ms Dymock explained that it was 'not optional' for the claimant to provide the information requested. She went on to set out the respondent's understanding, including that the claimant was to attend a 10-week course of therapy, commencing on 29 November 2017, that in June 2018, the claimant had told her manager, Adam Green, that the treatment was ongoing and that the respondent had since learned that the treatment from BASIC had ended in March 2018, such that there was a discrepancy in the information provided. The claimant was asked to explain this or provide evidence of the appointments taken in working time.

30. The claimant responded to say that she had attended her appointments and had not taken time off in lieu for hours which she had worked late, that there had been some dates when her therapist had been on leave and on those occasions she had been in work. The claimant refused to provide any further information, and no dates as requested, stating that the respondent was placing her under stress.

31. Later that evening, 21 September 2018, the claimant emailed Ms Dymock again to say that "*I feel it isn't within my best interests [for Ms Dymock] to be asking such questions especially over email.*" The claimant's email sought to justify her time off work on Wednesday afternoons for a variety of reasons, whilst asking the respondent to be compassionate and understanding when she, as a military veteran, was experiencing a tough time (Bundle page 154). By the time of the claimant's return to work, in October 2018, the claimant's EMDR hours had still not been established or confirmed.

32. Meanwhile, on 26 September 2018, the respondent held an 'all-staff event' at which staff were told of changes to the eligibility criteria for the GYBTW scheme. The claimant was off sick at the time and so had not attended this meeting. The information was to be cascaded to absentee staff by regional managers – this responsibility fell to Mr Green, for the claimant, but he overlooked this.

33. On 27 September 2018, the claimant attended and occupational health assessment. It had been understood by the respondent that the claimant would not return to work until the occupational health report was received and considered.

34. Without further notice to the respondent, the claimant returned to work on 8 October 2018. The claimant logged onto the respondent's systems at 8.30am that day and found that there were a number of cases in her diary.

Later in the morning, the claimant rang her manager to discuss her phased return to work. She told Mr Green, during the call, that she was working until 12.30pm that day, being 4 working hours in accordance with the recommendation of occupational health. The respondent had not yet received the occupational health report and so it was unaware of this recommendation, which had not been considered with the claimant. As a result, the respondent had to chase a copy of the report from the occupational health providers and Mr Green indicated that they would discuss the report when it was received.

35. The occupational health report appears in the Bundle at page 158 onwards, with a statement of advice to management at pages 165-7. The respondent received the occupational health report only on the afternoon of 8 October 2018, after chasing the occupational health provider for a copy. It had been sent to the claimant beforehand in accordance with her request. The occupational health report recommends a phased return that is graded, starting with the claimant working half days of 4 hours, so that the claimant's progress can be supported and monitored.

36. Between April and September 2018, Sarah Casemore, the respondent's operations director had been tasked to review the respondent's operations with regard to cost effectiveness and the efficient use of resources. In September 2018, Ms Casemore's review concluded that there was a duplication in the respondent's services, such that the claimant's Employment and Engagement Advisor role could be undertaken by the respondent's Employability Co-ordinators. 2 staff were affected, one being the claimant. The respondent therefore decided to enter a formal consultation process with the 2 affected employees.

37. On 9 October 2018, the respondent called the claimant to an online meeting in order to commence a consultation process about redundancy and the claimant was then placed at risk of redundancy.

38. The following day, 10 October 2018, the claimant's line manager, Adam Green, proposed a 1-2-1 meeting with the claimant, to take place in the John Lewis' café, at the store in Cheadle on 11 October 2018. The claimant did not attend and later told Mr Green that she was unable to attend because she had arranged to meet with her trade union representative about the redundancy process.

39. On 11 October 2018, Keren Rowlands, the respondent's senior HR manager was covering for Ms Dymock's annual leave. Ms Rowlands noticed that the respondent still did not have the claimant's EMDR appointment dates and so she emailed the claimant to ask for the outstanding information. Ms Rowlands informed the claimant that the respondent had been told that the claimant's course of EMDR had ceased at the end of March 2018 and that there was an apparent discrepancy

which needed to be clarified. The claimant was requested to provide the respondent with the dates and times of her appointments for EMDR treatment that she had attended on Wednesday afternoons in the period from 1 April to 23 July 2018 when the claimant was signed off work, sick. Ms Rowlands told the claimant that this was a reasonable management request for information and that she was expected to provide the information without any further delay (Bundle page 172).

40. On 12 October 2018, the claimant had a telephone call with her manager to review her return to work (Bundle page 176). The claimant said that she felt her first week back had gone OK and she requested an increase in her working hours, which was agreed. The claimant also requested not to meet in public because she felt that she might become upset.

41. Also on 12 October 2018, the claimant registered for employment support under the respondent's GYBTW scheme. Later that day, the claimant received an email from Ms Casemore to say that the respondent was unable to proceed with the claimant's application because it did not provide a service to veterans who were already in employment (Bundle page 177).

42. On 15 October 2018, the claimant responded to Ms Rowlands request for her EMDR dates. The claimant said she did not have the dates and that she should have been asked for the information 10 months ago (Bundle page 184).

43. On 17 October 2018, the claimant was suspended on full pay because of her failure to provide the information requested to confirm her attendance at EMDR therapy which the claimant was told might amount to serious insubordination. Her suspension was confirmed in a letter of 18 October 2018 and an investigation was undertaken by Ms Casemore.

44. On 1 November 2018, the claimant attended an investigation meeting. The notes of the meeting appear in the Bundle at pages 190 – 192. The claimant said when questioned that she had not attended therapy on a number of the dates in question and that on those dates when she had no attended therapy she had been at work. The respondent asked the claimant about the recurring diary entries for appointments in her electronic calendar and the meeting notes show that the claimant replied that she "had not managed her diary entry, adding that she hadn't worked with Outlook before, it was not intentional and to mislead". The claimant suggested that the respondent could check the phone and HQ records and emails which she said would show she was actively asking for work and that she worked hard for the respondent.

45. Also on 1 November 2018, the claimant attended a further consultation meeting about the proposed redundancies.

46. After the claimant's investigation meeting, Ms Casemore looked into the claimant's mobile phone records, together with her email and Citrix activity. The respondent found significant gaps including no evidence of activity by the claimant for those private appointment periods after 4 April 2018.

47. On 6 November 2018, Wendy Edge emailed the respondent in reply to its enquiries. She confirmed that an initial 12 weeks of therapy sessions ended on 4 April 2018 and that sessions resumed on 12 September 2018 (Bundle page 219).

48. On 15 November 2018, the respondent informed the claimant that it would be proceeding with a disciplinary process with a view to arranging a formal hearing.

49. On 16 November 2018, the claimant submitted a formal grievance to the respondent which appears in the Bundle at pages 221-222. In her grievance, the claimant complains that the respondent had failed to provide her with support and reasonable adjustments during her EMDR treatment and that ,upon her return to work, the respondent had shown what the claimant said was a complete disregard for the contents of the occupational health report and had refused her access to the GYBTW. The claimant demanded an investigation into the conduct of the respondent's management.

50. On 26 November 2018, the claimant was given notice of dismissal for redundancy with a notice period that was to end on 11 January 2019.

51. On 5 December 2018, the respondent held a disciplinary meeting followed by a grievance meeting with the claimant. Both meetings were conducted by Mark Louw, the respondent's finance director. The claimant had consented to Mr Louw dealing with both meetings, and on the same day.

52. On 19 December 2018, Mr Louw wrote to the claimant with the outcome of the disciplinary hearing (Bundle page 277). Mr Louw found that there was no evidence that the claimant had undertaken work as she claimed to have been on the dates and specific times booked out for therapy appointments in her diary. However, Mr Louw concluded that the matter could not be considered as gross misconduct because of the claimant's health - he considered that the claimant's mental health was a mitigating factor. He also decided not to give the claimant a warning because her employment was shortly to terminate by reason of redundancy and so that the claimant could leave the respondent with a clean record. The Tribunal found that Mr Louw adopted a pragmatic approach in an effort to help the claimant to move on from the respondent.

53. In addition, on 19 December 2019, Mr Louw wrote to the claimant with the outcome of the grievance hearing (Bundle page 279). The letter is clear and reasoned. Mr Louw did not uphold each of the 4 points of the claimant's grievance. He concluded that the respondent had provided the claimant with reasonable levels of support, which was equivalent treatment to that afforded to other members of staff and that the communications between HR and Wendy Edge had been professional and that there had been no attempt to make medical assessments. In respect of the GYBTW scheme refusal, Mr Louw found that the review in September 2018 had led to changes to the scheme eligibility criteria, thereby limiting the scope of the scheme to dealing only with veterans who were out of work on under notice of termination. As the claimant was, by then, on notice of redundancy she was invited to register with the GYBTW service.

54. On 24 December 20158, the claimant submitted an appeal against the grievance outcome and also commenced ACAS early conciliation. A grievance appeal hearing took place on 10 January 2019, chaired by Deidre Mills, the respondent's chief executive. The notes appear in the Bundle at pages 289-293.

55. On 11 January 2019, the claimant's employment terminated, by reason of redundancy. The claimant received an enhanced redundancy payment and also pay in lieu of notice from the respondent.

56. On 21 January 2019, Ms Mills wrote to the claimant to inform her that her grievance appeal was not upheld. The letter appears in the Bundle at pages 294-300. Ms Mills set out her view that the claimant's grievance had been investigated thoroughly by Mr Louw and that the grievance hearing had addressed all of the points raised, in particular pointing out that the changes to the GYBTW scheme had been put in place for all veterans and was not an act of discrimination.

The applicable law

57. A concise statement of the applicable law is as follows.

58. The complaint of disability discrimination was brought under the Equality Act 2010 ("EqA"). Disability is a relevant protected characteristic as set out in section 6 and schedule 1 of EqA.

59. Section 39(2) EqA prohibits discrimination against an employee by dismissing her or by subjecting her to any other detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

60. The EqA provides for a shifting burden of proof. Section 136 so far as is material provides as follows:

> *(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.*

61. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

62. In *Hewage v Grampian Health Board [2012] IRLR 870* the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong [2005] ICR 931* and was supplemented in *Madarassy v Nomura International PLC [2007] ICR 867*. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct discrimination

63. Section 13 EqA provides that 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. The relevant protected characteristics include disability.

64. Section 23 EqA provides that on a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case, and that the circumstances relating to a case includes that person's abilities if the protected characteristic is disability. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability.

65. Further, the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including Amnesty International v Ahmed [2009] IRLR 884, that in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, disability) had any material influence on the decision, the treatment is "because of" that characteristic.

Harassment

66. Section 26 EqA provides that:

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

(a) A engages in unwanted conduct related to the 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

(2) A also harasses B if-
(a) A engages in unwanted behaviour of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1) (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.

67. The concept of harassment under the previous equality legislation was the subject of judicial interpretation and guidance by Mr. Justice Underhill in *Richmond Pharmacology and Dhaliwal [2009] IRLR 336*. The Tribunal has applied that guidance, namely:

"*There are three elements of liability (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an*

adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's [protected characteristic].”

Reasonable adjustments

68. The duty to make reasonable adjustments, in section 20 EqA, arises where:

(a) the employer applies a provision criterion or practice which places a disabled employee at a substantial disadvantage in comparison with persons who are not disabled; and

(b) the employer knows or could reasonably be expected to know of the disabled person’s disability and that it has the effect in question.

69. As to whether a “provision, criterion or practice” (“PCP”) can be identified, the Equality and Human Rights Commission Code of Practice in Employment (“the EHRC Code”) paragraph 6.10 says the phrase is not defined by EqA but “*should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one-off decisions and actions*”.

70. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) EqA defines substantial as being “*more than minor or trivial*”. In the case of Griffiths v DWP [2015] EWCA Civ 1265 it was held that if a PCP bites harder on the disabled employee than it does on the able-bodied employee, then the substantial disadvantage test is met for the purposes of a reasonable adjustments claim.

71. The duty is to take such steps as it is reasonable, in all the circumstances, to take to avoid the provision criterion or practice having that effect. The duty is considered in the EHRC Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case. An adjustment cannot be a reasonable adjustment unless it alleviates the substantial disadvantage resulting from the PCP – there must be the prospect of the adjustment making a difference.

72. Under section 136 EqA, it is for an employer to show that it was not reasonable for them to implement a potential reasonable adjustment.

Discrimination arising from disability

73. The prohibition of discrimination arising from disability is found in section 15 EqA. Section 15(1) provides: -

(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.

74. The proper approach to causation under section 15 was explained by the Employment Appeal Tribunal in paragraph 31 of Pnaiser v NHS England and Coventry City Council EAT /0137/15 as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

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

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links …[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) ….. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) …..

(h) Moreover, the statutory language of section 15(2) makes clear …. that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so.

75. In City of York Council v Grosset [2018] WLR(D) 296 the Court of Appeal confirmed the point made in paragraph (h) in the above extract from Pnaiser: there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test.

76. The EHRC Code contains provisions of relevance to the justification defence. In paragraph 4.27, the EHRC Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggests that the question should be approached in two stages:-

(1) is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

(2) if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

77. As to that second question, the EHRC Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

78. In the course of submissions, the Tribunal was referred to a number of cases by Counsel for each party, in addition to those mentioned above, as follows:

- Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285
- Wilcox v Birmingham Cab Services Limited [2011] UKEAT/0293/10
- Prospects for People with Learning Difficulties v Harris [2012] UKEAT/0612/11
- Wasteney v East London NHS Foundation Trust [2016] IRLR 388
- First Great Western Ltd & another v Waiyego [2018] UKEAT/00566/18
- London Borough of Lambeth v Agoreyo [2019] IRLR 560

79. The Tribunal took these cases as guidance but not in substitution for the statutory provisions

Submissions

80. The Solicitor for the respondent supplied detailed written submissions which he spoke to. The Tribunal has considered these with care but does not rehearse them in full here. In essence it was asserted that:- the claimant had been justifiably investigated for unauthorised time off work because of discrepancies found in her outlook diary; the claimant's suspension was a neutral act for which the respondent had reasonable and proper cause; when asked to confirm the dates of her therapy sessions, the claimant had become evasive and had effectively refused consent for her psychotherapist to respond to the respondent's enquiries; the claimant was upset to be investigated and this had led her to complain to the Tribunal rather than any discrimination; that the claimant had unreasonably contended in effect that the respondent should not have pursued the disciplinary allegations because she was disabled; and in any event, the respondent's decision not to dismiss the claimant for gross misconduct was fair and compassionate given the circumstances.

81. Counsel for the respondent also contended that: the reasonable adjustments claim was unfounded in that the return to work was agreed to be on a phased based but then the claimant had unilaterally decided on her hours, which the respondent had then agreed; and that the claimant had been managed remotely for a long time without objection such that the respondent reasonably believed it to be her preference and further that the last 1-2-1 complained of was in April 2018 due to the claimant's absence and therefore substantially out of time. It was also submitted that the claimant was not harassed as she alleged in that: the return to work was agreed and supported with reasonable adjustments implemented, and that any delay in the occupational health report was not attributable to

the respondent; the number of HR emails sent to the claimant was not excessive and were largely aligned with the expiry of sick notes; and that Ms Dymock's account of the conversation with Ms Edge should be preferred and that the claimant was not in fact described as having "behavioural difficulties". In respect of the GYBTW scheme refusal, the respondent relied upon the scheme rules which had not applied to her comparators due to a change in the eligibility criteria, in September 2018.

82. The claimant also supplied written submissions and made a number of detailed oral submissions which the Tribunal has also considered with care but does not rehearse in full here. In essence it was asserted that:- the claimant was a former military veteran who had been proud to work for the respondent and who had made every effort to resolve her dispute without a Tribunal hearing; that events and the actions of the respondent had triggered an exacerbation of her mental health issues; that the dates of her therapy had been at the discretion of Ms Edge and she had asked the respondent to check for evidence of work activity; and that client availability had shaped her working week and activity.

83. The claimant also submitted that there had been a breakdown in communication surrounding her return to work; that HR should have initiated contact to implement reasonable adjustments; that the GYBTW refusal had hindered her progress into meaningful and enjoyable employment; and that she had not been aware of the change in the eligibility criteria.

The Tribunal's conclusions (including where appropriate any additional findings of fact)

84. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Return to work - Direct discrimination

85. The Tribunal reviewed its findings of fact about the claimant's return to work on 8 October 2018. The respondent had proposed that any return to work should take place after receipt of the occupational health report had been considered by both parties. The claimant had not replied to disagree with or dispute this suggestion. The claimant had also proposed to postpone her return (following her initial request to return before 21 September 2018) until after her annual leave at the end of September 2018. During the claimant's 2-weeks of annual leave, the respondent treated the claimant gently and understandably did not press her to confirm arrangements. Unlike earlier communications, the claimant never confirmed a date with the respondent nor did she inform the respondent that she in fact intended to return on 8 October 2018. Instead, the

claimant chose simply to log-on to the respondent's systems that day, at 8.30am, when she was aware that the respondent's policy in such circumstances was to start later, at 10am. Indeed, on 20 September 2018, Ms Dymock had proposed working hours between 10am and 3pm at a time when the occupational health report, recommending 4 hours per day had not been received. In those circumstances, the Tribunal considered that the claimant's return to work was less supported and less well managed than a return to work might have been. However, the Tribunal also considered that the situation was of the claimant's making and not something that the respondent had subjected her to either intentionally or at all and was not because of her disability.

86. The claimant relied on Carol Anne Jones as a comparator. She had suffered from cancer and gave evidence in support of the claimant about her return to work. Ms Jones had attempted a return to work in December 2016, which had not gone well. A plan for a phased return was therefore arrived at in respect of her later return, with Ms Jones' input, to support a managed return to work. The Tribunal considered this to be a very different situation to that of the claimant and concluded that Ms Jones was not a valid comparator. In the claimant's case, the respondent had reasonably understood that the occupational health report on the claimant would be used, when it arrived, as a basis for discussion on the arrangements for the claimant's return to work, with the claimant's input. However, it has been found as a fact that the claimant unilaterally decided to return to work because of her financial situation and without regard to her fitness to do so. In those circumstances, the respondent was unable to support the claimant as it would have liked nor could it manage a return to work which was presented as a fait accompli on 8 October 2018.

Remote management and return to work - reasonable adjustments

87. The Tribunal agreed with the respondent's concession that its remote management arrangements constituted a PCP but did not conclude that such arrangements put the claimant at a substantial disadvantage in comparison with persons who are not disabled or at all. It was apparent from the evidence that the respondent's remote management arrangements had been in place for some while for the claimant and those arrangements had suited the claimant. Arguably, they were to the claimant's advantage because the respondent was not easily able to see or monitor the work the claimant undertook or when in fact she was "at work", hence it had to investigate the claimant's telephone calls and internet access on the relevant afternoons. There was no evidence that the claimant had complained about the way she was managed remotely in the past or the frequency of remote management meetings. Ms Jones' evidence had been that she had raised issued with meetings held in a public place and the respondent had then moved to book private rooms at her request and the Tribunal found no evidence to suggest that the

respondent would not have done the same for the claimant if asked. The Tribunal found, from the evidence, that it had been the norm for the claimant to attend supervision by telephone conference approximately every 6 – 8 weeks and that she had participated in a number of meetings with her manager at Starbucks in central Manchester. This was in complete contrast to the claimant's suggestion that she should not cope with public or crowded places and so had been disadvantaged by Mr Green's particular request to meet in the John Lewis' cafe. The Tribunal found that the claimant had not attended the meeting in John Lewis on 11 October 2018 of her own choice because, as she had told Mr Green later, she had instead arranged to meet with her trade union representative about the forthcoming redundancy process. In any event, the claimant's return to work review, which had been the purpose of the meeting in John Lewis, was conducted by telephone conference to which the claimant did not object (Bundle page 176).

88. In respect of the claimant's allegation that the respondent's arrangements for the claimant to return to work without prior agreement of her hours was a PCP, the Tribunal disagreed. As found at paragraphs 27 and 24 above, and as described in paragraph 85 above, this was a situation of the claimant's own making and not the usual manner in which the respondent arranged phased returns to work. The reality was that the claimant dictated her own working hours on the day she returned, thereby alleviating any disadvantage, although none has been found. The respondent had made proposals for the claimant's return to work in September 2018 which had gone effectively unanswered by the claimant. Subsequently, on 8 October 2018, the respondent agreed to the initial hours which the claimant wished to work and had already started without notice and further, once it had sight of the occupational health report, the respondent reasonably discussed and reviewed the claimant's return to work and agreed to arrangements in place.

HR emails and communications – Direct discrimination and harassment

89. The Tribunal considered the number, timings and nature of HR emails to the claimant in the period from mid-July to early October 2018 whilst the claimant was off work sick. This was a period of approximately 11 weeks during which period the respondent's HR had sent the claimant a total of 6 emails. The Tribunal did not consider that the respondent's communications amounted to "large numbers of emails" or an excessive number for such a period of time as alleged. It was also noted that only 2 of the 6 emails were about the respondent's repeated request for the dates of the claimant's therapy appointments. The Tribunal also considered that the request for dates of the claimant's therapy appointments was a legitimate matter for the respondent to pursue at the time, that it would have done so with any employee in the face of such

discrepancies as had arisen and that it did not do so excessively or in an oppressive manner despite the claimant's continued resistance and her effective refusal to cooperate in September 2018. In the circumstances, the Tribunal concluded that the HR emails in question did not constitute less favourable treatment or harassment of the claimant and were not sent because of the claimant's disability.

90. The Tribunal has found as a fact that Ms Dymock did not use the term "behavioural difficulties" to describe the claimant in her telephone conversation with Ms Edge on 7 August 2018 but that Ms Dymock's description of the claimant's behaviour had been, inadvertently, transposed into "behavioural difficulties" in Ms Edge's notes. It was unfortunate that the note was then relayed to the claimant by Ms Edge but this does not amount to less favourable treatment nor harassment of the claimant by the respondent – see paragraph 22 above.

GYBTW – Direct discrimination and discrimination arising from disability

91. The Tribunal has found that the claimant applied for the GYBTW scheme in October 2018, in response to the respondent announcing a redundancy process and placing her at risk of redundancy – see paragraph 41 above. Unbeknown to the claimant, the scheme rules had changed in September 2018 and the claimant was not eligible to register with the GYBTW scheme unless or until she was made redundant and on notice of the termination of her employment. That was not the claimant's situation when she had registered for the scheme. Her rejection was within the rules at the time. The changes to the GYBTW scheme had been put in place for all veterans and the claimant's rejection was therefore not because of her disability nor was there any evidence that it was because of the protected characteristic of disability more generally. The respondent was operating rules that had been reasonably amended due to a review of the respondent's charitable resources, and in an effort to manage and balance its expenditure against income.

92. The claimant relied upon a comparator, David Jackson-Harlem, in addition to a hypothetical comparator of a sick and/or injured ex-service person with a health condition. The claimant's argument was that Mr Jackson-Harlem had not been and/or the hypothetical comparator would not have been rejected as she was for the GYBTW scheme. The evidence concerning Mr Jackson-Harlem was that he had left the respondent's employment in July 2017 and his admission to the GYBTW scheme took place long before the eligibility criteria were amended. He was not therefore a valid comparator. The Tribunal also considered the claimant's defined hypothetical comparator in respect of which the claimant did not present any evidence. The Tribunal nevertheless concluded that a sick and/or injured ex-service person with a health condition was also not a

valid comparator. The claimant was rejected because she was not unemployed nor on notice of the termination of her employment at the time. A sick and/or injured ex-service person with a health condition who was also employed and/or not on notice of the termination of their employment would also have been rejected under the scheme rules.

93. In the course of the hearing, the claimant sought to rely on an additional comparator, Jonathan Lewis, following a suggestion by Ms Jones, in her evidence, that he was accepted onto the GYBTW scheme in 2019 because of "a discretion". The claimant brought no evidence of Mr Jones' precise circumstances not what the discretion might have been or how it was operated, if it existed. The claimant did not seek to argue that she should have been admitted onto the GYBTW scheme in October 2018 by operation of the respondent's discretion. In those circumstances, the Tribunal was unable to conclude that the claimant had been treated less favourably than Jonathan Lewis in any event.

94. In addition, the Tribunal did not consider that the claimant's rejection amounted to unfavourable treatment because of something arising in consequence of her disability. The claimant contended that the 'something arising from disability' was that her ability to communicate was impaired and that she employed coping mechanisms such that she avoided conflict and became disengaged. However, the Tribunal has found that the claimant was rejected for the GYBTW scheme because she did not meet the eligibility criteria in that she was not unemployed nor on notice of the termination of her employment at the time and not because of anything arising in consequence of her disability.

95. The respondent contended that, even if the claimant's rejection from the GYBTW scheme in October 2018 amounted to unfavourable treatment, the change in the eligibility criteria was a proportionate means of achieving the respondent's legitimate aim of the prioritisation of those veterans in most need, against a backdrop of an increase in clients/beneficiaries and a decrease in funding. The Tribunal accepted that such was a legitimate aim for a charitable organisation faced with increasing demand for its services to veterans and agreed with the respondent that it was proportionate in the circumstances to review the eligibility criteria and to determine that the best use of its charitable funds would be to focus on those veterans most in need, being those without employment or within their notice period.

Suspension - Harassment

96. The Tribunal considered that the claimant was suspended on 18 October 2018 because the respondent had reasonable cause to suspend her and to commence formal disciplinary action over the apparent discrepancies found in her outlook diary which had led to serious allegations of

dishonesty and insubordination. The claimant had failed to engage with the respondent's enquiries which were reasonable in the circumstances and it was suspected that she had instructed her therapist to ignore the respondent's communications, despite that the claimant had ostensibly give the respondent authority to contact Ms Edge on the understanding that it would be seeking confirmation of her therapy session dates. The Tribunal considered that the respondent was left with little choice. It had concluded that the claimant's actions had been misleading and could be in breach of trust and confidence such that suspension and formal investigation was appropriate in the circumstances.

97. There was no evidence to suggest that the claimant's suspension was anything other than a neutral act by the respondent and she was suspended on full pay so no loss of income arose. The claimant also complained that the respondent had revoked her IT access as part of the suspension and also told her that she was not permitted to speak to members of her team. The Tribunal accepted the respondent's submission that it was necessary and proportionate to remove the claimant from the IT system in order to deploy its investigation into the claimant's use of the system and to instruct her not to communicate with colleagues during that process. The fact that the claimant did not like the terms of her suspension did not mean that such constituted unlawful harassment of her because of disability.

One-to-Ones – Reasonable adjustments

98. The Tribunal has accepted that managing the claimant remotely amounted to a PCP but that this did not put the claimant at a disadvantage in comparison with people who are not disabled – see paragraph 87 above. The claimant admitted under cross-examination when asked about meetings with her manager, Adam Green, that she had had lots and many by telephone. In the Bundle, at page 124, there is an email from the claimant's previous manager, Elizabeth Skeet, copying in Mr Green, about what arrangements had been agreed with the claimant for managing her remotely. In Ms Skeet's email it is stated that it had been expressly agreed with the claimant that, as far as possible, when communicating with the claimant, Ms Skeet and Mr Green would use a combination of telephone and email, and also face-to-face contact. In addition, the claimant's appraisal for July 2018, at page 320 of the bundle, records that the claimant "*did not have a preference in terms of distance or F2F support*". In respect of the frequency of meetings with a manager, the respondent's policy was to hold such every 6-8 weeks. The claimant had met with her manager in January and February 2018 and then not again until May 2018. However, the claimant had not complained about the interval at the time, nor had she raised it in her appraisal in July 2018 as might have been expected. In those circumstances, even if the claimant

had been at a disadvantage, the Tribunal considered that the respondent could not reasonably have been expected to know of any disadvantage.

Conclusion

99. In light of all the above, the Tribunal has concluded that the claimant did not suffer discrimination because of her disability in any of the ways contended for. The Tribunal has considerable sympathy for the claimant, labouring with her mental health. However, the law cannot provide redress for what a claimant perceives to be unfavourable treatment where the Tribunal has found that not to be the case. From an inspection of the claimant's work diary, it appeared to the respondent that the claimant may have continued to take time off on Wednesday afternoons whether or not she had a therapy session to attend. The respondent was entitled to make informal enquiries about those apparent discrepancies and, when its questions went unanswered, to investigate the matter as it would with any employee. In doing so, the Tribunal considered that the respondent had been patient and lenient with the claimant. Whilst the claimant felt that the respondent had been wrong in its approach to and conclusions about her conduct, her understanding of the position was misguided. This is demonstrated by the fact that the claimant believed that she had been exonerated because the disciplinary process had resulted in no sanction. In fact, as Mr Louw explained in evidence, because the claimant's job was redundant, he had decided not to dismiss her for misconduct, in light of the claimant's mental health issues, despite that dismissal was an option open to him. In a sense, Mr Louw had let the claimant off lightly because of her disability and had treated her more favourably than a non-disabled employee would have been treated in the same circumstances.

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Employment Judge Batten
16 August 2021

JUDGMENT SENT TO THE PARTIES ON

17 August 2021

FOR THE TRIBUNAL OFFICE