Case No: 2602340/2019

EMPLOYMENT TRIBUNALS

Claimant: Mrs K Xidakis

Respondent: Rolls-Royce PLC

Heard at: Nottingham/Midlands East (by Cloud Video Platform)

On: 14, 15, 16 December 2020 and 5, 6, 8, 9, 12 July 2021

Before: Employment Judge Faulkner
Mrs D Newton
Ms J Dean

Representation: **Claimant** - Mr R Somerville (Counsel)
Respondent - Ms A Niaz-Dickinson (Counsel)

JUDGMENT

1. The Respondent has not refused to permit the Claimant to exercise her rights under regulation 13 of the Working Time Regulations 1998 ("the WTR"). Her complaint under the WTR is therefore not well-founded.

2. The Respondent did not contravene section 39 of the Equality Act 2010 by treating the Claimant unfavourably because of something arising in consequence of her disability, in refusing to let her carry over annual leave entitlement other than that provided by regulation 13 of the Regulations from any of the holiday years 2018, 2019 or 2020. The Claimant's complaints in this respect are therefore dismissed.

3. The Respondent did not contravene section 39 of the Equality Act 2010 by failing to comply with the duty to make reasonable adjustments in relation to the requirement that the Claimant work with Tim Dolman. The Claimant's complaints of failure to make reasonable adjustments are therefore also dismissed.

REASONS

1. Our Judgment in this case, dated 16 July 2021, was sent to the parties on 22 July 2021. These reasons are provided in response to the Claimant's request dated 4 August 2021. They represent the unanimous decision of the Tribunal following an 8-day hearing held via Cloud Video Platform.

Hearing

2. It was plain to the Tribunal from receipt of the witness statements and bundle on day 1 that this Hearing was never going to be completed within the three-day listing. Both parties, the Respondent in particular given that the Claimant was legally represented at the Hearing only, should have raised this with the Tribunal well before what transpired in December 2020.

3. The bundle was, in the end, well over 1,000 pages in length, having been supplemented by a further bundle ahead of day 4. Our approach to that, agreed with the parties, was that apart from the pleadings which were of course essential reading, we would only read those documents we were taken to during oral evidence. We made clear that we would not consider documents, not even those explicitly referred to in the witness statements, that were not highlighted to us in this way, as to do so would have elongated the Hearing even further. Numerical references below are references to the bundle.

4. As to witnesses, the parties presented around 100 pages of statements from the following:

4.1. the Claimant – her statement alone ran to 53 pages;

4.2. her additional witness, Robert Aldread, employed by the Respondent until September 2018 and at one point the Claimant's line manager;

4.3. Tim Dolman, formerly employed by the Respondent as Commercial Executive, Operations & Capability;

4.4. Sara Sheard, formerly employed by the Respondent as Commercial Director;

4.5. Mark Ashworth, formerly employed by the Respondent as Head of Internal Controls;

4.6. Marcus Dix, the Respondent's Head of Corporate Finance; and

4.7. Adele MacDonald, one of the Respondent's Senior People Partners.

Alpha-numeric references below are references to the statements, for example KX12 refers to paragraph 12 of the Claimant's statement, and SS10 to paragraph 10 of Sara Sheard's statement.

5. We asked the parties at the start of day 1 whether there were parts of the statements we did not need to consider, but they were unable to identify any. We were therefore required to read them in their entirety. We therefore began to hear the Claimant's evidence on the first afternoon. It was unsurprising to us at

the time, more so on reflection, that the combination of Ms Niaz-Dickinson's and our questions for the Claimant took the best part of two days. Ms Niaz-Dickinson's questions remained focused on and pertinent to the issues set out below.

6. Mr Somerville's position in relation to the Respondent's witnesses was initially and unusually that he did not propose to cross-examine them at all, apparently on the basis that he believed he would be able to establish the Claimant's case by reference to the bundle only. We made clear that we would therefore be bound to take the Respondent's evidence as unchallenged, which he appeared to accept. We were not prepared to tell him however, as he requested us to, that he did not need to put the Claimant's case to the Respondent's witnesses. This would have been an unusual step in any event, but at the point at which the request was made, we were in no sense as familiar with the case as the parties. Indeed, that remained so at the conclusion of the Claimant's evidence on day 3. We could not know with any certainty therefore, even at that stage, where the key conflicts of evidence lay, if any. That was always a matter for Mr Somerville and the Claimant.

7. On hearing that we were not able to give him the answer he sought, and having heard the questions put to the Claimant, by the Tribunal in particular, Mr Somerville decided that he would need to cross-examine the Respondent's witnesses after all. It was agreed that a further five days would be required to accommodate their evidence, submissions, deliberation, delivery of judgment and, if relevant, dealing with remedy. Regrettably, in particular because of Ms Niaz-Dickinson's full diary, we were unable to arrange the additional days until July 2021. The Tribunal re-read some of the key materials, and considered its notes of the first three days, before the Hearing resumed.

8. We record also that the Respondent agreed that the Claimant could have a blank piece of paper with her during her oral evidence, to enable her to note questions that were put to her. It was also agreed that the Respondent's witnesses and other attendees from the Respondent would turn off their videos so that the Claimant could not see them whilst she was giving evidence. Finally, we note that Mr Aldread did not give oral evidence, as Ms Niaz-Dickinson did not wish to question him.

Issues

9. It was agreed with the parties on day 1 that the issues to be decided by the Tribunal were as set out below. This was supplemented by an additional complaint made by the Claimant, without objection from the Respondent, between the adjournment of the Hearing in December 2020 and its resumption in July 2021. At a Preliminary Hearing before Employment Judge Batten in February 2020, it was determined that at all relevant times the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 ("the Act") by reason of anxiety.

Discrimination arising from disability

10. The first issue was whether the Claimant was treated unfavourably by not being permitted to carry over 77.6 hours of annual leave from 2018 to 2019, 65.5 hours from 2019 to 2020 and/or 76.6 hours from 2020 to 2021. Whilst the

Respondent accepted that she was not so permitted, it did not accept that this was unfavourable treatment.

11. The Respondent conceded that if there was unfavourable treatment, it was because of the Claimant's sickness absence.

12. The Respondent also agreed that the sickness absence arose in consequence of the Claimant's disability.

13. Accordingly, if there was unfavourable treatment, the Tribunal was required to decide whether it was a proportionate means of achieving a legitimate aim. The legitimate aims were said to be having a clear and consistent policy and enabling the staffing of the Respondent's rota. It was said that the Respondent achieved those aims proportionately by only permitting the Claimant to exercise her rights under the WTR in respect of carrying forward annual leave.

14. In respect of the 2018 to 2019 holiday year, the Tribunal was also required to determine whether the Respondent had actual or constructive knowledge of the Claimant's disability prior to 2 July 2019 when it received the occupational health report at 113, at which point the Respondent accepts it had constructive knowledge.

15. The Respondent also contended that the complaint related to the carrying over of annual leave from 2018 to 2019 was out of time. If relevant, this meant that the Tribunal was therefore required to determine whether, if that was an act of discrimination, it was conduct extending over a period ending with any later act of discrimination the complaint in relation to which was in time, or alternatively whether it was just and equitable to extend the usual time limit.

Reasonable adjustments

16. The Respondent agreed that it had a provision, criterion or practice ("PCP") that as a Commercial Manager the Claimant worked with Mr Dolman. For the purposes of this Claim, the PCP applied from November 2017 onwards, though as will appear below the Claimant worked with him for some years before then. We note that she ceased to work with Mr Dolman from 1 January 2019, though she alleged that the effects of the PCP continued beyond that. We return to that in our Analysis below.

17. The second question was whether the Claimant was put to a substantial disadvantage as a result of the PCP. The Claimant initially said that the disadvantage was that the PCP triggered her anxiety – as Mr Somerville put it, her anxiety interfered with how she saw apparently innocent actions on Mr Dolman's part and led to her sickness absence. He was thus at pains to say that it was not part of the Claimant's case before the Tribunal that Mr Dolman had bullied her. Mr Somerville subsequently stated that the Claimant's case was that having to work for Mr Dolman, or be near him, and being forced to move jobs and take a pay cut were the substantial disadvantages. We will return below to the subsequent development of the Claimant's case in this regard. The Respondent did not accept that there was a substantial disadvantage as required by section 20 of the Act.

18. If there was a substantial disadvantage, the third question was whether the Respondent failed to take reasonable steps to avoid it. Having suggested a long

list of alleged reasonable steps at the start of the Hearing, Mr Somerville confirmed that the Claimant only argued that she should have been seconded to another role at the same pay or moved into an alternative role at the same pay.

19. As to the Respondent's knowledge of the Claimant's disability, its position was as set out above.

20. As to its knowledge of the alleged substantial disadvantage, it denied the same as it says that by the time it received the occupational health report of 2 July 2019 referred to above, Mr Dolman was no longer the Claimant's manager.

21. The Respondent also contended that the complaints of failure to make reasonable adjustments were out of time. If relevant, the same issues arise as are set out above at paragraph 15.

Holiday pay claim under the WTR

22. This complaint was that the Respondent had not properly permitted the Claimant to carry forward her entitlement to annual leave under the WTR, to the extent that it had accrued during sickness absence. Mr Somerville confirmed that this was a complaint that the Respondent failed to comply with regulation 13 or 13A of the WTR.

23. The question for the Tribunal was therefore what the Claimant's entitlement to leave was under the WTR and whether the Respondent had refused to permit her to exercise any such right. The Respondent also argued that the complaint relating to 2018 holiday was out of time.

Facts

24. Taking into account all of the material identified above, we now record our findings of fact. In giving oral judgment and reasons, we only had time to touch on these findings briefly. Our full findings now follow. In the usual way, it is not necessary for us to address in these findings all of the factual matters rehearsed in the evidence. We have sought to focus on those matters relevant to determining the issues set out above.

Background

25. The Respondent has employed the Claimant since 2002. She is currently an Internal Audit Manager.

26. The Claimant joined the Respondent's "Civil Commercial Centre of Excellence Team", and thus worked with Mr Dolman, from 2011 until 1 January 2019, as Commercial Manager IT programmes. She says (KX6) that she enjoyed the job but was not comfortable working for Mr Dolman, and so from as early as July 2012 started enquiring about other roles, though not continuously, as whilst initially she was in the same office as Mr Dolman, when that ceased to be the case, her difficulties working with him were not so much of an issue. Mr Dolman says that in her performance review meetings, the Claimant told him she was happy and not thinking of what would be next in her career, though in her September 2017 personal development review ("PDR") she told him that her next move would be outside of the Commercial team. She was employed on Global

Grade 13 from February 2013. Mr Dolman describes her as a consistently good performer.

Disability

27. As noted above, the Claimant was disabled at the relevant times (whatever they were – see below) by reason of anxiety. We did not consider the medical records within the bundle in any detail, except those we were taken to expressly. We did consider EJ Batten's decision on the question of disability (154-159). We note in particular the following statements within that decision, noting also the specific issue EJ Batten was required to deal with:

27.1. Two events unrelated to work – which it is not necessary for us to record – were life-changing for the Claimant and affected her whole outlook.

27.2. In June 2018, she suffered a "mental breakdown" (we will return to that below). By April 2019, she was experiencing regular panic attacks, which continued throughout 2019.

27.3. The Claimant suffered significant anxiety from at least 2018 onwards, affecting her daily and in every aspect of her life at all material times – EJ Batten described it as continuing and ever present.

27.4. From June 2018, the Claimant's state of mind caused serious concerns to the medical professionals treating her – several referred her for psychological therapy and cognitive behavioural therapy ("CBT").

27.5. The Claimant was a disabled person within the meaning of the Act from November 2017, quite possibly for a long time before then.

28. Also included in the bundle was a report of a Chartered Clinical Psychologist, Dr Jean Mitchell (718 to 779), written in June 2020. We return to how the report was compiled in our Analysis below. Given its length, we did not read the report in full, though we did note the following matters highlighted during the evidence:

28.1. Like EJ Batten, it refers to delayed onset post-trauma symptoms connected to two incidents earlier in the Claimant's life, which were unrelated to work.

28.2. It concludes on balance that problems at work were the main trigger for her anxiety which would not have developed otherwise.

28.3. The Claimant coped with Mr Dolman even though she found him difficult and erratic, as she did not share his office and everyone else was in the same boat.

28.4. The Claimant's previous traumas "became entwined with her difficult work experiences", Mr Dolman's behaviour re-evoking "unconscious or suppressed memories" (774).

28.5. The Claimant will require further therapy to deal with her past traumas.

28.6. It is doubtful she will ever be able to fully revert to her past coping strategies, though the Claimant accepted in evidence she has well-established coping mechanisms.

29. The Claimant also accepted that there is no evidence in her medical records of clinically significant problems prior to 2017. Mr Dolman says (TD12) that from 2011 to 2016, he saw no evidence of the Claimant having any mental health issues. He adds (TD25) that at no point in 2017 did she say to him directly, or display any suggestion, that she was struggling with work or with him. He nominated her for a recognition award in August 2017.

The Claimant's relationship with Tim Dolman

30. At KX3 and the following paragraphs of her statement, the Claimant says that working for Mr Dolman triggered her anxiety in ways she did not experience with other managers. She says she perceived him as emotionally volatile, which unnerved her.

31. In early 2017, it was agreed that the Claimant would take the lead in and help deliver a major new IT project, known as the CLM project, the first phase of delivery being in the later part of that year (TD19 and TD21). She says (KX8) that Mr Dolman began to increase his involvement in the project as 2017 progressed. What Mr Dolman says (TD14) is that he was ultimately accountable for its delivery, and so whilst the Claimant was to run the project on a day-to-day basis, this needed to be with his oversight. At TD20, he says that he and Ms Sheard agreed given the size and importance of the project, that it would benefit from his closer involvement, something he says he discussed with the Claimant.

32. In April 2017, Mr Dolman told the Claimant about something called the Leader Essentials course which he thought would be supportive of her development (TD17). The Claimant later asked Mr Dolman if she could withdraw from the course but says that she was told by Mr Dolman that it was mandatory. Mr Dolman denies that comment; he says that he talked her through how the course would help her development, and that it would be invaluable in respect of her leadership skills. His evidence is that they agreed the Claimant would attend. At 665a.33 to 665a.35, there are emails concerned with a review meeting the Claimant attended with Mr Dolman on 7 September 2017. Her attendance at the course appears to have been discussed and confirmed. The emails suggest that the Claimant did not seek to amend this part of the meeting outcomes, although we did not see the attachments to the emails. Mr Dolman does not accept that the Claimant would not have pushed back about attendance at the course had it been an issue, describing her as able to be quite direct, for example regarding her 2017 salary review. Mr Dolman says that what concerned the Claimant (TD18) was the timing of the course, due to take place in November 2017, in the context of project delivery. Similarly, Dr Mitchell stated in her report (772) that the Claimant was anxious and panicky on the morning of the course, given how busy she was and also because she felt the course was not commensurate with her experience. In the light of all of this evidence, we conclude that the Claimant was not made to attend the course; her concerns about attending it arose out of her busyness at the time she was due to do so.

33. In the second half of 2017, the Claimant met with Mr Aldread. He says (RA18) that the Claimant was showing signs of stress and anxiety during 2017 and (RA5) that she told him she was finding it difficult and stressful working with Mr Dolman, who she said could overreact and overrule her decisions. He says that she seemed anxious and stressed and so he advised that she speak with Mr Dolman. Quite possibly as a result, on 26 September 2017 the Claimant met with Mr Dolman, ostensibly to get clarity as regards her role (KX13). Mr Dolman

said that she was responsible for leading the CLM project; the Claimant says that he kept interfering with it (again, KX13).

34. On 22 November 2017 (215) the Claimant emailed Mr Dolman requesting a discussion as soon as possible. She says she felt she was being left out of discussions that were properly within her remit. She accepts that the email was forthright, reading, "I'll do whatever you want me to but just need to be clear on what that is". Mr Dolman replied that he understood and welcomed an open discussion.

35. The meeting took place the next day. The Claimant says she was told by Mr Dolman that she was not keeping him up to date, which had led to him looking foolish in meetings. She also says he told her, "I'm the boss, so you just have to do as I say". Mr Dolman says that neither of these things was said and, moreover, neither are they the sorts of things that he would have said. He accepts that they talked about the process of him consulting the Claimant about decisions, but that he did not say she made him look foolish, as in fact the Claimant was meticulous in her work and always helped him be ready for meetings. In our view, that very much chimes with the overriding impression we have of the Claimant and her abilities. As for the second comment, Mr Dolman described it as disrespectful. That in turn chimes with what other employees said about his supportive management style – see further below. In both respects therefore, we preferred Mr Dolman's evidence.

36. The Claimant also says that Mr Dolman told her they would need to meet every day, during lunchtime, which she describes as unreasonable, though she says the arrangement had petered out by late January 2018. Mr Dolman cannot recall making that request (TD23). Given the very evident time pressures the team was under at that point, and given also that the Claimant did not raise any concern about this when she was clearly willing and able to do so in other contexts, we find that any comment about consultation between Mr Dolman and the Claimant was not said as the Claimant says she remembers it. This is not consistent either with her view that Mr Dolman was not consultative.

37. The Claimant attended the Leader Essentials course in November 2017, on a residential basis. It seems clear from the evidence of the Respondent's witnesses that it was not a course for new managers only, as the Claimant appears to suggest. Mr Aldread's (unchallenged) evidence is that the Claimant later told him she nearly went off sick to avoid attending.

38. As part of the course, the Claimant and her colleagues undertook something called a River of Life exercise. This was very distressing for the Claimant, as it brought back memories of the outside of work traumas we have referred to. For reasons unknown to the Tribunal, her copy of the exercise was distributed to other delegates, something which understandably led to a complaint on her part (213). The Claimant says the exercise exacerbated her anxiety problem; she does not accept it was the trigger for it. She says her coping mechanisms were failing already. She told Dr Mitchell (773) that she "unravelled" when in her room later that day.

39. Dr Mitchell says (775) that the Claimant's confidentiality being broken added to her stress and anxiety, though had she not had difficulties with Mr Dolman in the previous 5 years, she would probably have coped. Dr Mitchell further opines that the personal events which the Claimant recalled during the exercise would

not have affected her in the same way as her sense of being "intimidated" and/or "bullied" by a "senior male authority figure". It seems clear that neither Mr Dolman nor the Claimant knew that the exercise would be part of the course, nor what it would entail. In her complaint about the distribution of her copy of the exercise (213), the date of which is unclear, the Claimant made no reference to its impact upon her wellbeing.

40. At the end of November 2017, Mr Dolman told the Claimant he was bringing in a colleague called Jo Walker to lead another IT project. The Claimant says she felt undermined as a result (KX17).

41. The Claimant accepts that there was no diagnosis regarding her mental health by November 2017 and that she had not been off sick for any reason related to her mental health by that point. Indeed, she told Mr Dix (604) in his investigation in late 2019 of her concerns about Mr Dolman (see further below) that it was in January 2018 that she started to struggle with her mental health. She also told Mr Dix that she had not shared this with Mr Dolman. The Claimant says (KX19) that by mid-January 2018, she could no longer cope working for Mr Dolman, saying that she was crying in the evenings after work. Mr Dolman recalls however a meeting on 22 January 2018 (TD28) at which the Claimant interrupted him when he was speaking about a key issue and he responded by asking her to let him speak. He says that she did not show any sign of being upset.

42. Mr Aldread met with the Claimant in late January 2018. During that meeting the Claimant was in tears for 30 minutes (RA7). Mr Dolman volunteered to speak with Mr Dolman or with Ms Sheard, but the Claimant asked him not to. She told Mr Aldread she was worried she could be on the verge of some kind of breakdown, and that she was anxious about applying for new jobs and Mr Dolman finding out about that; she said she felt sick at the thought of a confrontation. The Claimant agrees that the meetings with Mr Aldread were in confidence, so that her expectation was he would not tell anyone else, though Mr Dolman himself said that he would have expected Mr Aldread to raise the matter internally if he had concerns. On 31 January 2018, the Claimant emailed Mr Dolman requesting a meeting with him, Mr Dolman replying, "Are you struggling to work with me at the moment?". The meeting took place on 1 February 2018.

43. The Claimant prepared notes ahead of the meeting (218-9) in which she recorded that she had started to look for a new role. She noted that she felt she needed to tread carefully to manage Mr Dolman's reactions, that decisions were being made she was not aware of or bought into, and that she felt that she would have a "real breakdown" if she did not find a resolution. She went on to note, "A lot of the time I find you perfectly reasonable but I do find you unpredictable … I feel I have to do this for my own health". She wrote that she felt on edge if she had to raise something, in case Mr Dolman got angry, saying that he alternated between micro-managing issues and then stepping away completely.

44. The Claimant told Mr Dolman at the meeting that she felt it was unrealistic for either of them to flex their styles. Mr Dolman recalls (TD33) that the Claimant told him she had been thinking about the situation for a few weeks. He says he was devastated by what the Claimant told him and, doubtless as a result, spoke in an emotional way in response. He offered to change reporting lines, to "self-check" his approach to the Claimant, or if needed for the good of the CLM project to step aside as the Claimant was invaluable to it – he was working on a number

of projects at the time, not just the CLM project. The Claimant did not agree to a change of line manager, though she says by the time of her sickness absence from July 2018 (see below), that is what she wanted. Notwithstanding what is recorded in the Claimant's notes Mr Dolman says (TD34) that at no point did she tell him she was suffering from stress or mental health issues. The Claimant agrees that this is correct and that she conducted herself at the meeting in a way that was clinical and direct. It is not suggested Mr Dolman saw the Claimant's notes and his evidence was that the Claimant did not read them out in full, which seems consistent with what we have just recorded. Mr Dolman's firm evidence was that the Claimant discussed difficulties with her role, with the project and with him, and did not mention a mental health condition. We accept that account.

45. The Claimant then met Ms Sheard. Again, the Claimant prepared a note beforehand (220) in which she set out that she had started to look for a new role as she could not work with Mr Dolman on the CLM project any longer because he was too involved and made snap decisions. She wrote "I feel I will have a real breakdown if I do not find a resolution … I have not mentioned any of this to Tim as I am worried about his reaction".

46. The Claimant says she told Ms Sheard she wanted a new role as she feared she would have a breakdown. Ms Sheard agrees that the Claimant said she was worried for her mental health if she continued in the role and so wanted to take action at that point. She also told Ms Sheard she had some personal issues. Ms Sheard cannot recall the Claimant referring to a breakdown, or fear of a breakdown, saying it would have stayed in her mind had she done so. In the same way as the meeting with Mr Dolman, it is clear that the Claimant's notes are not a record of what she actually said at this meeting. Ms Sheard appeared to us to be a very thoughtful individual, a senior manager with an empathetic approach towards others. We accept that she would have remembered any reference to a breakdown. We therefore prefer her evidence that this was not mentioned by the Claimant. We also accept her unchallenged evidence (SS3) that she was not aware of any issues between the Claimant and Mr Dolman prior to this meeting. Indeed, the two of them had worked successfully on another project before, and the Claimant had elected to work with Mr Dolman on the CLM project after her return from maternity leave. Ms Sheard received no complaints from other employees regarding Mr Dolman.

47. Ms Sheard recalls (SS8) that the Claimant kept repeating that she and Mr Dolman had different styles of working and that she was worried for her mental health if she continued working for him. Ms Sheard also recalls that the Claimant said she wanted a different type of role to broaden her experience. Ms Sheard asked the Claimant (SS9) if she was alleging that she was being bullied and advised her that she would support her if she wanted to raise a grievance. The Claimant agrees Ms Sheard asked her if she was being bullied but does not recall her mentioning a grievance. It is not necessary for us to resolve that conflict of evidence. There is broad agreement about the Claimant's reply to Ms Sheard at this point: Ms Sheard says she replied, "no it's nothing like that", whilst the Claimant says she told Ms Sheard, "I'm not trying to have a go at Tim, just trying to get away". She recorded in personal notes made some time later (558) that she told Ms Sheard dealing with Mr Dolman was emotionally exhausting. She added in those notes that by the end of the meeting with Ms Sheard, she felt like a huge weight had been lifted.

48. It is clear that the Claimant was concerned to have clear responsibilities. Ms Sheard asked her if she could "stick it out to September" to see the CLM project to its next phase, if Mr Dolman adjusted his management style. The Claimant says (KX24) that she replied she would have a breakdown if she had to work for Mr Dolman much longer. We have dealt already with the question of a reference to a breakdown; Ms Sheard says (SS10) that the Claimant made clear she wanted to move. As a result (SS11) Ms Sheard explored whether the Claimant wanted Ms Sheard to move Mr Dolman; she did not. The Claimant says she did not see how that could work as not many people at Mr Dolman's grade could do his job. Ms Sheard then asked the Claimant (SS12) if she wanted to move roles immediately; the Claimant said that she was fine to continue working as long as there was a plan in place for her to move. When Ms Sheard asked (SS13) if there were any other roles in the Commercial Team she would consider, the Claimant stated she did not want to stay in the Team. The Claimant says Mr Dolman was so prominent that any role within it would have required interaction with him.

49. The Claimant says that she was crying in the meeting with Ms Sheard, which was unusual for her, though she accepts this would not of itself have signalled that she had a mental impairment as it can be emotional for anyone to have difficulties with their manager. She did not know herself at that point that she had a disability. Ms Sheard's evidence is broadly consistent with this and with the account we have given above, as she recalls the Claimant was tearful at the start of the meeting but much brighter at the end. Whilst Ms MacDonald says she would have expected an HR People Partner to have been engaged after the meeting, Ms Sheard felt she was taking the right steps to prevent any mental health issues arising. The conclusion of the meeting was that Ms Sheard would not force the Claimant to stay in her role, and that they and Mr Dolman would work to make the transition to another role as seamless as possible when a replacement for the Claimant was found. The Claimant knew this would take time – she had in mind a couple of months.

50. Ms Sheard advised the Claimant that she was happy to help her in researching possible new roles (SS14), though she was clear in her evidence to us that the move to a new role, and which role, needed to be the Claimant's decision. Ms Sheard could have arranged a role swap within the Commercial Team so that the Claimant would have reported to an executive not including Mr Dolman but, as noted, the Claimant wanted to move out of the Team altogether. The Claimant was therefore to look into other roles and Ms Sheard was to speak to someone in procurement, which was one of the areas the Claimant was interested in. The Claimant was to revert to Ms Sheard if she thought Ms Sheard could effect introductions to other parts of the business.

51. On 8 February 2018 (KX25) the Claimant met with Mr Dolman again. He told her that he would like her to concentrate on the project management aspects of her role. The Claimant replied that if she was given relevant training and the rest of the team working on the project had clear roles, she was willing to assume a project management role until she found another job. Mr Dolman thanked her for her openness (TD39) and said he would support her and do everything he could to resolve the situation. His account is that the Claimant replied, "Thanks Tim, I can't believe how understanding you've been", whilst the Claimant says such a comment does not ring true and she would not have said it. It is not necessary for us to resolve that conflict of evidence. The Claimant indicated to Mr Dolman

that she understood it would take time to move her to another role, though she made clear she wanted to move out of the Commercial function (TD40).

52. Mr Dolman believes his relationship with the Claimant continued to be positive (TD41). His unchallenged evidence was that on the next day, 9 February 2018, the Claimant was out of the office and confided in him that she was worried about certain tasks. Mr Dolman sorted out the particular issues on her behalf.

53. The Claimant decided to apply for Global Grade 12 and 13 roles so as to maximise her chances of leaving Mr Dolman's team (KX29). She says Mr Dolman told her at the end of February that going down a grade would not impact on her salary (KX30). Mr Dolman denies this, because it was not in his gift, though he may have indicated that there was a crossover between the grades. We prefer Mr Dolman's evidence, as he was someone who struck us as taking a very careful approach to such matters, though the Claimant may well have converted what he said to something more concrete. Mr Dolman put the Claimant in touch with individuals who could help her secure a new role (TD42), supported her in preparation and coaching for interviews and gave her time off to prepare for them (TD44). He also actively encouraged her to meet the relevant manager for one of the possible vacancies (TD45).

54. On 27 March 2018, Mr Dolman spent two hours with the Claimant in preparation for an interview for the role of Head of Procurement which was a grade 13 role (TD46). The Claimant's case is that she did not find it helpful being in the same room as Mr Dolman, particularly on the day before an interview, but says she did not feel able to refuse to meet him. Mr Dolman recalls the Claimant as readily accepting the opportunity. For reasons unrelated to work, it would have suited him not to meet, though he was committed to helping the Claimant. Again, it is not necessary for us to resolve this conflict of evidence; indeed, it may very well be that what both witnesses say is an accurate reflection of what took place, what was said, their perceptions of each other and their personal feelings about the meeting. On 28 March 2018, the Claimant was interviewed. Mr Dolman said he would put in a good word for her with the recruiting manager. The Claimant says Mr Dolman later told her that he had said to the recruiting manager he hoped she would not give him a problem by recruiting the Claimant. Mr Dolman does not recall that comment. Given that it would have been completely at odds with what he, the Claimant and Ms Sheard were trying to do, and with his support for her in looking for other roles, again we prefer Mr Dolman's evidence. Ms Sheard advised the recruitment manager that the Claimant was an excellent candidate (SS13). Ms Sheard retired at the end of March 2018. She spoke with the Claimant just beforehand; the Claimant seemed to her to be content, as she was looking for new roles.

55. Around April 2018, the Claimant asked Mr Dolman if she could be seconded elsewhere until she found a permanent role. Her evidence (KX34) is that Mr Dolman immediately replied in the negative, referring to headcount restraints. Mr Dolman says (TD54) he has no recollection of any such request. The Claimant believes she said she would consider a secondment within the Commercial Team, telling us she did not rule out anything at that stage, as even being slightly removed from Mr Dolman's management would have been an improvement. The situation had moved on, she says, since the meetings on 1 February, and her health had deteriorated. Mr Dolman accepts that the two of them could have had a general conversation about secondments, and that if so, he may have given a

negative indication because the business was in the middle of a cost-cutting exercise and a secondment would not have reduced the headcount in his team. We think it is probable he said that a secondment was very unlikely in that context. The Claimant does not accept that a secondment would have required her to be replaced, thus increasing headcount in the Commercial Team, as in her view job swaps are common.

56. Mr Dolman supported the Claimant's application to undertake some training even though not directly linked to her role and even though it involved a large commitment of time and resource (TD50). The Claimant says (KX33) that she was told by Mr Dolman on 11 May 2018 that there was no funding for her to attend a course on project management. It is unclear to us whether this was the same course that Mr Dolman had supported her applying for, but either way, the Claimant accepts this was a normal management decision.

57. On 6 June 2018 (KX36), Mr Dolman asked the Claimant to join him and Jo Walker on a walking meeting. The Claimant says that during the walk Mr Dolman told her that with immediate effect the Claimant would be responsible for managing the CLM project and something called the CA project. The Claimant says she found it difficult not to have clarity about her role or the support she wanted, and says that this was a downgrade of her responsibilities. She says she felt set up to fail as she had not been given training in programme management and the team was not structured properly. She also felt there was no opportunity to discuss the matter with a colleague present. Mr Dolman gives a different account (TD53) saying that what the Claimant describes was proposed by her and Ms Walker. Not only is that consistent with the Claimant's discussion with Mr Dolman on 8 February, it seems inherently unlikely to us that Mr Dolman would have taken a decision that would create risk for such a key project, and particularly in light of his earlier discussions with the Claimant that he knew Ms Sheard had been made aware of, that he would have implemented such a change without her consent. Again therefore, we preferred his account.

58. Mr Aldread records (RA8) that between February and May 2018, he had occasional contact with the Claimant. He says that she mentioned she was becoming more disheartened as she had not secured a new role, adding that she continued to come across to him as anxious. On 15 June 2018, the Claimant was on a training course, when she had what she describes as a "mental breakdown". As she records at KX37, and in her personal notes made whilst later on sick leave (568), she had to do a presentation about the CLM project. Whilst doing so, she floundered and asked to be excused. She called Dawn Wood, a mental health champion for her team, and discussed with her what had happened. She told Ms Wood she thought she was going mad; Ms Wood advised seeing her GP who might be able to prescribe medication. The Claimant also emailed another colleague, Sian Skerritt, who was a manager, though not in Commercial (222c). The Claimant said in that email that the presentation was "just the straw that broke the camel's back", referring to issues both work-related and personal. Ms Skerritt and the course facilitator had spoken to the Claimant privately at the course to say that she had been acting strangely and that they were concerned that it was more than just her struggling to do the presentation. Although not involved at the time, Mr Dolman accepted in evidence that these events were a sign "something was going on".

59. The Claimant then went on annual leave, returning on 3 July 2018. She felt anxious on her return and was tearful, something several teammates commented

upon. On 10 July, she emailed Mr Dolman to say she could not work. The Claimant also spoke with Simon Hemmings, a senior person in the trade union, on around 12 July 2018, saying she needed help, and that she felt she had had a breakdown triggered by Mr Dolman. She had a similar conversation with Amanda Lofley, a union representative and another mental health champion. Mr Aldread on his part recalls (RA9) an email from the Claimant in July 2018, telling him she had had a "bit of a meltdown". Mr Dolman accepts that the Respondent therefore knew the Claimant had experienced a breakdown, though he says it was still not clear whether the issues the Claimant was experiencing were long term.

60. Mr Dolman described the Claimant as very thorough and analytical, someone who takes time with decisions and will fight her cause if she disagrees with something. He describes himself as willing to take decisions quickly when needed, reiterating that whilst the Claimant was responsible for the CLM project on a daily basis, he had ultimate accountability. Sometimes suppliers and colleagues came to him, not to the Claimant, when they needed a quick decision. He also reiterated that he saw no signs at all of any issues with the Claimant prior to her involvement in the CLM project, something he described as his team's biggest ever transformation programme. The Claimant played the same role in that project as she had on others, but with broader reach, on a larger scale and with a very demanding client. The Claimant plainly found it difficult when decisions were required of Mr Dolman in what was a high-pressure context, some of which unavoidably took place in confidential meetings. Mr Dolman says that this was because she liked to be in total control, which was simply not possible in this instance; he mentioned that she also had an issue with one of the client team whilst working on the project, who Mr Dolman agreed to arrange to remove. Mr Dolman does not accept that he overreacted or overruled the Claimant, as she reported to Mr Aldread (RA5). He says that sometimes things had to change as the project progressed, and he always sought to explain to the Claimant what had happened.

Sick leave to December 2018

61. The Claimant was on sick leave from 10 July to 31 December 2018, her GP notes citing work-related stress as the reason. As a result, she did not work with Mr Dolman again, though technically he was still her line manager throughout this period. Mr Dolman agrees that the GP notes suggested further action was required on the Respondent's part, saying that they indicated a discussion would be needed with the Claimant at some point.

62. The Respondent has its own Occupational Health Service ("OH"), although it is an external provider. On 19 July 2018 Mr Dolman referred the Claimant to OH (226 to 230), stating the reason for the referral as, "concern over psych [sic] wellbeing". Mr Dolman explained this to us by saying he assumed work-related stress was a psychological issue. The referral noted that the Claimant had been unhappy in her role for some time, and indicated that the Respondent could not support a secondment due to headcount restraints. Ms MacDonald told us that OH is not routinely asked whether the person being referred is disabled, though OH would flag this to the Respondent if they thought it appropriate. There was no question about disability in Mr Dolman's referral.

63. On 24 July 2018, the Claimant spoke with her GP again. She said she felt much better when not at work. On 31 July 2018, she told Mr Aldread (RA9) that she was feeling better enough for a catch up.

64. On 9 August 2018 OH reported to Mr Dolman (101-2 and 231-2). The advice was that the Claimant was not on medication, but she had referred to her GP's advice that she access other support services. It recorded that the Claimant had said work issues were causing distress and had been building for 12 months, to the point where, at the start of 2018, she could no longer continue. The report described the Claimant as still feeling anxious, and did not envisage her being able to return to work on 3 September 2018 at the end of her then current GP note. The adviser did not feel the Claimant had the emotional resilience to cope with a meeting with the Respondent at that point. She recommended a review in 6 weeks and that the Claimant undertake counselling. This was funded by the Respondent from 15 August to 26 October 2018. Mr Dolman does not accept the Respondent knew the Claimant was disabled at this point, as he says it did not know if what was being described by OH was longstanding and because OH usually say if they believe an individual is disabled, and did not do so.

65. On 10 August 2018, the Claimant met again with Mr Aldread. She told him she had experienced a breakdown, which seems clearly to have been a reference to what happened at the course in June. Mr Aldread describes her as very distressed. It seemed to him (RA10) that she was reduced to a shell of the person he had known for 15 years. She told him she had not been getting much support in finding a new job. The note of the Claimant's discussion with her GP on 31 August 2018 (68), says that she was tearful at the thought of work, that she enjoyed time with her family and that it was thinking about work that was difficult.

66. Page 222 shows the jobs the Claimant applied for from February to September 2018. She did not get appointed to the first twelve, though some – after April 2018 – may have been withdrawn given the Respondent's cost reduction programme. Mr Dolman accepts it was surprising the Claimant was interested in one or two of the roles. He maintained however that because the Claimant was looking for a role voluntarily, as a career change, it was right that she should have to compete for them.

67. On 4 September 2018, the Claimant was told by Jo Walker that Mr Dolman was lining up Ms Walker as Head of IT for the Commercial function, reporting to him. The Claimant says she was shocked at this news (KX49) as she saw this as her role and she felt she should have been offered the opportunity herself. In mid-September, she applied for a grade 12 role as Internal Audit Manager. On 25 September 2018, the Respondent advertised the grade 14 role of Head of Digital Enablement. The Claimant says significant parts of her job were incorporated into this role (KX52) which Mr Dolman had not told her about. Mr Dolman says (TD57) that the role was designed with the Claimant in mind, but she was not interested in it. The Claimant told Mr Dix in late 2019, at her grievance appeal (477), that she would have been interested in it, even though the role was managed by Mr Dolman, saying, "I wouldn't want to work for him but wanted a job"; the Claimant told us that she would have needed therapy to do so.

68. Having been called for interview for the Internal Audit role, and having enquired about the salary, on 18 September 2018 the Claimant received an email from HR (236) to say that if she got a second interview, she could have a discussion with HR and her salary may be "able to be kept".

69. On 26 September 2018 the Respondent received a second OH report (247) doubtless following the six-week review previously referred to. It said the Claimant had made good progress and so could now attend meetings with the Respondent. She was fit to return to work, once work-related issues were resolved. It was noted that returning to the same environment with nothing resolved would only increase her stress levels again. Mr Dolman did not see any further OH reports thereafter.

70. On 28 September 2018, the Claimant attended an interview for the Internal Audit Manager role, with Fraser Thomson. Mr Dolman gave strong support to the Claimant's candidacy (TD73). The Claimant's case is that she understood her salary would remain unchanged. On 5 October 2018 however, Mr Thomson told her he wanted to offer her the role, but standard HR policy meant that she would move to the midpoint salary within grade 12, which was the grade for the role. The Claimant met with Mr Thomson again on 15 October 2018. Again, he told her he wanted to offer her the role; there was some discussion of salary, and it was agreed the Claimant would work 4 days per week (KX58). After he was told by the Claimant that she had a verbal offer, Mr Dolman told her this was fantastic news and that he was pleased (TD73).

71. On 16 October 2018, the Claimant met Jo Ginno of HR. She sent Ms Ginno an email beforehand (253) to say that she wanted to discuss options for returning to work reporting to a new boss, and gave a "summary of the interactions I've had with [Mr Dolman] over the past year that led to me being signed off with work related stress". The Claimant told Ms Ginno at the meeting (KX60) that she had found Mr Dolman intimidating, and that she had had a mental breakdown in June – again, this is a reference to the course presentation. She became very distressed. On the same day (RA13), Mr Aldread asked the Claimant if, apart from the hassle of sorting out a new job, she was generally better. She replied that she was and wanted the whole thing over.

72. On 24 October 2018, Mr Thomson told the Claimant that the Respondent could split the difference on her salary in the grade 12 role. The Claimant called Ms Ginno the next day. Ms Ginno reiterated the Respondent's standard practice when someone moves down a grade. The Claimant asked if her situation meant that her salary could be kept as it was. At this point, the matter was referred to Ms MacDonald. A third OH report was provided on 24 October 2018 (255-6), addressed to Jo Ginno. It described the Claimant as happy about her new role, saying that she was fit for work and could return accordingly.

73. On 2 November 2018, the Claimant met with Ms MacDonald. The Claimant says (KX66) that at some point during the meeting she cried. Ms MacDonald does not recall the Claimant being distraught. Consistent with the most recent OH report, Ms MacDonald described the Claimant as positive and energised about her new role. She told the Claimant that given her circumstances she would be able to reconsider the salary position.

74. On 15 November 2018, the Claimant met with a Mr D Hawley and others in the Respondent's HR team. The Claimant believed this to be a follow up to her meeting with Jo Ginno on 16 October. She was surprised to be asked about her relationship with Mr Dolman, but gave examples of how she said his behaviour made her feel. She says (KX67) that Mr Hawley said would he would consider what had been said and get back to her about next steps. The Claimant told Mr Hawley she did not wish to raise the matters formally. On the same day, Ms

MacDonald informed the Claimant that the Respondent's policy on salary stood, as the Claimant had proactively applied for the Internal Audit role. Ms MacDonald did say however (KX68), that the position could be revisited at a later date as a result of an investigation into the Claimant's concerns about Mr Dolman, which might impact on the position. The Claimant said that she would accept the role. Ms MacDonald says that the Claimant was keen to join what is a prestigious team, adding that it gave her a chance to use her skills more widely across the business and thus showcase them to a wider group of colleagues. The Claimant was thus formally offered the role of Internal Audit Manager at a salary of £52,400 (280).

75. We were shown (202b) an extract from the Respondent's pay policy. Each grade has a midpoint which is deemed to be 100% of the market salary for a role at that grade. The Claimant was on 94% of the market salary in her grade 13 role, and so the usual starting point in a grade 12 role would also be at 94% for that grade, naturally resulting a drop in pay. In circumstances where an employee takes a lower grade role, the policy allows the salary to be increased up to the 100% midpoint. In the Claimant's case, she was in fact engaged at 105% of the grade 12 midpoint. Ms MacDonald told us she was not comfortable with the Claimant retaining her existing pay as she would have been the highest paid employee at that level within Internal Audit, which Ms MacDonald felt was not appropriate given the need for upskilling on the Claimant's part. Ms MacDonald says it was however appropriate to go to 105% (AM20) because the Claimant's skillset would enhance the Internal Audit team, she had a history of high performance, and she was positively looking to progress her career.

76. The Claimant's case is that there were two parts to the reasonable adjustments she says should have been made for her. The first is that the Respondent should have initiated or supported a move to a new role, and not left it to her to do so. She also says it would have been reasonable to keep her on the same pay given the reasons she was moving and given that the Respondent has maintained pay in other circumstances.

77. On 23 November 2018 the Claimant completed a form she had received with the job offer (290), answering yes to a question about whether she had any "illness/impairment/disability". She also positively answered a similar question about whether any illness/impairment/disability had been caused by work. The form was sent to OH, and is only shared with the Respondent if an employee consents. It is unclear whether the Claimant did so, but it was not necessary for us to decide the point given it is accepted that what was known to OH was also within the Respondent's knowledge.

78. On 28 November 2018 (KX72) Jo Walker was appointed Head of Digital Enablement. Shortly after, the Claimant's role in Commercial was advertised as a grade 12 role reporting to Ms Walker. In December 2018 (309 to 313) there were email exchanges relating to the Claimant's PDR, which Mr Dolman had mentioned as part of the Claimant's transition to her new role. The Claimant told HR by email that this had led to her shaking and being in tears after weeks of feeling well. Mr Dolman agrees this was not a normal reaction to this situation.

Holiday

79. The Respondent's holiday year coincides with the calendar year. Each day of annual leave is 7.4 hours in the Respondent's system, so that the Claimant's

entitlement under regulation 13 of the WTR is 118.4 hours when pro-rated to take account of her part-time working. The Respondent's contracts of employment do not differentiate between various types of holidays – regulation 13 of the WTR, regulation 13A of the same or contractual – though its policy on accrual of annual leave during sickness absence (161-2) suggests that regulation 13 leave is deemed to accrue first. There is nothing in the Claimant's employment contract about carry over of holiday from one year to the next.

80. As set out below, the Respondent says that its policy in relation to carry over of holiday is essentially based on challenges around workplace planning, as well as its compliance with relevant legislation. Ms MacDonald explained (AM9 and AM10) that in exceptional circumstances an employee of the Respondent can ask to carry over 5 days, which must be taken by the end of March (or Easter). Ms MacDonald also says (AM4) that under the policy at 161-2 employees absent because of sickness are entitled to carry over up to 20 days, deducting any days of leave taken in the year in question. The policy is said to be based on regulation 13 WTR. The Respondent's employees on maternity leave continue to accrue all holidays, not just that under WTR regulation 13 (AM11). Jo Walker told the Claimant (KX105) that she did not lose any holiday after 11 weeks off for work related stress in 2017. Ms MacDonald says (AM14) that Ms Walker was absent and returned to work in the same leave year. Employees on sabbatical are paid in full for all accrued leave upon returning to work. Sabbatical leave itself is unpaid. An employee on sick leave is paid in full for up to two years.

81. The Claimant says (KX80) that at the time her sickness absence began in July 2018, she still had 141.2 hours of holiday to take. After email exchanges with HR, she was advised in April 2019 that she could carry over 14.8 hours from 2018 (319). Ms MacDonald explains (AM6) that of the 118.4 hours of leave under regulation 13 WTR the Claimant had taken 125.8 hours by the end of the holiday year. One of Ms MacDonald's colleagues in HR had calculated (340) that the Claimant had only taken 103.6 hours and therefore had 14.8 hours to carry over. This turned out to be because not all the leave she had taken had been uploaded on the system at that time, but it was decided that the carryover of 14.8 hours should be honoured. Eventually, after the Claimant had brought a grievance, including in relation to holiday, she was permitted to carry forward a further 48.8 hours from 2017 because she had reached an agreement to do so given her workload (426). This was added to the 14.8 hours, to make a total of 63.6 hours carried over from 2018 into 2019, to be taken within 18 months, that is by the end of June 2020.

82. For holiday year 2019, the Claimant says her overall entitlement was 336.2 hours. By the end of that year, she had taken 178.3 hours, leaving 157.9 to take. On 17 January 2020, she was told she would not be able to carry forward any of it. The Respondent's essential message, given to the Claimant on 20 January 2020 (629-30), was that she had taken more than the 118.4 hours allotted by regulation 13 WTR. The Claimant points out (666-7) that some days she took as time off in lieu were recorded as holiday, but this was rectified. The Respondent's position (137) is that because the Claimant took 178.3 hours, and 118.4 hours was her entitlement under regulation 13, she was not permitted to carry anything forward.

83. For holiday year 2020, the Claimant says she took none of her annual leave entitlement because she was off sick for the whole year. It is agreed that she was allowed to carry over 118.4 hours accounting for regulation 13 leave.

84. Ms MacDonald explained at AM5 that the purposes of the Respondent's policy as operated above are to ensure that there is a clear and consistent position for all employees, to ensure all employees well enough to work are treated consistently, to enable the Respondent to staff the workplace so as to meet operational commitments and to ensure fairness in planning holiday. That evidence was not challenged. Ms MacDonald elaborated on it orally, saying that the Respondent seeks to be as fair and consistent as possible to all employees, including line managers, in fulfilling its legal requirements as to holiday entitlement. She says that the policy the Respondent adopts, and applied to the Claimant, is proportionate to achieving its aims because those on sick leave get two years' full pay under the Respondent's sick pay scheme, and to accumulate all holiday entitlement in addition is not thought appropriate. She reiterated that the Respondent's policy is also in line with the statutory framework. Managers have many employees wanting time off of course, and if someone has a lot of accumulated leave on returning to work from a long sickness absence, it can be even more difficult to manage pressure at certain periods and so create disharmony amongst affected employees. The Internal Audit team consists of 35 people. The Claimant works in a sub-team of around 8 people, working together to a well-defined and demanding schedule of work.

2019 – return to work and subsequent absence

85. As already noted, the Claimant had almost 6 months' sickness absence in 2018. In the document she prepared setting out the alleged substantial disadvantage she encountered as a result of working with Mr Dolman, to which we return below, she says that she was compelled to keep in touch with Mr Dolman whilst absent. The emails at 271-7 suggest otherwise, namely that contact was as much initiated by the Claimant as Mr Dolman and that on occasions the Claimant ignored Mr Dolman's communications. We were not taken to any evidence showing that she was compelled to contact him during this period.

86. The Claimant returned to her new role on 2 January 2019, on a phased return, initially 9.00 am to 1.00 pm, increasing to her full hours by 30 January 2019. She says (KX77) that she increased her hours to make a good impression on her new manager, though (KX78) she found the additional half day she had agreed to work in this role challenging.

87. The Claimant took a total of four days' sickness absence in the first half of 2019. The Respondent says it was reasonable to conclude that now she was in a new role, there was no disadvantage for the Claimant as a result of the PCP of working with Mr Dolman. In her end of year appraisal for 2018 (314), completed on 25 February 2019, the Claimant said, "Seven years of bullying and intimidation reached its peak … I suffered a mental breakdown as a result of being bullied by Tim". John Golding, her new manager, conducted the evaluation of the Claimant's performance. Mr Golding was not a witness at this Hearing. Mr Dolman did not know why the Claimant's comments appear not to have been picked up.

88. In January 2019, the Claimant told Mr Aldread (RA14) that she was doing really well, saying she only wished she knew in July she would be having 6 months off and a job she wanted at the end of it – then she could have actually enjoyed her time off. On 15 February 2019 (323) she emailed Mr Hawley in HR about her PDR rating. She said that as a result of "bullying", she had been pushed out of a role and project she enjoyed.

89. The Claimant was unwell in April 2019 (KX90) but took no more time off until 24 April, when she was absent for a few days. This coincided with Ms MacDonald confirming to the Claimant (344) that the position in relation to carry forward of holiday entitlement from 2019 was as previously advised. The Respondent made a further referral to OH on 7 May 2019, resulting in a report being produced (368-9) the next day. This stated that she was enjoying her new role, was settled back at work, but was still encountering a level of ongoing anxiety and distress related to issues in her previous role which she was struggling to deal with. OH advised that Remploy would be able to offer up to 9 months' support to the Claimant. The Claimant found the discussions in April about holiday carry over very upsetting; she says it brought back everything else. On 7 May 2019, the Claimant met Martin Sharpe, Head of Internal Audit and a mental health champion (KX101). She tried to articulate how she was feeling but felt overwhelmed and struggled to do so. On 9 May 2019 she was told by OH that the Respondent had authorised six more counselling sessions. On 31 May 2019 she was referred again to OH by HR. The referral said that she was continuing to exhibit signs of anxiety and distress and had requested further counselling.

Grievance

90. On 8 May 2019, the Claimant presented a grievance (362-7) relating to a number of issues – carry over of holiday, the reduction of salary in her new role, the Respondent's refusal to fund additional counselling, and the fact that there had been no investigation into her allegations of bullying by Mr Dolman which she had shared with HR, or at least she had not been told of any. It was addressed to John Golding. The Claimant made clear she had been off sick for 6 months in 2018 because of work- related stress, said that this was caused by Mr Dolman, and made reference to her mental wellbeing. Mr Ashworth, appointed to hear the grievance, accepts he was on notice of a mental wellbeing issue for the Claimant at this point, but did not consider that, of itself, this required further investigation as the Claimant was now assessed as fit to work. He was focused on her four specific points of grievance. She expressly did not want him to investigate Mr Dolman's behaviour.

91. Mr Ashworth did not review the Respondent's policy relating to disability, which we assume was part of a policy or suite of policies related to discrimination and equal opportunities, and which perhaps surprisingly was not included in the bundle. Mr Ashworth interviewed Jo Ginno and Mr Hawley, both of whom as noted above had seen the Claimant in October 2018. Ms Ginno told him she did not think the Claimant's concerns about Mr Dolman had been properly investigated (404), but both said that whilst there was evidently a deteriorating relationship between the Claimant and Mr Dolman, they saw nothing to flag any requirement for a formal investigation. Mr Hawley (410) said that what she had told him in October 2018 was "all generalisations" without specifics. He said "nothing alerted [him] to the need to escalate to a formal investigation". No other

employees raised concerns during the informal enquiries they had apparently made at the time, and the general feedback about Mr Dolman was positive. As a result, they told Mr Ashworth they saw no need for further action.

92. The Claimant attended a grievance meeting with Mr Ashworth on 23 May 2019. Amanda Lofley attended as her representative. Mr Ashworth says again (MA8) that the Claimant was adamant she did not wish to bring a formal grievance against Mr Dolman. He also says neither the Claimant nor Ms Lofley advised him that she was disabled, though Ms Lofley told him (376) that she had dealt with a lot of people with mental health issues and the Claimant was "very, very poorly" – this referred to their discussion in July 2018 mentioned above. Following the grievance meeting, HR referred the Claimant to OH, describing her as "suffering from anxiety and stress" (393-8).

93. The grievance outcome report of 25 June 2019 (424-8) determined the following:

93.1. Regarding the Claimant's holiday, Mr Ashworth had re-done the calculation. Having been advised by Ms MacDonald that the Respondent's policy had been consistently applied since 2015, the correct amount of holiday carry over had been applied for 2018, on the basis of the requirements of WTR regulation 13, but 6.5 days had been carried over from 2017 by agreement with Mr Dolman, which would be added to the Claimant's 2019 entitlement. Mr Ashworth says (MA17/18) that this was in line with the Respondent's policy. Mr Ashworth could not explain in his evidence the purpose of the policy in not allowing carry forward of any additional leave.

93.2. As to the Claimant's pay, he found that the Respondent's policy as described above had been applied and the Claimant's pay increased beyond what it required, to reflect her good performance at grade 13. He accepts that flexing the policy might have been possible, but believed this had been carefully considered by HR and the Claimant's new manager, following which the Claimant had been placed on a salary proportionate to others on the same grade. She had also recently had a standard pay increase, which is unusual for someone in a new role. The purpose of the policy, Mr Ashworth says, is to fairly reflect each person's position in relation to their colleagues.

93.3. Mr Ashworth found no evidence that the Respondent had refused to support counselling, but he agreed there had been some communication issues and delays, and the OH referral mentioned above was made to enable further sessions to be arranged.

93.4. As to discussions with HR about Mr Dolman, Mr Ashworth noted that the Claimant had not raised a grievance. She had raised her concerns informally (MA24) and been told several times she could raise them formally. There was no agreed intention to advise her of the outcome of her discussions with HR, whose informal investigation had revealed no concerns. The Claimant had not provided details of her allegations regarding Mr Dolman, either to HR or indeed to Mr Ashworth himself.

94. The Claimant worked reduced hours from 2 July to 15 July 2019. On 2 July 2019, the Respondent received a further OH report (450) following the referral mentioned above. It stated that the Claimant was at work but felt anxious and

distressed, was happy in her new role but overwhelmed by the impact of her grievance. It advised that it would be reasonable for her to get some counselling and that she would benefit from CBT. The Adviser stated, "I feel her perceptions may not go away until the grievance is amicably dealt with".

Grievance appeal

95. The Claimant appealed Mr Ashworth's decision, and attended an appeal meeting on 7 August 2019 with Mr Dix.

96. The notes of the meeting clearly show the Claimant saying, in relation to holiday carry over, that the Respondent's policy gave rise to discrimination arising from disability – 480. Mr Dix accepts he should have asked what the Claimant meant by her reference to disability. He did not know, when hearing the appeal, the circumstances in which the duty to make reasonable adjustments arises, but said in evidence he agreed there was a requirement to make reasonable adjustments at that point, perhaps including not reducing the Claimant's pay on redeployment.

97. Mr Dix says that whether the holiday carry over policy was legal went beyond his remit (MD13), though he did review it to check its provisions for those off sick for long periods; he described the reason for the policy as ensuring fair and consistent treatment for all staff, those on sick leave and those not.

98. As for the investigation into the allegations about Mr Dolman, he found that HR did not receive detailed information and that the Claimant had maintained she did not want a formal enquiry. In his view this meant that there was nothing to alert HR to the need to instigate an investigation. Mr Dix offered the Claimant the opportunity to provide details of her allegations against Mr Dolman to him.

99. As for pay, Mr Dix says (MD22) that the Respondent had applied a generous interpretation. There was no evidence the Claimant's post was disappearing, such that she was making a voluntary move. The Claimant applied for the Internal Audit role knowing it would involve a pay cut. Mr Dix says that both HR and the recruiting line manager work hard to ensure consistency of pay with those doing the same role.

100. On 16 October 2019, the Claimant was referred to OH again. The resulting report (525-6) said that the adviser was hopeful that with further talking therapies and support services, the Claimant would not be absent from work in relation to anxiety going forward, although that could not be guaranteed. The report referred to recent symptoms of heightened anxiety, that the Claimant acknowledged that issues in her previous role had had a longer-term effect on her wellbeing, and that at times she continued to struggle with sleep, concentration and motivation. It did however report her to be fit to remain in work.

101. As noted above, Mr Dix discussed with the Claimant the possibility of an investigation at that stage into her allegations of bullying by Mr Dolman. As a result, the Claimant sent details of her allegations on 6 December 2019 (541) attaching notes of various meetings, including with Mr Dolman and Ms Sheard in early 2018, and a 41-page summary written when she was off sick in July 2018. We did not read the 41-page document. We briefly detail the specific allegations below.

102. The Claimant met with Mr Dix on 11 December 2019. Mr Dix felt that many of the matters raised were no more than the Claimant's opinion and so he did not consider it possible to investigate them all (MD25). He decided to consider those specific occasions witnessed by colleagues, key themes and to make a general enquiry as to whether others had seen similar behaviours to those alleged.

103. He interviewed a number of employees, asking them a general question and then moving to specifics. He found the Claimant's allegations unsubstantiated. Only one could be corroborated; the rest could not, either because someone else presented a different account or because the events as the Claimant described them did not take place. The one exception was a meeting in January 2018, in relation to which no team member could corroborate the Claimant's account. Mr Dix thought that colleagues would have remembered the incident if it had been as bad as the Claimant said. Further, Mr Dix concluded that if Mr Dolman's style was as the Claimant described it, he would have expected others to raise concerns or for such issues to have come up in Mr Dolman's PDRs. Mr Dix concluded that the pressure of the CLM project led to a communication breakdown. He found that there had perhaps been bad management, but not bullying. By bad management or (MD34) poor leadership, Mr Dix told us he was referring to how Mr Dolman took the project very seriously, so that there were instances where perhaps he became more involved than he should have been.

104. The outcome was confirmed on 12 February 2020 (631-8) to the effect that Mr Dix had found no evidence of bullying. Mr Dolman had been described by other colleagues as energetic, driven, supportive, having high expectations and a strong view on how he wanted things to be run, so that he could be perceived as direct. There were no other allegations of or witnesses to bullying. The Claimant's specific examples could not be corroborated, though Mr Dolman's increased involvement in her work had caused the Claimant unease (638).

105. Taking the six specific matters raised by the Claimant in turn, Mr Dix found:

105.1. It was very clear Mr Dolman did not use the Claimant's job title.

105.2 Lucy Mason did not recall the Claimant being excluded from a meeting between her and Mr Dolman that the Claimant should have attended.

105.3. No-one recalled Mr Dolman telling the Claimant to be quiet and let him speak, and would have recalled something like that if it had happened.

105.4. The Claimant misinterpreted that another team member was upset when raising something with Mr Dolman – in fact that person was upset because they thought they may have made an error.

105.5. The Claimant was also mistaken in thinking Mr Dolman had privately asked one of her team to work flexibly – all of the team were asked the same.

105.6. Jo Walker did not agree she took on what had been the Claimant's role – in her view, it was a much broader remit.

106. Mr Dix concluded that Mr Dolman had to take some decisions without the Claimant's involvement, and had to be more visible and involved in the CLM

project; this was welcomed by some but "evidently caused unease for the Claimant". He told us that this reflected the Claimant wanting complete control; he described the Claimant as "a control freak", though he then apologised for using that term.

Time limits

107. ACAS Early Conciliation took place from 19 July 2019 until 19 August 2019. The Claimant's Claim Form was submitted on 19 August 2019.

108. The Claimant tried to contact her union from 11 July 2019, finally getting to speak with someone on 19 July 2019 (KX114). She was advised on the question of time limits that she had 3 months less one day from the point she lost holiday entitlement to bring a claim, so that she needed to make a request for Early Conciliation as soon as possible. In respect of her pay, the union told her she would have 3 months starting from the date of the grievance decision letter saying that her pay was not being reviewed. The Claimant says it was clear to her by 19 January 2020 (see 627) that Ms MacDonald did not intend to review her salary again, as had been indicated on 15 November 2018.

Law

Burden of proof

109. Section 136 of the Act provides as follows:

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

(2) If there are facts from which the court [which includes employment tribunals] *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".

110. Direct evidence of discrimination is rare, is often not in the hands of the claimant and so tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Igen,** updating and modifying the guidance that had been given by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.** The Claimant bears the initial burden of proof. According to the Court of Appeal in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913**, "If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the Respondent's act was a discriminatory one) then the claim will succeed unless the Respondent can discharge the burden placed on it at the second stage". Since we gave oral judgment in this case, the Supreme Court has affirmed the Court of Appeal's decision, in **Royal Mail Group Ltd v Efobi [2021] UKSC 33**.

111. At the first stage, the Tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what

inferences of secondary fact could be drawn from them**.** As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

112. Given the Respondent's concessions outlined at the start of these Reasons, the burden of proof provisions as just summarised only arise in this case in two ways. First, in relation to the section 15 complaint, it is for the Claimant to establish unfavourable treatment. Secondly, in relation to section 20, the duty to make reasonable adjustments, the burden was on the Claimant to establish that there were facts from which the Tribunal could decide, in the absence of any other explanation, that she was placed at a substantial disadvantage by the agreed PCP and that there was an adjustment the Respondent should have made but did not, that it would have been a reasonable step and that it would have eliminated the substantial disadvantage. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. That would require that its explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence. In relation to the reasonable adjustments case, this might be showing that the PCP did not substantially disadvantage the Claimant or that the steps she says should have been taken were not reasonable. Section 15 sets out a specific burden on the Respondent in respect of knowledge of disability and justification – see below.

113. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**. In some cases, it may be appropriate for a tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination.

Discrimination arising from disability

114. It is not necessary to say anything about the reason for the treatment the Respondent afforded to the Claimant or whether it arose in consequence of disability, as both these points were agreed.

115. As to what constitutes "unfavourable treatment", the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** held that it is first necessary to identify the relevant treatment and it must then be considered whether it was unfavourable to the Claimant. The Court said that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as "detriment" found elsewhere in the Act, referring to a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others.

116. A complaint of discrimination arising from disability will be defeated if the Respondent can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim – "justification" for convenient shorthand. We draw the following principles from the relevant case law, some of which concerned justification of indirect discrimination though we see no reason for a difference in approach in the context of section 15:

116.1. The burden of establishing this defence is on the Respondent.

116.2. The Tribunal must undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary.

116.3. What the Respondent does must be an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said, approving Mummery LJ **in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

116.4. In **Hardy & Hansons plc v Lax [2005] ICR 1565** it was said that part of the assessment of justification entails a comparison of the impact upon the affected person as against the importance of the aim to the employer. It is not enough that a reasonable employer might think the treatment justified. The Tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of the aim. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

116.5. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Naeem v Secretary of State for Justice [2017] ICR 640**.

116.6. In summary, the Respondent's aims must reflect a real business need; the Respondent's actions must contribute to achieving it; and this must be assessed objectively, regardless of what the Respondent considered at the time. Proportionality is about considering not whether the Respondent had no alternative course of action, but whether what it did was reasonably necessary to achieving the aim.

Knowledge

117. A complaint of discrimination arising from disability will also be defeated if the Respondent can show that at the time of the unfavourable treatment, it did not know and could not reasonably be expected to know that the Claimant was a disabled person. We return to this below in summarising the law on reasonable adjustments.

Reasonable adjustments

118. Section 20 of the Act provides:

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

(2) The duty comprises the following three requirements.

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

119. Section 21 provides:

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

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

120. "Substantial" in this context means "more than minor or trivial" – section 212(1) of the Act. The Tribunal's task is to set out the nature, effects and extent of the alleged substantial disadvantage and assess it objectively. In other words, it must consider what it is about the PCP that puts the Claimant at the alleged disadvantage. Clearly, if the Claimant would have been at a disadvantage without the PCP, then it was not substantial. As can be seen from section 20(3), a comparative exercise is required, namely consideration of whether the PCP disadvantaged the Claimant more than trivially in comparison with others. As indicated in **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216** the comparator is merely someone who was not disabled. They need not be in a like for like situation, but should be identified by reference to the PCP, so as to test whether the PCP puts the Claimant at the substantial disadvantage.

121. The next question is whether there were any reasonable steps which the Respondent could have taken to avoid the disadvantage which were not taken. It is well known that assessing whether a particular step would have been reasonable entails considering whether there was a chance it would have helped overcome the substantial disadvantage, whether it was practicable to take it, the cost of taking it, the employer's resources and the resources and support available to it. The question is how might the adjustment have had the effect of preventing the PCP putting the Claimant at a substantial disadvantage compared with others. This is an objective test, and the Tribunal can substitute its own view for that of the Respondent. In **Archibald v Fife Council [2004] ICR 954**, the House of Lords held that the duty to make reasonable adjustments might require an employer to treat a disabled person more favourably. As a result, the local authority in that case could lawfully put a disabled employee into a role without competition if taking that step was reasonable in the circumstances.

122. Since we gave judgment orally, the EAT has handed down its decision in **Aleem v E-Act Academy Trust UKEAT/0099/20**. The EAT referred to **O'Hanlon v HM Revenue and Customs UKEAT/0109/06** in which the EAT held that it would be a very rare case in which maintenance of full pay would be a reasonable adjustment, in that case in the context of a sick pay arrangement.

That decision was upheld by the Court of Appeal. It also referred to **G4S Cash Solutions (UK) Limited v Powell UKEAT/0243/15** where a disabled employee returned from absence into a new role but with his former, higher, rate of pay maintained. Some months later the employer sought to change that, but the EAT held there was no reason in principle why it could not amount to a reasonable adjustment to maintain it. In **Aleem** itself, the employer had been clear throughout that the employee could not retain her higher pay from her previous role, though it maintained it for a while for specific reasons, including the conclusion of a grievance process. The EAT held that even discounting financial pressures – argued in that case, though not in the case before us – in the light of **O'Hanlon** and **Powell**, there was nothing particularly exceptional or unusual about the case such that it was a necessary reasonable adjustment to maintain the employee's pay.

123. There are also issues of knowledge, the first of which also applies to section 15. Paragraph 20 of Schedule 8 to the Act provides:

"*(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—*

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

124. The burden is on the Respondent to show that it did not have knowledge – certainly that is clear enough in relation to section 15 given the express wording of section 15(2). The EAT held in **Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10** that what this provision requires is that the employer know (or could reasonably be expected to know) that an employee was suffering from a mental impairment, the adverse effects of which on their ability to carry out day-to-day activities were substantial and long-term, that is the various constituent elements of the definition of disability in section 6 of the Act – though as made clear in **Gallop v Newport CC 2013 EWCA Civ 1583** it is knowledge of the facts of the Claimant's disability that is required, not an understanding by the Respondent that those facts meet the statutory definition. .

125. If the employer did not know and could not reasonably be expected to know the Claimant was disabled, knowledge of disadvantage does not arise.

126. What is reasonable for the Respondent to have known is for the Tribunal to determine and will depend on all the circumstances of the case. The question is what the Respondent would have found out if it had made reasonable enquiries – in other words there should be an assessment of what the Respondent should reasonably have done, but also of what it would reasonably have found out as a result (**A Ltd v Z EAT 0273/18** reflecting paragraph 5.15 of the EHRC Code on Employment (2011)). The Code says at paragraph 6.21 that knowledge will be imputed to an employer if its agent or employee has the requisite knowledge.

Time limits

127. Section 123(1) of the Equality Act 2010 provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Section

123(3) says that for the purposes of this section conduct extending over a period is to be treated as done at the end of the period, and failure to do something is to be treated as occurring when the person in question decided on it.

128. A continuing effect on an employee is not of itself sufficient to establish a continuing act. In **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96** it was said that the question is whether there is an ongoing situation or continuing state of affairs in which the Claimant was less favourably treated and for which the Respondent is responsible. The Court of Appeal acknowledged that the burden is on a Claimant to prove a continuing act, and noted that a Claimant may not succeed in proving the alleged incidents actually occurred or that, if they did, that they add up to more than isolated and unconnected acts.

129. The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies for example in unfair dismissal cases. Nevertheless, there is no presumption that time will be extended – **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of the tribunal granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

130. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** it was said that Parliament has given tribunals "the widest possible discretion" in deciding whether to extend time in discrimination cases. Notwithstanding **Keeble** there is no list of factors which a tribunal must have regard to, though the length of and reasons for delay, and whether delay prejudices a Respondent for example by preventing or inhibiting it from investigating the claim whilst matters were fresh, will almost always be relevant factors. It was said that there is no reason to read into the statutory language any requirement that the Tribunal must be satisfied that there are good reasons for the delay, let alone that time cannot be extended in the absence of an explanation of delay from the Claimant. At most, whether any explanation or reason is offered and the nature of them, are relevant matters to which the Tribunal should have regard. Where the alleged breach of the legislation is a failure to act, time runs from end of period in which the Respondent might reasonably have been expected to comply with its duty; that period should be assessed from the Claimant's point of view.

Working Time Regulations

131. Starting with regulation 30(1), the complaints a worker can bring under the WTR include a complaint that an employer has refused to permit her to exercise any right under regulation 13.

132. The key right under regulation 13 is to take four weeks annual leave in each leave year. Under regulation 13(9), that leave may only be taken in the leave year to which it relates. There are now coronavirus exceptions to that rule, which are not relevant here. In addition, however, the Court of Appeal in **NHS Leeds v Larner [2012] ICR 1389**, endorsed by the EAT in **Plumb v Duncan Print Group Ltd 2016 ICR 125**, essentially said that a worker on sick leave is entitled to take annual leave at another time. Regulation 13(9) is therefore to be read as saying that a worker's annual leave may only be taken in the leave year to which it relates "save where worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave".

133. Leave in those circumstances may therefore be carried over to another holiday year, meaning the entitlement is to take it, as other case law determines, within 18 months of the end of the year from which it was carried over. That is the entitlement that may be enforced in the tribunal, to take the carried over leave, or on termination to be paid in lieu of it, not to have the tribunal enforce carry over of leave as such. As the IDS Handbook says, in an extract provided by Ms Niaz-Dickinson, the point is that workers must be permitted to take the carried over leave at some other time.

134. We noted also the decision of the EAT in **Bear Scotland v Fulton 2015 ICR 221**. At paragraph 82, albeit obiter, Langstaff J essentially determined that an employer can decide which leave, that is whether regulation 13, regulation 13A or other leave, is taken first in any leave year. In that regard, regulation 13A provides an additional 8 days of leave. Whilst of course that was introduced to reflect the standard 8 days of public holidays in the UK, it is not the case that it can only be taken on those bank holidays. Regulation 13A does not say that, and for workers who have to work on bank holidays, they are still entitled to the 8 days, just at some other point. In relation to those days, carry over from one leave year to the next is not mandated in the same way as the amended regulation 13(9) in the event of sickness, though a relevant agreement may provide for it.

135. Finally, because regulation 9 of the Maternity and Parental Leave Regulations 1999 provides for terms and conditions of employment to continue during maternity leave apart from remuneration, and annual leave is not remuneration, all annual leave accrues during maternity leave. Of course, in any given case, it is very unlikely a woman's year off (assuming she takes her full entitlement) would coincide exactly with the holiday year, and so there would be some carry over of regulation 13 leave in her case as well. It is unclear whether the law requires employers to permit the balance of annual leave also to be carried over; this does not appear to have been decided.

Analysis

136. It was neither possible nor necessary to deal with every point of argument raised in an 8-day case, as is well known. Both counsels' submissions were extensive, Mr Somerville's written submissions alone running to 51 pages. We therefore focused on those arguments we regarded as of material importance. As the Judge responsible for writing these Reasons, I want to acknowledge the assistance of my lay member colleagues, generally of course, but in particular when applying their practical workplace experience to those matters where we were required to determine reasonableness and proportionality, namely the questions of knowledge of disability, the justification defence under section15 and

the reasonableness of the contended for adjustments. The final preliminary to our conclusions is to say that whilst we noted Mr Somerville's lengthy submissions on witness credibility, the evidence did not suggest to us that any general conclusions could properly be reached in that regard. As our findings of fact show, our preferred approach was to take each material conflict of evidence on its own merits.

Working Time Regulations

137. Mr Somerville confirmed that the complaint under this heading was of breach of regulation 13 only. It was common ground that the Claimant's entitlement under regulation 13, pro-rated for her as a part-timer, was in each of the years relevant to her complaint, 118.4 hours.

138. It seems tolerably clear that the Respondent's policy on carry forward of holiday accrued during sickness absence was that any leave taken in the year in which the absence occurred would be deemed to be regulation 13 leave. That is what it says (at 161) and it is precisely reflected in the email exchange involving Ms MacDonald and her HR colleague at 340, in relation to carry over from 2018. We noted that this is consistent with the position set out in **Bear Scotland**. The position in relation to carry forward of regulation 13A leave is as we have set it out above.

139. The Claimant eventually carried over 48.8 hours from 2017 into 2018, because of work she had been required to do on the CLM project in 2017. Those hours of holiday were not WTR leave, it is fair to assume, as we were not told of or taken to evidence that the Claimant was absent because of sickness for any appreciable time in 2017 or more pertinently that she had not taken her 118.4 hours of regulation 13 leave in that year. The 48.8 hours were therefore just an add on to her overall holiday entitlement for 2018. For regulation 13 purposes therefore, those hours fell out of account. We add that we did not see the Respondent's discretionary agreement to the carry-over of that holiday as relevant to the proper analysis of the Claimant's WTR complaints.

140. What the Claimant took in 2018 was, by agreement, 103.6 hours of leave. For the reasons just given, she was properly deemed to have taken her regulation 13 leave first. What she took was 14.8 hours less than her regulation 13 entitlement. That is what the Respondent allowed her to carry over.

141. We appreciate this is a complex area of law, but in the document the Claimant submitted to the Tribunal on 8 July 2021 setting out her position on 2018-19 carry over, at box 7 dealing with regulation 13, her figures are therefore wrong. She took 103.6 hours of WTR regulation 13 leave, not 54.8 hours – her figure erroneously assumes the 48.8 hours carried over from 2017 (eventually into 2019) was regulation 13 leave when it was not. She also erroneously ascribes some of the leave she took to regulation 13A. For the reasons also just given, it was not (see also our comments above on the law relating to regulation 13A); her regulation 13 leave was taken first. The Respondent's position in respect of carry-over from 2018 was therefore correct.

142. Moving to the next year, the Claimant arrived in 2019 with 118.4 plus 14.8 hours of regulation 13 leave, namely 133.2 hours. For the reasons just given, the 48.8 hours being carried forward from 2017 was not regulation 13 leave. The

14.8 hours could be taken by June 2020 and so could also have been carried forward to 2020 if not taken.

143. Again, the Respondent was entitled to say regulation 13 leave was deemed to be taken first. The Claimant confirmed she took 178.3 hours in total in 2019. As the Respondent said therefore, she had no entitlement to carry over anything further; all of her regulation 13 leave was used in 2019, including the 14.8 hours carried over. Paragraph 5 of the Claimant's calculation document for that year is therefore also incorrect. For the reasons already given, she had not carried over 63.6 hours of regulation 13 leave (the 48.8 plus 14.8 hours referred to above). It follows that the figure at paragraph 7 of her document, setting out what she says was the regulation 13 leave she took in 2019 (114.7 hours), is also incorrect. Again, the divide she made between regulation 13 and regulation 13A leave in this document was also incorrect for the reasons also already given. The Respondent did not fail to permit the Claimant to take regulation 13 leave to which she was entitled either in 2019 or 2020. We noted that there appears to have been an error in ascribing some days off in lieu to holiday entitlement, but that was rectified, and has no impact on the figures just rehearsed, including crucially the Claimant's statement of the leave she actually took in the 2019 leave year.

144. The Claimant did not seem to contend that the Respondent was in breach of regulation 13 in respect of 2021, so there is no need to say anything further about that. She was off sick for the whole of 2020 and agreed she carried forward therefore 118.4 hours. That was her regulation 13 entitlement. Of course, it is not known yet whether the Respondent will actually allow it to be taken, but it is clear the Tribunal could not conclude there has been a breach of the WTR when the 2021 leave year has not yet ended.

145. For all of these reasons, the WTR complaints were not well-founded and failed. Of course, that was not necessarily the end of the Claimant's complaints about holiday as she brought them alternatively under section 15, which complaints also included the rest of her holiday entitlement.

Discrimination arising from disability

Unfavourable treatment

146. We noted first what was said in **Williams** about the broad similarity between unfavourable treatment and detriment and that a relatively low threshold of disadvantage is required. Ms Niaz-Dickinson sought to argue in closing submissions that there had been no unfavourable treatment, but not, as she effectively acknowledged, with much conviction. Most of her arguments seemed to us to go to the issue of justification rather than to whether the Claimant had been unfavourably treated. They also strayed into comparisons with others, which is not what section 15 requires, at least not at this point. The test laid down in **Shamoon** is whether the treatment was of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment. The Claimant lost her holiday when moving from one year to the next, with the exception of that to which she was entitled under WTR regulation 13. She could reasonably conclude that this was to her detriment, quite clearly so. There was therefore unfavourable treatment.

147. Given the Respondent's concessions when defining the list of issues, it is agreed that the Claimant was unfavourably treated for a reason arising in consequence of her disability. That left two questions, first that of knowledge of disability, and secondly that of justification.

Knowledge of disability

148. The question of knowledge of disability in this context applied only to the first complaint, namely carry over of leave from 2018 to 2019, as the Respondent accepted that it knew or ought reasonably to have known that the Claimant was a disabled person by 2 July 2019. In closing, Ms Niaz-Dickinson effectively accepted, based on Ms MacDonald's evidence, that the date of the unfavourable treatment in this instance was 24 April 2019 when Ms MacDonald sent the email at 344 referred to above. The question for us to consider therefore was whether the Respondent knew or ought reasonably to have known as at that date that the Claimant was disabled. The burden was clearly on the Respondent to establish that it did not have such knowledge.

149. As already noted, the Respondent accepts that it had "constructive knowledge" of the Claimant's disability from 2 July 2019, when it received the OH report at 113. We asked Ms Niaz-Dickinson what that report showed, that is what more it revealed beyond what the Respondent already knew. In short, Ms Niaz-Dickinson's submission was that at this point the Respondent knew or ought to have known that the effects of the Claimant's mental impairment were long-term.

150. As set out above, we were required to determine what the Respondent would reasonably have found out if it had made reasonable enquiries, in other words whether it knew or could reasonably have known of the link between what it in fact knew and the fact of the Claimant's disability. What the Respondent in fact knew is to be assessed by what other employees knew, especially senior managers and, as the Respondent accepted, what was known to OH. We reminded ourselves that the knowledge in question was knowledge of the facts of the Claimant's disability, though not knowledge (or constructive knowledge) that these facts coalesced to establish that the Claimant was disabled as defined in the Act.

151. It was in this way that we were required to assess the position prior to 2 July 2019, which was of course relevant to the complaint of failure to make reasonable adjustments as well. Mr Somerville contended that the Respondent knew or ought reasonably to have known of the Claimant's disability from November 2017, the specific point from which EJ Batten concluded that the Claimant was disabled. This was doubtless with his eye on the complaint of failure to make reasonable adjustments (the section 15 complaint could not be said to have arisen until much later). We therefore began there and tracked our way through to 24 April 2019, asking ourselves the questions just referred to, assessed against the information which the Respondent accumulated or could reasonably have accumulated during that period.

152. The event of note in this regard in November 2017 was the Claimant's attendance at the leadership course which included the River of Life exercise. We do not doubt the difficulty this created for the Claimant, but note (213) her communication to the Respondent about that occasion. She did not mention her health, focusing entirely on what she understandably saw as a breach of

confidentiality. The Claimant accepts that there had been no diagnosis of mental ill-health at all by November 2017 and it is agreed she had not been off sick for any mental health related reason by that point; indeed, our understanding is that her absence generally at that point was minimal or at least not of any particular note. She told Mr Dix (604), in his investigation in late 2019 into her concerns about Mr Dolman, that it was in January 2018 she started to struggle with her mental health. Both that reflection and the facts to this point, amply demonstrate that the Respondent did not know and could not reasonably have been expected to know of the facts of the Claimant's disability.

153. As set out in our findings of fact, the Claimant recounts a number of meetings with Mr Aldread throughout the period of time we were required to assess. We noted his witness statement carefully, and that it was not challenged by the Respondent. Much of his evidence was hearsay, that is simply reciting the Claimant's descriptions of particular events or of how she felt, but he did inform the Tribunal of his personal observations of the Claimant, which were potentially relevant to the issue of the Respondent's knowledge. The Claimant agrees that she asked Mr Aldread to keep their discussions confidential, the significance of which fact is difficult to assess. It seems plain the meetings were not official in nature, so that Mr Aldread made his observations in a personal capacity, as the Claimant's friend and former manager. Ms Niaz-Dickinson submitted that as a result what he knew was not part of the Respondent's institutional knowledge, whilst Mr Somerville submitted that the Respondent was fixed with what Mr Aldread knew, regardless of the context of his meetings with the Claimant, given that he was a senior manager. In the end, we did not feel it necessary to decide this point, as will become apparent below, though we determined the issue of the Respondent's knowledge taking into account Mr Aldread's observations as part of our chronological assessment, that is effectively adopting Mr Somerville's position.

154. Mr Aldread's first observation of relevance arose in his meeting with the Claimant in January 2018, in relation to which he recounted that the Claimant was in tears for 30 minutes and told him she was worried she could be on the verge of some kind of breakdown. Of course, that was rightly a cause of concern but it was plainly not enough to suggest that further enquiries should be made at that point nor was it in any sense sufficient to indicate that the Claimant was a disabled person. The Claimant was plainly struggling, including with some work-related issues, but what Mr Aldread records of that occasion would not of itself reasonably have intimated that she had a mental impairment having a substantial adverse effect on her ability to carry out day to day activities, still less that such an effect was long term.

155. Turning to consider what was known by Mr Dolman, it is clear that he had not been told of any difficulties being encountered by the Claimant by January 2018 (see the Claimant's comment to Mr Dix at 604). At their meeting on 1 February 2018, the Claimant told Mr Dolman that she had to move out of the team for the sake of her health. That clearly showed a concern on her part, but from Mr Dolman's perspective, at that point there was nothing further. He says very clearly (TD34) that the Claimant at no point told him she was suffering from stress or mental health issues. The Claimant agrees that is correct. His understanding was that the Claimant informed him at the meeting that she had issues with the CLM project and with him. That was a reasonable conclusion at that juncture.

156. The Claimant informed Ms Sheard on the same date that she was worried for her mental health. Again, that was and ought properly to have been of concern, but it is relevant to note that the Claimant tied this specifically to continuing in her role as Commercial Manager, as Ms Niaz-Dickinson emphasised in submissions. The Claimant accepts that her crying at the meeting with Ms Sheard was not a sign of a mental health disability; indeed, the explanation she gave of her concerns to Ms Sheard focused on a lack of clarity in her role. Ms Sheard was perfectly entitled to take that at face value.

157. Ms MacDonald would have expected an HR people partner to be engaged following the meeting with Ms Sheard. That would therefore have been a reasonable step for the Respondent to take. If it had happened, it is reasonable to conclude that it would have resulted in a conversation between HR and the Claimant but not, at that stage, anything further. These were after all the Claimant's first communications to the Respondent of concerns about possible effects on her health and, as we have recorded, practical steps were put in place at that meeting to plan the Claimant's exit from Mr Dolman's team and the Claimant communicated very clearly that she could continue working in the team with that plan in place. On 21 March 2018, Ms Sheard spoke with the Claimant again, and ascertained that she was content to be looking for new roles. No further flag was therefore raised suggesting further action was required. We noted Mr Somerville's repeated emphasis in cross-examination and submissions that the fact that the Claimant was applying for multiple jobs, including some outside of her previous experience and some at a lower grade, was an indication to the Respondent that something was wrong. We do not think that this can be said to lead to a conclusion that the Respondent ought reasonably to have known at this point that the Claimant was disabled, certainly not at this early stage and in any event in the context of what she had agreed with Ms Sheard and Mr Dolman.

158. We next considered the Claimant's experience at the course she attended in June 2018 when she was unable to continue with her presentation. Mr Dolman accepts this was a sign that "something was going on". The Claimant informed Ms Wood, Ms Skerritt, and Mr Hemming of what had happened, describing her experience as a breakdown. She said something similar to Amanda Lofley, a mental health champion, and later told Mr Aldread, in it should be noted rather different language, that she had experienced a "bit of a meltdown". Ms Lofley told Mr Ashworth during the grievance process (376) and with reference to June or July 2018, that she had dealt with a lot of people with mental health issues and that the Claimant was "very, very poorly". The Claimant went on holiday almost immediately. One week after her return, on 10 July 2018, she told Mr Dolman that she could not attend work. That was relatively unusual for her, as we have noted, and the Claimant's sick note referred to work-related stress. We were in no doubt that at this juncture, further action was required on the Respondent's part. The Claimant's annual leave for two weeks limited what it could reasonably be expected to do immediately after the course, but it was a reasonable step to make an OH referral to seek professional advice upon her return. That is precisely what the Respondent did, making the referral in July.

159. The Respondent has its own OH service. Although an external provider, the Respondent accepts that it was fixed with whatever OH knew. We found it somewhat surprising that the Respondent does not routinely ask OH whether the person being referred is disabled, though we readily accept Ms MacDonald's evidence that OH would flag this anyway if it thought it appropriate. The key

question is what the Respondent was told as a result of the OH referral, noting that it could not uncritically accept what OH said (including any absence of reference to disability) but had to make its own assessment, so that it can be held to what it should reasonably have concluded from all of the circumstances, including what the various OH reports revealed. In any event we do not think the Respondent can fairly be criticised for not asking expressly about disability at this point, as these were the very early stages of engaging with concerns about the Claimant's health and this was the first OH referral.

160. The first report, resulting from that referral, was dated 9 August 2018. It revealed that the Claimant had told OH she had encountered work issues causing her distress and that this had been building for 12 months to the point where she could no longer continue at the start of 2018. We note that the penultimate paragraph of the report said that the outlook for the Claimant depended on how well she engaged other support services, and that OH would review her again in 6 weeks. It also stated that no other issues were raised by the Claimant impacting on her mental wellbeing other than the work issues. OH said the outlook was guarded. Nevertheless, particularly with the short timescale for review – which did not signal that there was a long-term issue at that stage or that a long-term issue could be foreseen, and meant that further advice would be forthcoming – we do not think the Respondent could be criticised for not making further enquiries at that point. On the same basis, we do not think either that it could in any sense be said to have been fixed with knowledge of the facts of the Claimant's disability.

161. The day after the report, 10 August 2018, the Claimant told Mr Aldread that she had experienced a breakdown in June. It seemed to him (RA10) that the Claimant was reduced to a "shell of the person" he had known for 15 years. That was evidently more concerning than what he had observed earlier in 2018, but even taking what Mr Aldread knew as part of the picture of the Respondent's institutional knowledge, it is plain that the Respondent was doing what could reasonably have been expected of it to ascertain more about the Claimant's situation, and for the reasons just given that it could not reasonably be expected to know the facts of disability at that point in the light of the OH report.

162. The promised six-week review followed and on 26 September 2018 the Respondent received another OH report (247). The Claimant was still off sick, but she was reported as having made good progress in that relatively short period, so that she could now attend meetings with the Respondent. Further, the advice was that she would be fit to return to work once the work-related issues she described had been resolved. The conclusion was that she would be reviewed again in 3 weeks, at which point it was hoped that a return-to-work date could be set. In our judgment, and drawing on the industrial expertise of the Tribunal's lay members in particular, the reasonable conclusion from this report was that the Claimant's health concerns were, or were likely to be, short term and that they were linked to workplace issues (confirmed by the sick notes), rather than something more fundamental and underlying.

163. On 16 October 2018 the Claimant met with Jo Ginno, informed her that she had experienced a "mental breakdown" in June (KX60) and became very distressed. That too would properly have been a matter of concern, but in respect of the Respondent's collective knowledge, it has to be seen in the context of the further OH report of 24 October 2018 (255), in which the Claimant was declared fit for work and the Respondent was advised that no more OH reviews

were required. We accept of course that just because someone is declared fit for work or indeed is at work, does not mean that they are not disabled nor of itself that an employer can reasonably draw the conclusion that they are not disabled, but in the overall context summarised above, it is our judgment that in light of this report the Respondent could reasonably have concluded that whatever was happening in respect of the Claimant's health, it was short term at this point. Furthermore, and for the same reasons, it is not clear what more the Respondent could do to follow up the report in order to ascertain further information.

164. On 2 November 2018, the Claimant met Ms MacDonald, and cried during that meeting as well. It was at this point that Ms MacDonald picked up that there had been some issues in the Claimant's then current role. This too has to be seen in the overall context of what else was being brought to the Respondent's attention and its overall store of knowledge at this point. In light of that larger picture, Ms MacDonald cannot be criticised for taking no further specific action on the basis of that meeting alone.

165. We then come to the form the Claimant completed in relation to her new role in Internal Audit, on 23 November 2018. She ticked "yes" in answer to the questions about whether she had "any illness/impairment/disability". We noted the broad nature of the question, namely that it related to illness as well as to disability. We noted also the Claimant's comment in providing further information on the form that she was "currently recovering from work related stress", that she was considered "fit to return to work provided that I have a new line manager", and that in terms of reasonable adjustments "a phased return to work would be beneficial". There was nothing on the form to suggest that this was, or likely to be, an ongoing issue. Whilst the Respondent arguably had knowledge that the Claimant had a mental impairment, and that it had some impact on her in relation to work, the question of an impact on normal daily activities had not been raised by OH at all, in the various reports that had been provided to the Respondent by this point. Further, the Respondent did not have evidence that any impact on the Claimant of any description was or was likely to be long term. It looked from the information it had obtained from reasonable enquiries, as Ms Niaz-Dickinson submitted, that there had been a short-term impact and that this had subsided. We accept Mr Somerville's submission that the reference to reasonable adjustments in the form is language borrowed from the disability strand of the Act, but what the Claimant went on to refer to was a short, phased return-to-work. We did not think that sufficient to change our assessment of the position at this point.

166. The Claimant remained on sick leave until 31 December 2018, that is around five and a half months in total. In December 2018 (309 to 313) she engaged in the email exchanges about her PDR, telling HR that she had been shaking and in tears after weeks of feeling well. Whilst Mr Dolman agrees this was not a normal reaction to the subject of completing a PDR, the Claimant's reference to "weeks of feeling well" is confirmation of our analysis that it was not unreasonable of the Respondent not to reach the conclusion at this point that the Claimant was disabled. All of the information it had received, from the OH reports in particular but also from the various meetings we have referred to and indeed this email exchange, meant that it was reasonable for the Respondent to view the situation as it did, namely that the Claimant had experienced an adverse reaction to a work-related matter which, with her imminent change to a new role, was resolved.

167. By 30 January 2019, the Claimant had returned to work and increased her working hours to 4 days per week. In her end of year appraisal for 2018, completed on 25 February 2019 (314), she said that, "7 years of bullying and intimidation reached its peak … I suffered a mental breakdown". This was forceful language, but in light of the medical advice the Respondent had received and which we have summarised, and in view of the fact that the Claimant was back at work, carrying out her new role effectively without further absence, we did not think this of itself reasonably required the Respondent to take further action or of itself reasonably suggested a different conclusion to that which we determined it could reasonably have been expected to reach to that point.

168. We then come to May 2019. On 7 May 2019, the Claimant met with Martin Sharpe, the Respondent's Head of Internal Audit, and another mental health champion (KX101), during which meeting the Claimant sought but struggled to articulate how she was feeling and felt overwhelmed. That was no doubt an uncomfortable experience for the Claimant but of itself did not take us further forward or change the analysis already set out above. The next day, another OH report (368-9) advised the Respondent that she was enjoying her new role and settled back at work, though she was still encountering a level of ongoing anxiety and distress related to issues in her previous role and struggling to deal with that. For the first time, OH touched on an impact on the Claimant's ability to carry out day to day activities, referring to her sleep, mood and general well-being. It was also on 8 May 2019 that the Claimant put in her grievance in which she made reference to her mental wellbeing.

169. In our judgment, the content of the OH report on 8 May 2019, and the Claimant's grievance, put things on a different footing for two reasons. The first was the reference – albeit brief – to the impact on the Claimant outside of work and more generally than work. The second was the fact that the timescale over which the Claimant had raised concerns with the Respondent about her mental health (to be contrasted with the possibility of mental health concerns, which she raised in early 2018) was now approaching 12 months. This certainly did flag the need to take further steps, which is what the Respondent did. On 31 May 2019, HR referred the Claimant to OH (392), which included a request for counselling support. This is what led to the further OH report of 2 July 2019 (450), at which point for the reasons given by Ms Niaz-Dickinson, the Respondent concedes that it knew or should reasonably have known the Claimant was a disabled person.

170. For all of the reasons given above, we accepted the Respondent's case on the issue of knowledge of the Claimant's disability, being satisfied that it had established that it did not have knowledge and could not reasonably have been expected to have had knowledge of disability at the time of the unfavourable treatment on 24 April 2019 or, more broadly, prior to 2 July 2019. The first complaint of discrimination arising from disability failed on that basis. We therefore went on to consider, in relation to the two remaining complaints, the question of justification.

Justification

171. Again, the burden of proof was on the Respondent. There were two issues for us to consider, namely whether it had legitimate aims, and if it did whether the unfavourable treatment was a proportionate means of achieving them. The aim (or aims) must represent a real need on the Respondent's part and what it did

must be an appropriate and reasonably necessary means of achieving one or more of them. In other words, the unfavourable treatment must have been connected to achieving the aim(s) and no more than was reasonably necessary to do so. It is also relevant to ask whether a less discriminatory measure could have achieved the aim(s). This required us to weigh in the balance the impact of the unfavourable treatment on the Claimant and the importance of the aim(s) to the Respondent, weighed by us as the industrial jury based on what we heard from the parties (the Respondent in particular of course), not just what the Respondent considered at the time.

172. We started our analysis of this question by noting that the Claimant did not challenge the Respondent's evidence in this regard, summarised by Ms MacDonald in her statement and then elaborated in her oral evidence in answer to questions from the Tribunal. It was nevertheless incumbent on us to assess the Respondent's case in this regard for ourselves, and that is what we did. We also rejected Mr Somerville's written submission that the Respondent did not raise the question of justification in its witness statements. It plainly did. The Respondent's aims were set out in Ms MacDonald's witness statement at AM5 (and more briefly in Mr Dix's evidence) as first having a clear and consistent policy for all, including for those well enough to work and including managers responsible for planning staff holidays, and secondly enabling the staffing of the Respondent's rota, to meet operational commitments. In her oral evidence, Ms MacDonald elaborated on what was set out in her statement, referring to the need to be as fair and consistent as possible to all employees, including line managers, and explaining the competition for holidays that can be faced by line managers, for example where a number of employees want to take leave in school holidays. She also added, reflecting the Respondent's case throughout, that the Respondent was seeking to fulfil its legal obligations.

173. We first considered therefore whether the Respondent had legitimate aims in having and seeking to implement a clear and consistent policy on holiday carry over, allocate holiday entitlement fairly between employees and meet its operational requirements. Evidently, being able to meet operational commitments is important for any employer; that seemed to us so inarguable that nothing further need be said about it. Wanting a clear and consistent policy position, set out in advance so that managers know what they are to apply and employees know what will be applied, both to them and to their colleagues, also in our view speaks for itself. Seeking a fair allocation of holiday for all is also clearly a legitimate aim given the difficulties in employee relations it can create for an employer if this is not felt to be the case, both in respect of taking of holiday and in respect of covering for those who are on holiday. We heard little detail of the Claimant's team, or their circumstances, other than that she works most closely with a team of seven or eight people and that, unsurprisingly, Internal Audit is a team that impacts on and interfaces with most or all parts of the Respondent's business, and has time-critical projects. It is not difficult to see how the aims contended for by the Respondent were clearly legitimate aims in that specific context.

174. The key question therefore, as is often the case, was that of proportionality. Did the Respondent act proportionately in applying its policy of only permitting the Claimant to exercise her rights under regulation 13 of the WTR?

175. First of all, doing so clearly assisted with the achievement of the aims. Only allowing carry forward of regulation 13 leave is first of all clear, secondly

consistent, and thirdly minimises the impact of substantial carry forward by someone returning to work after a long absence. It thus reduces the impact which this could have on other employees both in terms of their ability to take their own holidays and their providing cover. It thus in turn minimises the impact on the Respondent's ability – specifically, it can readily be said, the ability of the Internal Audit team and the Claimant's mini-team within it – to meet its operational needs.

176. Secondly, was the unfavourable treatment reasonably necessary to achieving the Respondent's aims? Again, this was not really challenged by the Claimant during the course of the evidence, though again this was a point for the Tribunal itself to assess. Of course, the Respondent could in theory have allowed carry over of all holiday, not just regulation 13 holiday, but that is not the right way to assess this point. The question is not whether the Respondent had no alternative – it clearly did – but of undertaking a balance of the impact on the Claimant of losing some of her additional holiday entitlement because of her disability-related absence, and on the other hand the impact on the Respondent of her carrying forward more than her regulation 13 leave. We concluded that the Respondent discharged the burden upon it to answer this question, for the two reasons it put forward.

177. First, employees on long term sick leave generally (who it will be widely accepted will be likely to include more disabled employees than employees who are not disabled), and the Claimant specifically, have the comfort and assurance that they will be entitled, under the Respondent's very generous sick pay arrangements, to two years' full pay, should they be off for sufficient length of time to need it. We recognise of course that sick leave and annual leave are not the same types of leave (that is at least true in respect of regulation 13 leave), but think it reasonable on the Respondent's part to conclude that the sick pay scheme was one reason to limit what the Claimant should be permitted to carry over by way of annual leave as her sick leave unfolded. It was in effect seeking to strike a balance in the contractual entitlements of its employees who face long-term absence between providing the support for those employees that the sick pay scheme and statutory holiday carry-over provides and the impact on the Respondent of further holiday carry-over that we have referred to.

178. Secondly, the unfavourable treatment reflects the statutory framework and the case law which has considered it. We should be hesitant to conclude that an application of the statutory framework by the Respondent was not a reasonable means of achieving its aims and of striking the balance we have referred to, particularly noting that regulation 13A does not, whether as drafted or under judicial scrutiny, require carry over of untaken leave. We also note that the Respondent allows, though does not compel, the taking of annual leave during sickness absence. On that basis, if there were concern about losing annual leave because of the Respondent's carry over policy, an employee on long term sick leave can take annual leave whilst off sick, as the Claimant has herself decided to do this year, which whilst not ideal means that the effect of the Respondent's policy on carry over can be mitigated.

179. Thirdly, could the Respondent have adopted a less discriminatory means of achieving its aims? It could have allowed full carry over of all holiday, not just that under regulation 13, which would still have met its aims of achieving clarity for all employees, as that is also a policy that could be made known and universally applied. Leaving aside the fairness aim, it would however plainly

undermine the aim of meeting operational commitments given that it would give the relevant manager even more annual leave to accommodate on the Claimant's (or any long-term sickness absentee's) return to work. The Claimant did not suggest any other less discriminatory means of achieving the aims that might have been adopted.

180. Taking these points together, we were satisfied that the proper balance was struck in the Respondent's treatment of the Claimant even where, again in accordance with the law, that carried forward holiday needs to be taken within 18 months of expiry of the relevant holiday year. This conclusion was not in our view meaningfully challenged by three points made on the Claimant's behalf:

180.1. First there is the case of Jo Walker following her absence on sick leave. As the Respondent pointed out, this was an absence lasting only 11 weeks, and did not traverse two holiday years so that the question of carry over did not arise.

180.2. Secondly, there is the position of employees taking a sabbatical. First, this is unpaid. Secondly, it is rarely for more than 12 months (190). Thirdly, as Ms MacDonald told us, employees who have been on sabbatical get paid for their accrued leave on return rather than taking the holiday, which is the Respondent's point in relation to its operational requirements and the other aims it relies on.

180.3. Thirdly, there is the position of employees taking maternity leave. As a matter of law, they accrue all of their holiday during maternity leave. The position on carry-over is unclear, as we have said, and the Respondent cannot be criticised in those circumstances for taking the view that those on maternity leave should be allowed to carry over their annual leave in full. Furthermore of course, maternity leave is for 1 year at most. The Respondent is required to manage all sorts of competing practical and legal requirements.

181. For the reasons we have given, we were satisfied that the Respondent made out the justification defence provided by section 15 of the Act. The Claimant's complaints of discrimination arising from disability therefore failed. Although the Respondent effectively conceded that there was no time limit issue in relation to these complaints, given that the complaints failed on their merits, there was no need for us to consider this question further.

Reasonable adjustments

182. It was agreed that the PCP was that the Claimant worked with, or the Respondent had a requirement that she work with, Mr Dolman, which remained the case as our findings of fact show, up to 31 December 2018 or, as the Respondent would have it, October 2018 when the Claimant secured a new role in another team.

The Claimant's case on substantial disadvantage

183. It was necessary for us to make two points about the Claimant's case on the substantial disadvantage which she says she was put to by the PCP. Both were made by me as the Employment Judge at several points during the course of the Hearing.

184. The first was the shifting nature of the Claimant's case in this regard. It is always important of course that a party's case is clearly spelt out in all respects, but particularly where that party bears the burden of proof, as the Claimant did in

showing the requisite disadvantage. Regrettably, her case was far from clear because it changed considerably as the case progressed. She initially said that the disadvantage was that the PCP triggered her anxiety – as we have noted, Mr Somerville put it in terms of the Claimant's anxiety interfering with how she saw apparently innocent actions which then led to sickness absence. This was essentially the position as articulated by the Claimant to Employment Judge Evans at a Case Management Preliminary Hearing on 5 November 2019 (46) when a list of issues was discussed. On day 3, Mr Somerville said that it was having to work for Mr Dolman, or be near him, and being forced to move jobs and take a pay cut that were the substantial disadvantages. It was this that led to our requiring formal clarification of the Claimant's case and resulted in the Claimant's lengthy document sent to the Respondent early on in the adjournment of this case and which was seen by us on its resumption. We were dismayed to see the case on substantial disadvantage put in a yet further different way in the Claimant's written submissions, which we saw for the first time once the evidence was completed. That is not satisfactory at all, whether for the Respondent or the Tribunal, or indeed the Claimant. As we made clear during submissions, we were prepared to base our deliberations on the Claimant's document. We were conscious that in the limited time available on day 4, the Respondent could only conduct a representative cross-examination of the Claimant in relation to that document, but we considered it carefully in its totality in reaching our decision.

185. The second point we emphasised repeatedly was how the constituent parts of a complaint of failure to make reasonable adjustments hang together. There seems to have been, it may be said on both sides but particularly on the Claimant's, some lack of clarity in this regard, which did not help either the presentation or determination of the case. A clear example of the confusion about how the constituent parts relate to each other was Mr Somerville's statement that the substantial disadvantage included the Claimant having to work near Mr Dolman, when that was clearly the PCP or as close to the PCP as one could get.

186. In our decision in April 2021 rejecting the Claimant's application to amend her complaints of failure to make reasonable adjustments, we sought to explain how such complaints work. We repeat that here:

186.1. In principle, we accept Mr Somerville's submission that it is desirable to avoid having to plead multiple PCPs and thus to give a pleaded PCP a generous interpretation, though having to plead more than one PCP cannot always be avoided, and doing so can be helpful in avoiding confusions such as have arisen in this case. Nevertheless, we adopted as generous an interpretation as we could of the Claimant's case, recognising that she was a litigant in person, apart from at the Hearing itself.

186.2. The Tribunal must then determine the substantial disadvantage, and as set out above, the burden is on the Claimant. If it is said that there were various substantial disadvantages, they do not need to have arisen at the same time. It is also possible a substantial disadvantage could arise after a PCP has ceased to operate.

186.3. The Claimant must then suggest that there were steps the Respondent could have taken but failed to take. This too was explored at length, specifically at the start of the Hearing in December 2020, and the Claimant's case in this respect developed somewhat as well. It was eventually clarified that the

Claimant contended for two-fold steps she says the Respondent should have taken, namely placing her in another role, and placing (or as it may be accepting) her in another role at the same pay.

186.4. If all of the above constituent parts of the case are made out, it is if the Respondent did not take those steps and they were reasonable that a complaint succeeds.

186.5. Putting all of the above together, the central point of the duty to make reasonable adjustments is to require employers to adjust the PCP in order to overcome the substantial disadvantage encountered by the employee. The question therefore is whether any modification or qualification could be made to the PCP which would or might remove the substantial disadvantage it allegedly causes. The steps which can be reasonably required of an employer therefore depend on the PCP it has applied. The alleged substantial disadvantage(s) cannot be divorced from the other requirements for establishing a failure to make reasonable adjustments. The substantial disadvantage must arise from the PCP, namely the requirement to work with Mr Dolman, even if broadly construed, and the adjustments contended for must address the PCP, to avoid the disadvantage(s) the Claimant alleges she was put to as a result.

186.6. It is not enough for the Claimant to say to us, or for that matter at the relevant times to the Respondent, that there was a substantial disadvantage or that she felt there was; there must be some evidence of it. The Claimant's underlying anxiety disorder was not of itself evidence of substantial disadvantage, nor could it be said to necessarily lead to a conclusion that working with Mr Dolman caused a substantial disadvantage. The Claimant bore the burden to prove it.

186.7. As noted in our summary of the law, "substantial" means "more than minor or trivial". The Tribunal should ask what was the nature and extent of the disadvantage and what it was about the PCP that put the Claimant at the alleged disadvantage.

Substantial disadvantage – analysis

187. For reasons of efficiency we sought to group together the multiple substantial disadvantages alleged by the Claimant in the document seen by us on 5 July, rather than addressing each of a very long list in turn.

188. Those set out in boxes 1 and 2 essentially assert that working with Mr Dolman triggered the Claimant's anxiety. We could see that this alleged substantial disadvantage could properly be said in principle to have arisen from the PCP and that in principle it could have been avoided by addressing the PCP, at least whilst the PCP persisted. This was one of the substantial disadvantages articulated from the outset, including before EJ Evans. We accepted too that the Claimant's need to take sick leave could be said in principle to be a disadvantage arising from the requirement to work with Mr Dolman and that taking the steps the Claimant contended for would, again in principle, have avoided it. The same is the case in respect of the Claimant having to leave her role in the Commercial team (mentioned in Box 4), move to a lower graded role and take a reduced salary.

189. Some of the disadvantages the Claimant listed in box 3 we found not to be established on the facts – specifically, being required to attend the November

2017 course, being required to walk with Mr Dolman every lunchtime and having to stay in contact with him whilst off sick in 2018.

190. Some of the alleged disadvantages were, even put at their highest, no more than minor or trivial, for example the Claimant being asked by Sara Sheard on 1 February 2018 if she could work with Mr Dolman to the end of September. When the Claimant said she could not, this was not pursued further. Accordingly, if there was a disadvantage, it was entirely transient.

191. Many of the disadvantages the Claimant listed in boxes 3 and 4 did not seem to us to arise from the PCP nor would what the Claimant presumably says the Respondent should have done have addressed the PCP, namely the requirement to work with Mr Dolman. Specifically:

191.1. She refers to having to do the River of Life exercise and having her notes circulated. Of course, neither she nor Mr Dolman knew that either of these things would happen, but more to the point the Claimant presumably says that she should not have had to do the exercise and should not have had her notes circulated (i.e., she should have been excused from both of those requirements). The alleged substantial disadvantage does not flow from the requirement to work with Mr Dolman, and what the Claimant presumably says should have been done to avoid what happened would not in any sense have addressed or changed the requirement to work with him, which is what the Claimant says should have been done and that the Respondent unreasonably failed to do.

191.2. The Claimant's reference to not being informed of organisational changes (by reference to KX52) encounters the same issue. Assuming the Claimant's case is that she should have been told of these changes, it is wholly unclear how that is a step the Respondent should have taken that would have addressed the requirement to work with Mr Dolman.

191.3. Having to accept a new working pattern in her role in Internal Audit is another example. Quite apart from the Claimant saying at KX58 that the hours were agreed and at KX77 that she increased her hours because she wanted to make an impression on her new manager, it is clear that the new working pattern arose from requirements of the new role and wholly unclear how what we assume the Claimant says should have happened – working different hours – would have addressed the requirement to work with Mr Dolman. The same is the case in relation to the other features of the Claimant securing her new role, such as not being given a written offer and the comment allegedly made by Martin Sharpe on 7 May 2019 that the Claimant was making a mountain out of a molehill (KX101), the context of which is unknown to us). Similarly, it was when working in Internal Audit that the Claimant says she was required to check emails whilst off sick (KX139), so that again, the assumed adjustment of not being required to check emails would not in any sense have addressed the PCP on which her case was based.

191.4. The Claimant referred to Mr Dolman asking her to manage, rather than lead, the CLM programme. This was not something she emphasised at all in evidence and did not seem to us to be more than minor or trivial. In any event, the step the Claimant presumably says should have been taken to avoid that disadvantage would not have addressed the requirement to work with Mr Dolman. Similarly, Jo Walker being lined up for a role leading IT for the Commercial Function – which the Claimant says she should have been asked about, as we will come back to – would have been avoided by the Claimant being given the opportunity to consider applying for the role. That, most plainly of all,

would not have addressed the requirement to work with Mr Dolman; quite the opposite.

191.5. The Claimant referred also to what happened on the June 2018 course. There is no suggestion she had any objection to going on the course or making the presentation, nor were we told she would not have attended the course (and thus made the presentation) if she had not been working for Mr Dolman, though that can perhaps be supposed. Again, assuming the Claimant says she should have been excused from the course, that step would not have addressed the requirement to work with Mr Dolman.

191.6. The Claimant also made reference in her document to her grievance, the holiday carry-over issue, her pay in her new role and other HR issues such as access to counselling, and indeed this litigation. Quite apart from the holiday matter being the subject of a separate complaint, it is plain that any issues related to these matters arose from either inefficiency on the Respondent's part or the application of its policies and that, for example, a more efficient grievance process or settling this litigation would not have addressed the PCP.

191.7. The Claimant also refers to having to work in the same building as Mr Dolman in late 2019. Neither party took us to that in evidence. In any event, it seems clear that this is not something that could have been addressed by the steps the Claimant contends should have been taken to address the PCP, namely to be moved to a different role. She was already in one.

192. The result of this analysis was that the substantial disadvantages we concluded the Claimant could properly contend for were that the PCP gave rise to anxiety, sick leave, leaving her role in Commercial and taking a lower grade role and reduced pay. Effectively, that took us back to the list of issues agreed with EJ Evans.

193. Of themselves, these disadvantages were more than minor or trivial, but the crucial question that emerged and was considered at length during the evidence, was whether it was working with Mr Dolman that put the Claimant to these substantial disadvantages.

194. Mr Somerville drew much attention to the decision of EJ Batten at the Preliminary Hearing in February 2020, for example her comment that from June 2018, the Claimant's state of mind caused serious concerns to medical professionals, that from April 2019 she experienced regular panic attacks and her conclusion that "the Tribunal rejected the submission of Counsel for the Respondent to the effect that such anxiety was occasioned by a reaction to work and the Tribunal did not accept the submission that the Claimant's anxiety manifested itself only in isolated incidents. The medical evidence did not support such a conclusion".

195. The conclusions drawn by EJ Batten were conclusions on the issue of disability, in relation to which respondents often seek to draw a distinction between a mental impairment which has a substantial adverse effect on a person's ability to carry out day-to-day activities, and on the other hand something that is simply a reaction to work events. EJ Batten was not addressing the question of whether the Claimant's anxiety, still less the other disadvantages she relies on, arose from Mr Dolman's behaviour. She was deciding the question of disability. Her judgment did not therefore assist us in determining this question. As it happens, that included our not reading in a way

adverse to the Claimant EJ Batten's rejection of the submission that the Claimant's anxiety was occasioned by a reaction to work.

196. We also needed to address Ms Niaz-Dickinson's comment during her oral submissions to the effect that the Claimant suffered as a result of Mr Dolman's behaviour, which Mr Somerville described as a "concession" of the issue of substantial disadvantage. We were not prepared to find against the Respondent simply on the basis of one careless and very brief comment, in the middle of a sentence as we recall it, and in the course of long submissions at the end of a tiring day, that was essentially contrary to all the arguments the Respondent's witnesses and Ms Niaz-Dickinson had herself put before us to that point. It was incumbent on us to clarify Ms Niaz-Dickinson's meaning, which we did. She is well aware of her duty to the Tribunal and explained that what she intended to say was that this was the Claimant's case. We were amply satisfied with that explanation.

197. We turned next to the report by Dr Mitchell, on which Mr Somerville placed great reliance, particularly paragraphs 11.26, 11.29 and 11.30. In brief summary, the report concluded that the main trigger for the Claimant's problems at work was having to work with Mr Dolman and that her anxiety would not have developed otherwise. Ms Niaz-Dickinson submitted that it was entirely for the Tribunal to determine what weight to attach to the report, whilst Mr Somerville submitted that it was unchallenged. We noted:

197.1. It was written quite some time after the relevant events, in June 2020, nearly 18 months after the Claimant ceased working for Mr Dolman, though of course we do not say that of itself invalidated the report, as this will very often be the case with third party involvement in litigation.

197.2. Dr Mitchell was not present during the Hearing for questioning, and unlike with Mr Aldread, we were not told that the Respondent agreed her evidence.

197.3. As we noted in discussions during submissions, the instructions to Dr Mitchell were not agreed with the Respondent. Without in any sense impeaching Mr Somerville's very obvious integrity, we did not see the instructions to ascertain their impartiality, but we do note that the expert saw the Claimant's evidence (statements from the Claimant herself and Mr Aldread) and did not see the Respondent's statements.

198. For those reasons, we had regard to the report, but considered ourselves to be in a much better position than Dr Mitchell to weigh the parties' competing evidence, much of which was simply not before her. We have had regard to Mr Aldread's evidence as well, but noting again that what he recounted is largely what the Claimant told him; his first-hand evidence was principally relevant to the question of the Respondent's knowledge, as set out above.

199. Against the matters the Claimant relies on in support of her case on substantial disadvantage, we noted the following:

199.1. The Claimant worked with Mr Dolman from 2011. We acknowledged her evidence that she started looking for other roles from mid-2012, though less so when not in the same office as Mr Dolman (we note the PCP was the requirement to work with him, not share an office with him). This is balanced by Mr Dolman's equally unchallenged evidence that the Claimant expressed during her PDRs that she was not looking beyond her role in Commercial.

199.2. The Claimant was a consistently good, in fact high, performer throughout this period – whilst working with Mr Dolman.

199.3. There was no evidence in the Claimant's medical records of clinically significant problems before 2017. The Claimant accepts there had been no diagnosis regarding her mental health by November 2017 and that she had not been off sick for any mental health related reason by that point. She told Mr Dix in late 2019 that it was in January 2018 that she started to struggle with her mental health.

199.4. She volunteered to work with Mr Dolman after returning from maternity leave, on the high-profile CLM project.

199.5. That came on stream in 2017 and intensified in the latter stages of that year. It was the Team's biggest ever transformation project, in which the Claimant played the same role as on previous projects, but with a broader reach and on a larger scale, with a very demanding client. Mr Dolman was more closely involved in the CLM project than he had been in others, which we find unsurprising. The Claimant plainly found it difficult when decisions were required of Mr Dolman in high-pressure situations, some of which decisions were unavoidably taken in confidential meetings. This was because – and we say this entirely without criticism of her – she liked to be in total control of what she was managing, which in this instance was not possible.

199.6. The Claimant's meetings with Mr Aldread took place from the second half of 2017, the signs of upset he observed increasing from early 2018, although not uniformly, as Mr Aldread notes (RA8) that between February and May 2018 they had only occasional contact.

199.7. The Claimant's concerns about the Leader Essentials Course in November 2017 seem principally to have been centred around its timing, given her work on the CLM project, which was by this time ramping up. As we have said, the Claimant appears to have agreed to attend and only later asked to be excused.

199.8. In her meeting with Mr Dolman on 1 February 2018, the Claimant emphasised the difficulty she had because of not being involved in all of the decisions required on the project. She told Ms Sheard that Mr Dolman was too involved.

199.9. She agreed, both with Ms Sheard on 1 February and Mr Dolman himself on 8 February, to continue working as she was, that is with Mr Dolman, as long as there was a plan for her to move.

199.10. Mr Dolman gave unchallenged evidence (TD41) that shortly after the 1 February meeting, the Claimant was out of the office and confided in him that she was worried about certain tasks.

199.11. What happened at the training course in June 2018 did not involve Mr Dolman. It was shortly after that event that Mr Aldread provided his starkest account of the Claimant, that she had been reduced to a shell of the person he had previously known.

199.12. The Claimant's own evidence was that when she was told by Jo Walker on 4 September 2018 that Mr Dolman was lining up Ms Walker to head up IT for the Commercial function reporting to him, she felt she should have been offered the opportunity herself, to make her own decision about whether she wanted to

take up that role. She told Mr Dix in late 2019 that she would have been interested in it, even though it was managed by Mr Dolman.

199.13 The cause of the Claimant's upset at her meeting with Ms MacDonald on 2 November 2018 was the Respondent's position regarding her salary in her new role in Internal Audit.

199.14. The OH reports did not really address the issue of the Claimant's relationship with Mr Dolman, referring in very general terms to work issues and the working environment. Notably, the report of 2 July 2019 (450) described the Claimant as happy in her new role but overwhelmed by the impact of her grievance.

199.15. We noted Mr Dolman's description of the Claimant as very thorough and analytical, who takes time to make decisions, and of himself as someone who is willing to take decisions quickly when needed. Ms Niaz-Dickinson perhaps unhelpfully described this as a personality clash, but it is clear that the burden of the Respondent's evidence, particularly that of Mr Dolman himself, but also of Mr Dix and implicitly that of Ms Sheard, was that it was the CLM project which caused the Claimant's difficulties.

199.16. We also noted Mr Dix's investigation into the Claimant's complaints about Mr Dolman, which is the best and most contemporaneous evidence we have of a detailed and independent look at the issues. Only one complaint could be corroborated. The rest could not, either because a different account was presented by someone else, or the events as the Claimant described them did not take place. Essentially, the Claimant was found to be factually wrong on nearly all of the specific matters investigated. It was Mr Dix's conclusion that the pressure of the CLM project led to a communication breakdown between Mr Dolman and the Claimant, with perhaps some bad management on Mr Dolman's part on occasions, namely where he became more involved than he should have been.

200. In summary, even taking a generous view of the PCP, the Claimant's case depended on there being something about working with (or for) Mr Dolman, not another manager, or on different work or a different project, that created the more than minor or trivial disadvantages of anxiety, leading to absence and the need to take another role. We did not hear any evidence of her experience of working with other managers, though we noted that according to Dr Mitchell's report she had some difficulty with her manager before Mr Dolman (paragraphs 5.6 and 5.7) and at paragraph 11.30 the reference to the difficulty, given the Claimant's earlier life experiences, of Mr Dolman being a male authority figure.

201. On the basis of the evidence summarised above, we were far from satisfied that there were facts from which a reasonable Tribunal could conclude, in the absence of any other explanation, that the Claimant was put at a substantial disadvantage as a result of the PCP of having to work with Mr Dolman. We do not dispute that she experienced difficulties in respect of her mental health from around late 2017 or more likely early 2018, but the wider context, the timing of those mental health concerns arising, the fact that the more acute episodes related to matters such as the Leadership Essentials Course, the June 2018 presentation, the dispute around her holiday entitlement and her grievance and even her difficulty with someone else working on the project – none of which involved Mr Dolman – made it overwhelmingly likely in our judgment that it was the nature of the CLM project, including the need for greater involvement of a

more senior manager and the need for that senior manager to make decisions in relation to the project, sometimes quickly and without involving the Claimant, quite possibly combined with personal issues unrelated to work, references to which are scattered through the evidence, that led to the substantial disadvantages she relies upon. It seemed very clear to us – again as the industrial jury – that any manager on the project, or at least it might be said many such managers, would have had to be, or at least would have been, involved in decision-making in the same way and to the same extent as Mr Dolman, and that the Claimant would have encountered the same issues as a result. In short, the Claimant would have found herself at the same disadvantage without the PCP on which she relies.

202. The complaints of failure to make reasonable adjustments therefore fail. We proceeded a little further in our analysis for the sake of completeness, though not on the question of knowledge. We have set out our conclusions on knowledge of disability already. There was some complexity around when knowledge would fall to be assessed for the purposes of this complaint, related to when the Claimant could reasonably have expected the Respondent to take the steps she contended for, particularly that relating to pay. It was not necessary for us to consider that further. As to knowledge of disadvantage, it follows from our conclusions in relation to substantial disadvantage that the Respondent did not have and could not reasonably be expected to have had such knowledge. It would have been highly artificial to deal with this question hypothetically, that is as if the Claimant had established substantial disadvantage, and we did not attempt to do so.

Reasonable steps

203. We did however deal for completeness with the question of whether the steps the Claimant says the Respondent failed to take would have been reasonable. She contended for two, namely that the Respondent should have embarked on a pro-active search for alternative work for her, or should simply have placed her in another role (whether on a permanent basis or on secondment), and secondly that it should have done so without changing her salary.

204. We noted in relation to the first of these steps, the search for another role for the Claimant, that:

204.1. She agreed with Ms Sheard that she (the Claimant) would search for roles, Ms Sheard would speak to procurement as one area of interest and the Claimant would go back to Ms Sheard if she thought Ms Sheard could facilitate introductions for her to other parts of the business.

204.2. Ms Sheard was cognisant of the need for the Claimant to be in control of the search, which seemed to us reasonable both as a matter of respect to the Claimant's seniority, and of being accommodating to what the Claimant would clearly seem to have preferred.

204.3. The Claimant was given time off to prepare for interviews.

204.4. She was coached for one interview by Mr Dolman, although we have noted she says she did not find this helpful.

204.5. She was given introductions to other parts of the business.

204.6. The Respondent's case, articulated by Mr Dolman among others, was that because the Claimant was voluntarily looking for another role, as a career change, it was right that she should have to compete for them.

205. What the Claimant contended for was effectively the adjustment that arose in **Archibald**. That judgment made clear that employers can put disabled employees into roles without competition, and may thus be required to treat them more favourably than their colleagues, but only if it is reasonable to do so. **Archibald** does not mean that this will automatically be the case.

206. Although the Claimant referred to applications for several roles, with one exception she did not draw our attention to a role that she says she should automatically have been given, nor explain to us why that would have been a step the Respondent could reasonably have taken. The exception of course was the role she secured in Internal Audit. Indeed, in respect of most of the roles in the Claimant's list of those she applied for, we had no details whatsoever, including whether any were withdrawn because of the Respondent's cost-cutting exercise. If there were any such details in the bundle, we were not taken to them. We have nevertheless considered this point both generally and in relation to the Internal Audit role. In our view, the Respondent could have granted the Claimant an automatic interview for roles where she appeared to be a possible match, and looked at whether she was a close enough match in terms of skills and experience to mean she could be slotted into any specific role. We are not able to conclude that this was not done in any particular case, perhaps apart from the Internal Audit role, but in any event given the Claimant's seniority and the highly skilled and complex nature of the roles she was interested in, it was certainly important to assess her suitability for them. We note that the Claimant rejected the option to be placed into a role in the Commercial Department, even roles where she would not be reporting to Mr Dolman. As Ms Niaz-Dickinson said, such a move would have addressed the PCP of working with Mr Dolman and would have thereby avoided any disadvantage.

207. In summary, it is clear the Claimant was not left to her own devices in her search for a new role. Equally, she was not a junior employee so that the approach of "you look for a job and we will help you" seemed to us to be reasonable. Other than as offered to the Claimant in the Commercial Department and rejected, we do not think it would have been a reasonable step to simply place her in a new role, either in terms of what the Claimant would herself have wanted (if by placing her in a role one means literally doing so without her involvement), or because of the need to assess her suitability for undertaking it. On this basis, we would have found that the Respondent did not fail to take a step it could reasonably have taken in this regard.

208. As to the Claimant's pay, we have noted the case law above, including the case most helpful to the Claimant, namely **Powell**, to the effect that there is no reason in principle why maintaining pay in a lesser graded role could not be a reasonable adjustment. As that decision made clear however, it all depends on whether to do so would be reasonable. The EAT was clear that it would not be an everyday event for an employment tribunal to conclude that an employer was required to make up an employee's pay in the long-term to any significant extent, though it was possible to envisage cases where that might be a reasonable adjustment for an employer to have to make. The recent decision in **Aleem** bears out this approach.

209. We were not taken to the pay details of any role other than the one the Claimant took in Internal Audit and again therefore could only assess this point in relation to that role, which was in any event what we thought the Claimant intended.

210. We do not need to repeat here what the Respondent's policy says in relation to salary on redeployment. Mr Ashworth accepted that flexing that policy may have been possible, but said that placing the Claimant at the salary eventually decided upon was proportionate to others on the same grade. Ms MacDonald's evidence was that retaining the Claimant's existing pay would have been problematic as she would have been the highest paid at that level in Internal Audit yet needed to undertake some upskilling.

211. Again applying our experience as the industrial jury, we did not think it would have been a reasonable adjustment to put the Claimant into the Internal Audit role on the same pay as she earned before. Doubtless the Respondent could afford it (it did not seek to argue otherwise), but there was a fairness issue for it to consider in relation to other staff, which we concluded means that it would not have been practicable for it to take that step. The Claimant was given a pay increase above what would normally have been the case under the Respondent's policy and was also given a standard pay award within a very short time of taking on the new role, but it was well recognised that she did not have the experience of others in the Internal Audit team.

212. Assessing those circumstances overall, it was entirely reasonable not to put her on a higher salary than her closest colleagues. The EAT in **Powell** commented that the potential for discontent from other staff was an unattractive argument against making an adjustment in pay for a disabled employee, but that was not the totality of what the Respondent in this case was arguing. It would see it as unfair to other staff to pay the Claimant her old salary; allied to that it is evident that to do so would also be potentially disruptive to the integrity of the Respondent's pay arrangements which obviously affects very many employees. In short, we saw nothing in the circumstances of this case that, to borrow the words of the EAT in **Aleem**, was of an exceptional or unusual nature such as to lead to the conclusion that maintaining pay when the Claimant took a lower graded role. As we have noted, it was not part of the case before us that Mr Dolman had bullied her and that this mandated the maintenance of her previous pay.

213. For all of the reasons given above, the Claimant's complaints of failure to make reasonable adjustments are dismissed. In the light of our conclusions on the substantive issues, it was not necessary for us to consider the further question of time limits.

Conclusion

214. The Claimant's claim is therefore dismissed in its entirety.

Note: This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was video. It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

Employment Judge Faulkner

Date: 28 August 2021

Note

All judgments and written reasons for the judgments (if provided) are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties in a case.