EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4102303/2019 (A)

Hearing held in Glasgow on 3 February 2020 (abandoned except for pre-reading), 4 February 2020, 5 February 2020, 27 May 2020 (remotely by telephone) and 3 June 2020 (deliberations).

Employment Judge M Whitcombe
Tribunal Member Mr P O'Hagan
Tribunal Member Dr P Findlay

Ms K Modeste	**Claimant** **In person**
Barclays Bank (UK) PLC	**Respondent** **Represented by:** **Mr D Hay** **(Advocate)**

JUDGMENT

The unanimous judgment of the Tribunal is as follows.

(1) The claim for indirect disability discrimination contrary to section 19 of the Equality Act 2010 fails and is dismissed.

(2) The claim for breach of the duty to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 fails and is dismissed.

REASONS

Introduction and background

1. The respondent is a well-known UK retail bank and its business activities require little further explanation. It is one of many divisions and subsidiaries of Barclays PLC. The claimant was formerly employed by the respondent as a "Moment Community Banker" from 17 July 2017 until her resignation on 4 weeks' notice effective from 22 March 2019. The claimant worked in a contact centre which handles inbound calls primarily from the respondent's "Premier" customers.

2. The background to the claims is that on three occasions in 2018 the claimant received unpleasant, distressing and sexualised phone calls from members of the public in the course of her duties. Those acts were not done by any of the respondent's employees or agents. The issues in this case concern the respondent's obligations to the claimant under the Equality Act 2010 in those circumstances, given that the claimant is now agreed to be a disabled person on account of post-traumatic stress disorder ("PTSD").

3. Because the claimant represented herself, without access to much legal advice and with no experience of Employment Tribunal claims, we tried to help her as best we could during the hearing. We were much more flexible than we would have been if the claimant had been represented by an experienced lawyer. That flexibility included allowing her to raise significant new points necessitating an adjournment of the hearing. We also asked rather more questions of some witnesses than we might otherwise have done in order to ensure that the case set out in the claimant's witness statement and subsequent written submissions was properly explored and put to the respondent's witnesses.

Partially remote hearing

4. The pandemic had an impact on this case, both because one member of the Tribunal was required to shield and also because of the eventual closure to

the public of the ET premises in Glasgow. That was unfortunate because the case was very close to finishing at that point. In order to minimise further delay it was agreed that the final hour or two of evidence would be given by telephone conference call and that the parties could then reflect on the totality of the evidence before sending in written submissions. All involved felt that was a fair process and a pragmatic and proportionate reaction to the additional challenges posed by the pandemic. Neither side wished to make oral submissions instead or as well.

Disability, privacy and public hearings

5. By the time of the final hearing it was no longer in dispute that the claimant was a disabled person for the purposes of the Equality Act 2010 on account of PTSD. That disability existed long before the three phone calls referred to above. Very deliberately, we are not going to go into further details of the precise nature or cause of the claimant's PTSD.

6. That is done in order to minimise interference with the claimant's right to private life under Art 8 ECHR and also to ensure that she does not suffer any further trauma, either because of the way in which we express our reasons or because those reasons will appear in a publicly searchable online register. We do not believe that any interested observer would need those details in order to understand our reasoning. The parties themselves are well aware of the omitted details. We raised with both sides the possibility of more drastic orders under rule 50 of the Employment Tribunal Rules of Procedure (2013) and it was agreed that this was a satisfactory approach striking a proper balance between the claimant's interests and the important default principle of open justice.

Claims and issues

7. The claim form (ET1) raised claims which were very different from those which we eventually considered at this hearing. Preliminary hearings for case

management took place on 30 April 2019 and 15 June 2019 and the positions of both sides have evolved over time. The points originally taken by the respondent in relation to the ACAS Early Conciliation and jurisdictional time limits had been dropped by the time of the final hearing.

8. Ultimately, we were concerned with two types of claim:

   a. indirect disability discrimination contrary to section 19 of the Equality Act 2010;
   b. breach of the duty to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010.

9. In relation to the reasonable adjustments claim, the respondent relied on the defence of lack of actual or constructive knowledge of disability. The respondent accepted that there was no equivalent defence to the indirect discrimination claim.

10. We were provided with a helpful list of issues, which will be reflected in the structure of our reasoning.

11. By the end of the evidence, the issues had been narrowed by the claimant's concession that, short of finding an alternative role for her, there was nothing more that the respondent could reasonably have done to prevent the claimant from receiving sexualised calls. For as long as her work involved handling customer calls it was not a risk that could be excluded altogether.

12. The focus of the case therefore shifted to alternative duties. The claimant accepted that it was reasonable for her to have to go through the respondent's normal internal processes in order to secure a *permanent* alternative role. Her argument was that she could reasonably have been found duties, or combinations of duties, which would have enabled her to return to work other than call handling for as long as it took to secure a permanent alternative role.

Witnesses and documentary evidence

13. We heard evidence from the following witnesses, all of whom gave evidence in chief by reference to written witness statements which they verified on oath or affirmation. All witnesses were also cross-examined.

14. The claimant was her only witness. We invited some additional evidence relevant to remedy.

15. For the respondent, we heard from the following witnesses in the following order:

    a. Clare McCafferty, who became the claimant's team leader in July 2018;
    b. Deborah Glen, who heard the claimant's grievance;
    c. Caroline McLean, who was at the relevant time a Customer Care Leader with oversight of the claimant's team. Team leaders such as Clare McCafferty and Andrew Caulfield reported to Caroline McLean;
    d. Andrew Caulfield, the claimant's team leader when she commenced employment in August 2017;
    e. Leanne Davidson, currently a Workforce Change and Restructuring Lead and formerly a Client Experience Relationship Manager in HR and an Employee Relations Advisor. She was called in order to deal with some new points which we allowed the claimant to raise, and essentially dealt with the feasibility of temporary or permanent alternative work.

16. In general, we found those witnesses to be honest, helpful and reliable, giving evidence to the best of their recollection. The knowledge of the respondent's witnesses was constrained by the limits of their particular remit within the organisation.

17. We had concerns about Leanne Davidson's evidence, which was in several respects based on hearsay from other unnamed individuals rather than on matters within her own personal knowledge. When pressed, she could not

initially remember the name of the colleague who had supplied her with certain information so we allowed her to consult emails. Eventually it turned out to be a witness from whom we had already heard. When asked when and how she had communicated with that individual, Ms Davidson explained that she had not communicated directly with them at all, but rather information had been passed to her by lawyers. For those reasons, we were unable to give much weight to Ms Davidson's evidence where it related to the claimant's own situation or place of work. It also caused us to doubt the thoroughness of her research, the extent of unattributed hearsay evidence and the reliability of her assertions on other matters.

18. We were provided with a joint file of documents running to 319 pages. For the resumed hearing by telephone we were also provide with an "e-bundle" which was very similar, though not precisely the same. We were concerned that the respondent had taken it upon itself to redact many of the names on emails and other documents. It had not sought the permission of the ET to do so and no prior warning had been given. In another case that could have mattered very much, possibly leading to an adjournment and even awards of costs/expenses, but happily in this case the claimant knew the names behind the redactions and was prepared to carry on. We want to make it very clear that when a Tribunal orders disclosure of documents or the preparation of a bundle there is no right to redact anything without the Tribunal's prior permission.

Findings of fact

19. Having heard the evidence and the parties' submissions, we made the following findings of fact. They were either agreed or else the facts we found proved on the balance of probabilities.

20. The claimant performed extremely well in her role. She was a highly valued employee. She won awards for her performance. It was clear to us that the respondent thought highly of her work and highly of her as an individual. She was described as a very diligent and very caring employee who was sensitive

and liked by customers.

21. Typically, a call handler such as the claimant would take an average of about 50 calls each working day.

22. Inappropriate calls of a sexualised nature were extremely rare. Clare McCafferty had not previously come across any in all of her years of service with the respondent since 2012. The claimant was exceptionally unlucky to receive three during the period for which she worked in the respondent's contact centre. Her experience was not typical of that of call handlers in general.

23. It was clearly communicated to staff that they could terminate any inappropriate call of a sexualised nature. That was made clear in a resource known as "KIT" on the respondent's intranet. The key phrase is "you're empowered to make a decision to terminate the call immediately, without referral to a Team Leader". That was the advice for any call when "the caller is deliberately being a nuisance or is using explicit content/language".

The first call

24. During early January 2018 the claimant received an inappropriate call in the course of her work. It was of a sexual nature. The claimant raised the matter and the respondent referred it to the "notice to close" team. That team issued a warning to the customer concerned that his account would be closed if the behaviour occurred again. He was also suspended from telephone banking indefinitely. Telephone lines were then monitored to ensure that if that customer were to call again the call could be intercepted and his account closed. That is exactly what happened. The claimant did not take the call but the caller did attempt to call the telephone banking service on another occasion and his account was duly closed. He ceased to be one of the respondent's customers.

25. Following the incident, the claimant was reminded that she was authorised to

terminate any call which made her uncomfortable for any reason. That would obviously include calls of the above nature. Clare McCafferty checked on the claimant's welfare the next day and the claimant said that she was feeling fine. The claimant was told that the respondent would be taking action against the customer. The claimant's professionalism and composure in dealing with the incident were formally praised by way of an internal congratulatory message on 11 January 2018. The claimant was also told when the caller ceased to be one of the respondent's customers.

26. The claimant successfully completed her probationary period and became a permanent member of staff on 2 April 2018.

27. During an informal "1-2-1" conversation in a coffee shop in about July 2018 the claimant told her line manager Clare McCafferty that she had suffered bereavements which had caused her some anxiety in the past, but that she did not require any additional support on that account. The claimant did not mention any other past trauma or PTSD. More generally, the claimant did not mention any prior trauma (other than bereavement) or PTSD during any of the period for which Clare McCafferty was the claimant's line manager.

The second and third calls

28. Around 13 October 2018 the claimant received two more inappropriate calls of a sexual nature. The exact dates are not important. No inappropriate words were used but the caller spoke in a strange way that made the claimant uncomfortable. The caller was not a customer of the respondent and had withheld their number. The respondent was therefore unable to trace the caller. The claimant raised the call with line management and she was given time away from the phones. Later the same month the same caller managed to get through again and the claimant once again referred the matter to her manager.

29. The claimant's working arrangements were subsequently adjusted with effect from 31 October 2018 such that she would only receive calls from callers who had already been verified automatically as a customer of the respondent.

That is not to say that the claimant would necessarily know their names, sometimes they would be anonymous because they had not completed the whole of the automated identification process. However, they would definitely be customers of the respondent rather than members of the public in general and that provided a measure of control of the situation. They could be identified if necessary and steps taken to deal with inappropriate behaviour up to and including the closure of accounts.

30. After those calls the claimant was supported by line management and was referred to occupational health. Clare McCafferty provided regular support through frequent conversations. That included reminding the claimant that she could terminate any inappropriate call immediately. The claimant was also made aware of the availability of subsidised counselling sessions. She undertook those sessions to address anxiety following the calls. Line management escalated the call details and reassured the claimant that the matter had been referred to the respondent's internal security team for further investigation.

31. The claimant became more upset as time passed. Clare McCafferty had several private conversations with the claimant to seek to establish any underlying issue but the claimant did not mention anything about her health. She said only that she was nervous about receiving similar calls in the future. The claimant was specifically asked whether there was anything else, such as a past experience, which was causing her to become upset. The claimant said that there was not, and that it was just how she felt. In one meeting the claimant referred to the effect of the bereavement she had suffered earlier that year. She did not otherwise reveal anything about her past which might have been relevant.

32. The claimant was signed off work from 6 November 2018 onwards. The medical certificate referred to "work-related stress". She did not return to work prior to her resignation. In one call the claimant told Clare McCafferty that she was finding "it all very difficult". In response, Clare McCafferty suggested an occupational health referral. A referral was made on 14 November 2018.

33. The occupational health report dated 22 November 2018 was in some ways problematic. It found a substantial mental impairment in the form of low mood, tearfulness, disturbed sleep pattern and concentration. However, the report also noted that the impairment had neither lasted nor was expected to last 12 months or more. The claimant was expected to be able to return to work on a phased basis in a matter of weeks.

34. The confusing aspect of the report was that, despite those conclusions, there was an indirect reference to PTSD. There was no diagnosis of PTSD and no mention at all of PTSD in the answers to the formal questions posed in the referral. Almost incidentally the report mentioned that the claimant would be sent some fact sheets on matters including PTSD, stress and depression. The leaflets were not copied to the respondent. Clare McCafferty interpreted that as something possibly related to the claimant's bereavement.

35. The claimant subsequently informed Clare McCafferty that the counselling sessions were bringing up past experiences. The claimant did not give any further information about those experiences. Clare McCafferty did not think it appropriate to enquire further into the content of confidential counselling and did not do so.

36. The claimant brought a formal grievance dated 3 December 2018. Essentially, she complained that the respondent had not dealt adequately with the calls. One paragraph referred to sleep disturbance as a result of "flashes from past experiences…". We have deliberately avoided quoting the rest of that sentence but we are aware of it. In a subsequent email dated 6 December 2018 the claimant referred to the calls having "triggered flashbacks from my past experiences".

37. At the subsequent grievance hearing on 7 January 2019 the chair, Debbie Glen, explored the issue of "flashes from past experiences" sensitively. She made it clear that she was not asking the claimant to go into any detail if it was not comfortable for her to do so but asked whether she had suffered from

anxiety previously due to similar incidents. The claimant replied that she had experienced a very traumatic past and had previously seen a counsellor.

38. We have seen a letter bearing the date 14 January 2018 from a psychologist who had been working with the claimant under the auspices of Inspired Psychology Services. The name of the clinician is redacted although we cannot understand why. It was common ground that the date of the letter is erroneous and should instead read 14 January 2019. The letter states that the claimant's main symptoms were "indicative of a complex traumatic stress reaction" which appeared to be "rooted in traumatic events you have been subject to during your childhood/adolescence". We accept the respondent's evidence that this material was not available to occupational health and that the confidential counselling service did not send that report to the respondent, whether directly or indirectly.

39. A further occupational health report dated 17 January 2019 was obtained following telephone contact with the claimant on 16 January 2019. The key aspect for present purposes is the passage noting "key medical information". There is no reference at all to PTSD, no reference at all to trauma in childhood or adolescence and the only reference to prior stressors was a bereavement during July 2018. Otherwise no "personal stress factors were disclosed" and the case was regarded as one of work-related stress. Once again, the occupational health advisor concluded that there was a substantial mental impairment in the form of low mood, tearfulness, disturbed sleep and concentration. However, the conclusion was also that the impairment had not lasted and was not expected to last 12 months or more.

40. There were no vacant alternative roles in the Glasgow office where the claimant worked. It was an in-bound call centre and there were no non-telephony roles save for leadership roles. The claimant did not suggest during this case that she was in a position to fulfil a leadership role at the relevant time, even if one had been vacant.

41. Clare McCafferty was not empowered to transfer the claimant to any other

role outside her own business area. Nor was Caroline Mclean. The respondent's procedures required there to be a vacancy and for there to be an assessment of the candidate's suitability. While adjustments could be made to the application process for a disabled employee it was still necessary to identify a role and to meet the 'benchmarking criteria'. Clare McCafferty offered to assist the claimant if she wished to go through that process.

42. The respondent has an internal mobility policy which requires staff to have been in a role for 12 months before applying internally for a new one. That requirement was waived in the claimant's case.

43. The claimant's grievance was not upheld. She did not pursue an appeal. The claimant resigned on 4 weeks' notice by a letter dated 22 February 2019.

44. Finally, we note two types of evidence which we did *not* have.

    a. We did not have any expert or other evidence regarding the effect of sexualised calls on people with PTSD.
    b. We did not have any evidence of the general effect of sexualised calls on people who did not have PTSD.
    c. By "effect" we mean both the likelihood of being disturbed or upset and also the severity of any disturbance or upset.

Legal Principles

45. We have thought about the best way of structuring these reasons to ensure that they are as clear as possible to someone who is not a qualified lawyer or experienced in disability discrimination claims. While we would normally try to set out all applicable legal principles in a single section of the reasons we think that in this case it would be better and clearer to weave them into our reasoning.

46. For the moment, we will simply refer to the burden of proof, which is governed by section 136 of the Equality Act 2010. If the claimant proves facts from which we *could* conclude, in the absence of any other explanation, that the

respondent contravened the statutory provision concerned, then we *must* hold that the contravention occurred *unless* the respondent shows that it did not contravene the provision. Since there is no claim for direct discrimination we do not propose to list the many cases focussing on the application of those principles to *direct* discrimination, although we are of course aware of them.

47. In the specific context of indirect discrimination, it is necessary for the claimant to establish the existence of the relevant "provision, criterion or practice" ("PCP") and disadvantage before the burden can shift to the respondent in relation to justification. As long as a causative link between the PCP and the disadvantage is established by the claimant, the burden shifts to the respondent to justify the PCP (***McCloud v MOJ*** [2018] EWCA Civ 2844, ***Essop v Home Office*** [2017] UKSC 27, ***Dippenaar v Bethnal Green and Shoreditch Education Trust*** [2015] All ER (D) 306 (Oct), EAT).

48. In the specific context of reasonable adjustment claims the claimant is required to establish the PCP relied on and to demonstrate substantial disadvantage. The burden then shifts to the respondent to establish that no adjustment or further adjustment should be made (***Project Management Institute v Latif*** [2007] IRLR 579, EAT).

Reasoning and conclusions

Reasonable adjustments – substantial disadvantage

49. The first question arising under section 20 of the Equality Act 2010 is whether the claimant has established that a provision, criterion or practice ("PCP") of the respondent's put her at a "substantial disadvantage" in relation to a relevant matter in comparison with persons who were not disabled. Section 6(3)(a) of the Act provides that the reference to the protected characteristic of disability is a reference to a person who has a *particular* disability. In this case that means PTSD. The cause of the disability is not relevant to the statutory test. In relation to "disadvantage" the term "substantial" simply means "more than minor or trivial" and is often regarded as a relatively low hurdle. However, the claimant must still prove that the disadvantage exceeds

that level.

50. We are quite satisfied that a relevant PCP existed in this case. Earlier case management hearings noted that the PCP relied on was the requirement, as part of the claimant's normal duties, to handle calls from customers. That was undoubtedly a PCP in this case, and the respondent accepts that. The contentious issue is substantial disadvantage.

51. We have no doubt that the claimant was put to a substantial disadvantage by that PCP. It meant that she took calls from the public (or a subset of the public comprised wholly of the respondent's customers) and, however rarely, a very small proportion of those calls would be of a sexualised nature. Since it might only take one of those calls to cause the claimant distress, discomfort and anxiety the disadvantage she faced as a result of taking calls was certainly more than minor or trivial.

52. However, the issue is *not* simply the personal disadvantage to which the claimant was put by the PCP considered in isolation. The issue is *comparative* disadvantage. The relevant comparison is with "persons who are not disabled". The relevant disability is the claimant's disability of PTSD, but it is no more specific than that. The Act does not require any scrutiny of the *cause* of the PTSD.

53. We have given this much thought and we have come to the conclusion that the claimant has *not* proved on the balance of probabilities that the disadvantage she suffered, though undoubtedly very real and genuine, was any greater than the disadvantage suffered or likely to be suffered by people who did not have PTSD. We did not hear any evidence of the feelings or reactions of other call handlers who received similar calls and so the claimant's case depends on inference. We did not have any expert or other objective evidence of the effect of sexualised calls on people without PTSD. We observe that the calls were not merely unpleasant, on the face of it they were quite possibly the sort of calls which would be likely to make any call handler, including those without PTSD, upset, discomfited, distressed and

anxious. That is especially true if the non-disabled call handler were to receive three calls, as the claimant did. It would be an extremely unpleasant experience for any call handler. We do not think that the evidence in this case allows us to find that the extent or duration of the claimant's reaction was substantially greater than that of people without PTSD facing similar numbers of similar calls. To do so would be speculation on our part without evidence, since this is not a matter on which we feel entitled to take 'judicial notice' or to draw on the practical workplace experience of the Tribunal panel themselves. The comparative impact of the PCP is unknown and unproven and therefore the claimant has not persuaded us that the disadvantage she experienced was substantially greater than that likely to be experienced by call handlers without PTSD.

54. For those reasons we have concluded that the claimant has failed to prove all necessary aspects of substantial disadvantage *in comparison with persons who are not disabled on account of PTSD*. The reasonable adjustments claim therefore fails. However, we will go on to set out some additional findings because we concluded that the claim failed for another reason too.

Reasonable adjustments – lack of knowledge

55. A lack of knowledge can be a defence to a reasonable adjustment claim. Schedule 8, paragraph 20 to the Equality Act 2010 provides that there is no duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the relevant disadvantage by the PCP (***SSWP v Alam*** [2010] ICR 665, EAT). However, provided that the employer has knowledge of the facts constituting the disability it is not a defence that the employer was unaware that those facts amounted to a disability (***Newport City Council v Gallop*** [2013] EWCA Civ 1583). We have concluded that the respondent in this case has shown that it lacked the requisite knowledge of disability and its effects at the relevant times for the following reasons.

56. We will deal briefly with *actual* knowledge. There was no clear and direct evidence that the claimant had PTSD or that she was likely to be triggered or re-traumatised by sexualised calls. The respondent's witnesses told us that they were unaware of those things, and we believe them. The respondent did not have *actual* knowledge of disability or its effects. The more difficult issue is *constructive* knowledge – the things the respondent could reasonably be expected to know from the evidence available to them and from the surrounding circumstances.

57. The fit notes only ever referred to work related stress or anxiety. Those common and generic terms did not put the respondent on notice of the very specific condition of PTSD or its effects so far as the claimant was concerned. While the claimant's anxiety and eventual sickness absence ought to have been a "red flag" to any reasonable employer, the respondent *did* ask appropriate questions, both of the claimant herself and of appropriate experts. Supportive line management asked the claimant whether there was any underlying issue but the only clear answer given related to a bereavement rather than to the disability of PTSD or to the events leading to that condition. When, as part of the grievance, the claimant referred to incidents in her past, the respondent attempted to find out more and quite properly commissioned occupational health evidence.

58. We therefore turn to the occupational health evidence. That evidence could reasonably be expected to address the possibility of some underlying cause, including past trauma, which was contributing to the claimant's distress, anxiety and absence. It could reasonably be expected to answer clearly the ambiguities and uncertainties in the claimant's own answers to questions about underlying causes of distress. Both medical reports concluded that there was no long-term condition. While the earlier medical report contained an ambiguous passing reference to a leaflet about PTSD, the subsequent report made no reference to PTSD at all. In those circumstances we think that a reasonable employer was entitled to take the occupational health conclusions at face value without challenging them or asking follow-up questions. Apparently competent occupational health specialists had

concluded that the claimant was not suffering from a long-term condition and had not noted any relevant past trauma. The situation was not analogous to that in ***Newport City Council v Gallop*** (above) in which medical advice contained bare and unreasoned assertions. In our judgment the situation was much closer to that in ***Donelien v Liberata UK Ltd*** [2018] EWCA Civ 129. The occupational health evidence was apparently reliable, reasoned and based on evidence and examination. Lay people were entitled to give it considerable weight and to rely on it. That medical evidence post-dated the claimant's own references to past experiences and a reasonable employer could properly conclude that there was nothing further to investigate.

59. Quite properly, Mr Hay drew our attention to paragraph 6.19 of the EHRC Code of Practice and we are grateful to him for his scrupulous care to put before us material which might not be thought to help his case. We think the situation in that paragraph is distinguishable because in this case the employer *did* discuss matters with the claimant herself and *did* seek guidance from Occupational Health. Having done so, the employer was in entirely reasonable ignorance of the claimant's PTSD and of the effects of the PCP.

60. To the extent that the claimant had alluded to events in her personal life the respondent was reasonably entitled to think that the claimant was referring to a bereavement since nothing else was highlighted in the medical reports. The discussions the claimant had with a confidential counselling service were just that – confidential. That is the basis upon which the service was offered and we accept the respondent's evidence that it was unaware of the nature of any discussions the claimant might have had with her counsellor.

61. The reasonable adjustments claim therefore fails for the additional or alternative reason that the respondent has established the defence of lack of actual or constructive knowledge.

62. Having decided that the reasonable adjustments claim fails for two different reasons we will not go on to consider whether the respondent could reasonably have found the claimant temporary alternative work while she

searched for a permanent internal vacancy. On our findings, the duty to make adjustments did not arise in this case.

Indirect discrimination

63. We have considered the questions arising under section 19 of the Equality Act 2010. We will not set out that section in full.

64. The first issue is the *individual* disadvantage suffered by the claimant because of the application to her of the PCP. As before, the respondent accepts that the PCP was applied to the claimant and we think that concession is properly made on the evidence. As before, we are also quite satisfied that the claimant suffered individual disadvantage because the PCP exposed her to a risk, however small, that she would take calls of a sexualised nature, as indeed she did. Those calls caused her distress, discomfort and anxiety. That is clearly a disadvantage.

65. However, we have concluded that the claim fails for lack of proof of group disadvantage. The issue is whether the claimant has proved that the PCP put, or would put, persons with whom the claimant shared the protected characteristic of PTSD at a particular disadvantage when compared with people who did not have PTSD.

66. As noted above, we had no expert or other objective evidence regarding the effect or likely effect of sexualised calls on people with PTSD. There are many forms and potential causes of PTSD and it simply does not follow that all or even most people with PTSD would react in the same way as the claimant or experience the same disadvantage as the claimant. To give just two examples, PTSD might also be caused by experiences during military service or by involvement in a serious accident. There is no evidence on which we could find that PTSD caused by those sorts of experiences would also lead to the individual being triggered or traumatised by sexualised phone calls and it is therefore difficult to draw any conclusions about the experience of the

group of people with PTSD as a whole. Put another way, we had no evidence regarding the proportion of people with PTSD (however caused) who were likely to be "triggered" or otherwise upset or disturbed by sexualised calls or the extent of any upset or disturbance. Since the group for this purpose is made up of people with PTSD however caused, rather than PTSD caused in the same manner as the claimant's PTSD, there is no cogent evidence of group disadvantage in terms of the likelihood of being upset and disturbed by it. Similarly, there is no cogent evidence on which we could find that people with PTSD were, as a group, likely to suffer a more pronounced adverse reaction than people who did not have that disability.

67. Further, and whatever the group disadvantage might have been, there is insufficient evidence for us to find on the balance of probabilities that it was any greater or more prevalent than that suffered by people who did not have PTSD at all. The calls had the clear potential to cause distress to any call handler receiving them and we would be speculating without evidence if we found that people without PTSD were less likely to be affected at all, or likely to suffer lesser effects. We refer back to our reasoning in relation to the reasonable adjustments claim. In brief summary, we were not satisfied that the distress and anxiety experienced by the claimant was significantly different from that likely to be experienced by call handlers who did not have PTSD. We make the equivalent finding in respect of group disadvantage for the purposes of indirect discrimination. It has not been established on the balance of probabilities.

68. The indirect discrimination claim therefore fails because the claimant has not established that the group of call handlers with PTSD suffered or would suffer a particular disadvantage when compared with people without PTSD.

69. Additionally, the indirect discrimination claim fails because we find that the respondent's justification defence has been established. First, we are quite satisfied that the respondent had a legitimate aim. Quite simply, the function of the contact centre was to service the needs of the respondent's customers by telephone and in a timely manner. It was therefore an entirely legitimate

aim, rationally connected to the respondent's genuine business needs, for call handlers to answer calls from the respondent's customers and, in certain circumstances, from others.

70. As is often the case, the real issue is proportionality. We find that the PCP was a proportionate means of achieving the aim identified above. The respondent has very little control over who calls into the bank and even less over the way they conduct themselves while on a call. All that the respondent can really do is to take appropriate action against callers who abuse the facility and there is evidence in this case that the respondent did exactly that. To a degree, the respondent might be able to restrict the type of caller coming in and in this case there is also evidence that the respondent did exactly that. Adjustments were made such that the claimant would only receive calls from customers. That goes to proportionality because it reduced the risk of inappropriate behaviour on the part of the caller. The respondent's standing advice to call handlers, reemphasised as necessary, was that they should feel free to terminate any inappropriate call. While that cannot exclude all risk that call handlers might be exposed to inappropriate calls, the instruction certainly serves to minimise that exposure and to empower the call handlers to stop it. The concern of line management and the support offered to the claimant following the unsavoury incidents also weighs in the respondent's favour in the proportionality analysis.

71. We have concluded that the PCP (that the claimant was required to answer calls from members of the public, which might include sexualised calls from time to time), was proportionate to the respondent's legitimate aim. Put another way, the respondent has persuaded us that there was no way of achieving that aim which had less impact on the claimant.

Conclusion

72. The indirect discrimination claim fails for two different alternative reasons and the reasonable adjustments claim also fails for two different alternative reasons. We must therefore dismiss both of those claims.

73. We can easily understand how distressing and disappointing this conclusion will be to the claimant. We want her to know that we were as impressed by her as an individual as the respondent clearly was while she worked as a call handler. None of this has been the claimant's fault and we hope that she will not misinterpret our decision as any criticism of her at all. She did not deserve to receive those calls and we wish that she had not. We are quite sure that she was very deeply upset by them. The question for us was whether the respondent was in breach of its duties to a disabled person under the Equality Act 2010. We hope that the claimant understands why we have been unable to agree that the respondent was in breach of that Act.

Employment Judge: Mark Whitcombe
Date of Judgment: 11 June 2020
Entered in register: 12 June 2020
and copied to parties