



THE EMPLOYMENT TRIBUNALS

Claimant: Ms L Douglas

Respondent: National Probation Service

Heard at: Teesside Justice Hearing Centre
On: Monday 14th February – Thursday 17th February 2022

Before: Employment Judge Johnson

Members: Mrs C Hunter
Mr G Gallagher

Representation:

Claimant: Mr R Owen (CAB)
Respondent: Mr J McHugh of Counsel

JUDGMENT

The unanimous judgment of the employment tribunal is as follows:-

- (i) The claimant's complaint of unfair dismissal is dismissed upon withdrawal by the claimant.
- (ii) The claimant's complaints of unlawful disability discrimination (unfavourable treatment because of something arising in consequence of disability), contrary to Section 15 of the Equality Act 2010 are dismissed upon withdrawal by the claimant.
- (iii) The claimant's complaints of unlawful disability discrimination (failure to make reasonable adjustments, contrary to Sections 20 and 21 of the Equality Act 2010) are not well-founded and are dismissed.
- (iv) The claimant's complaints of unlawful disability discrimination (harassment contrary to Section 26 of the Equality Act 2010) are not well-founded and are dismissed.

- (v) The claimant's complaints of unlawful disability discrimination (victimisation, contrary to Section 27 of the Equality Act 2010) are not well-founded and are dismissed.

REASONS

1. The claimant was represented by Mr Owen of the local Citizens Advice Bureau. Mr Owen called to give evidence the claimant herself and her husband, Mr Ian McNaughton. The respondent was represented by Mr McHugh of Counsel who called to give evidence Ms Ann Powell (Head of National Probation Service Cleveland), Mr Joe Howard (claimant's line manager) and Ms Karin O'Neill (Head of Operations) to give evidence. The respondent had tendered witness statements from Mr Ian Cavanagh (Head of Quality and Effective Practice) and Ms Sarah Mainwaring (Head of Operations for the Probation Service – Yorkshire and Humber). Mr Owen did not wish to challenge the statements from those two witnesses and, accordingly, they were not called to give evidence and be cross-examined.
2. There was an agreed bundle of documents marked R1, comprising two A4 ring-binders containing a total of 621 pages of documents. The claimant, her husband and the witnesses for the respondent had all prepared typed, signed, witness statements, which were taken "as read" by the tribunal, subject to cross-examination and question from the tribunal.
3. By a claim form presented on 27th July 2020, the claimant brought complaints of unfair dismissal and unlawful disability discrimination. Those claims arose from the claimant's dismissal on 29th April 2020, for reasons which the respondent says related to her capability to perform the duties for which she had been employed, due to her long-term absence. That dismissal took place following the claimant's absence from work from 23rd May 2019 until 29th April 2020, a period of some 11 months. The claimant alleged that her dismissal was unfair and that she had been subjected to various acts of unlawful disability discrimination, both during the period leading up to that absence and during that absence.
4. The respondent concedes that the claimant is and was at all material times a disabled person as defined in **Section 6 of the Equality Act 2010**, by reason of her anxiety and depression. The respondent's position is that it did not have either actual or constructive knowledge of that disability until receipt of an Occupational Health report dated 12th July 2019. The claimant's position is that she was already disabled by the time she commenced her sick leave in May 2019, by which time the respondent knew or ought reasonably to have known that she was suffering from a mental impairment which amounted to a disability.
5. The parties had agreed a list of issues which reflects the clarification of the claims as set out in the claimant's document "Claimant's further particulars" dated 2nd November 2020, which document was produced pursuant to Orders made by the Employment Tribunal at a case management hearing on 30th September 2020. The first morning of this final Hearing was utilised by the tribunal panel to read the pleadings, orders, witness statements and documents from the bundle which are referred to in those statements. The parties and their representatives attended at

1pm on the first day of the Hearing. Mr Owen, on behalf of the claimant, was invited to identify the basis upon which the claimant alleged that her dismissal was unfair pursuant to the provisions of Sections 94 and 98 of the Employment Rights Act 1996, and in accordance with the well-recognised principals established in the following cases:-

Spencer v Paragon Wallpapers Limited [1977 ICR301]
BS v Dundee City Council [2014 IRLR131]
East Lyndsay District Council v Daubney [1977 ICR 566]
HJ Heinz Company Limited v Kenrick [2000 IRLR144]

It was pointed out to Mr Owen that, at the final meeting on 29th April 2020 at which the claimant was dismissed, the claimant accepted that she had been absent from work for 11 months, that there was no prospect of her returning to work for the respondent in the foreseeable future and that the claimant had in fact conceded that it was unlikely that she would ever be able to return to work for the respondent. After taking time to discuss that particular claim with the claimant, Mr Owen formerly withdrew the allegation of unfair dismissal. That complaint is dismissed by the tribunal upon withdrawal by the claimant.

6. Bearing in mind of the concession made by the claimant in respect of the fairness of her dismissal and the circumstances behind that concession, Mr Owen was invited to similarly consider the complaint that the claimant's dismissal amounted to unfavourable treatment because of something arising in consequence of her disability under S.15 Equality Act 2010, and which was not a proportionate means of achieving a legitimate aim. The tribunal drew Mr Owen's attention to the comments of the Court of Appeal in **O'Brien v Bolton St. Catherine's Academy [2017 EWCA-CIV-145]**. The Court of Appeal held that it was entirely legitimate for an employment tribunal to decide – in the context of dismissal for long-term sickness absence – that a finding that a dismissal was proportionate for the purpose of **Section 15 of the Equality Act** meant that it was not unfair for the purposes of **Section 98 of the Employment Rights Act**. The Court of Appeal accepted that the language in which the two tests are expressed is different, but said "It would be a pity if there were any real distinction in the context of long-term sickness where the employee was disabled within the meaning of the Equality Act. The law was complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law." The tribunal indicated to Mr Owen that the respondent's dismissal of the claimant would certainly be unfavourable treatment and that the reason for that dismissal was her long-term absence, which was a consequence of her disability. However, the tribunal enquired as to how the claimant intended to persuade the tribunal that her dismissal was not a proportionate means of achieving a legitimate aim, when it was clear and obvious that the claimant was never going to be able to return to work for the respondent at any time in any capacity. Mr Owen accepted that this claim could not succeed and it was withdrawn and is dismissed.
7. The tribunal then took Mr Owen through the other 10 separate allegations of unlawful discrimination contrary to Section 15 of the Equality Act 2010 and invited

Mr Owen to explain, in respect of each of those, what was the “something” and how that was said to arise “in consequence of the claimant’s disability” and how that led to the imposition of the unfavourable treatment referred to in each of those allegations. Mr Owen took some time to consult with the claimant, following which 9 of the S.15 allegations were withdrawn. Those allegations are dismissed upon withdrawal by the claimant. The remaining allegation is that, between 12th September 2019 and 10th February 2020, Ian Cavanagh and Karin O’Neill unreasonably delayed and failed to expedite the grievance process knowing the adverse effect it was having on the claimant’s mental health. Mr Owen applied to the tribunal for permission to amend the claimant’s claim, so that this allegation would be pursued as an allegation of failure to make reasonable adjustments contrary to Sections 21 and 21 of the Equality Act 2010. The alleged provision, criterion or practice applied by the respondent was stated by Mr Owen to be “the respondent’s grievance process and the usual time that takes”. This was said to put the claimant at a substantial disadvantage because it had an adverse effect on her mental health. The reasonable adjustment sought was to expedite the time taken to deal with the grievance process. Mr McHugh did not object to that application to amend and it was accordingly granted.

8. The claims which were left and those to be decided by the tribunal were identified as 2 allegations of failure to make reasonable adjustments, 4 allegations of harassment and a single allegation of victimisation.
9. The issues to be decided by the tribunal in respect of those claims were identified as follows:-
 - (i) By which date did the respondent have actual or constructive knowledge of the claimant’s disability?
 - (ii) In respect of the allegations of failure to make reasonable adjustments, what was the provision, criterion or practice applied by the respondent and how did that place the claimant at a substantial disadvantage in comparison to non-disabled persons?
 - (iii) What is the adjustment which the claimant says could and should have been made and how would that have removed the disadvantage?
 - (iv) With regard to the allegations of harassment, what was the “unwanted conduct” alleged by the claimant and how did that relate to her disability?
 - (v) If proven, did the conduct have the purpose or effect of either violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive for her?
 - (vi) If it did have that effect, was it reasonable for the conduct to have that effect taking into account the claimant’s perception and all the circumstances of the case?
 - (vii) With regard to the allegation of victimisation, what was the detriment to which the claimant says she was subjected? If such detriment is proven,

did the respondent subject the claimant to that detriment because she had done a protected act (the respondent concedes that the claimant entering into ACAS early conciliation on 10th June 2020 was a protected act)?

10. Where there was a dispute on the facts between the claimant and the respondent, the tribunal made its findings of fact on the balance of probabilities, having carefully considered the evidence of the claimant and the other witnesses and having considered the various documents to which it was referred.

Findings of fact

11. The claimant was employed by the respondent as a probation officer from 1st April 1998 until she was dismissed on 29th April 2020, a period of over 22 years. It is acknowledged by the respondent that the claimant was a loyal, competent and devoted employee, with a clean disciplinary record.
12. The claimant originally worked for the Sex Offender Management Unit (SOMU), which was responsible for managing all the sex offenders in the Cleveland area. That unit was disbanded in or about June 2017 when the claimant transferred to the Stockton-on-Tees probation team.
13. The claimant's witness statement explains that she experienced "severe stress due to the pressure of work" for some 2 years when working with SOMU and that she had a short period of sickness absence in April 2017. The minutes of a formal attendance review meeting held on 15th March 2017 gave the reason for the claimant's absence as "stress". The claimant had a second period of stress-related absence in September/October 2018, following which there was an assessment by the respondent's occupational health team.
14. Between June 2017 and May 2019, the claimant was managed by Sharon Barnett, a senior probation officer. Whenever Ms Barnett was absent, the claimant was managed by Sandra Clement.
15. The claimant's unchallenged evidence to the tribunal was that she "repeatedly complained that my workload was beyond capacity and disproportionately high compared to other probation officers" but that this was not acknowledged, nor was her concern that her mental health was being adversely affected.
16. Sharon Barnett resigned from the respondent's employment in May 2019 and on 22nd May 2019 Sandra Clement became the claimant's manager. The claimant explained to the tribunal that she had "concerns about Sandra Clement as a manager, as she was aggressive in her manner and quick-tempered. She became angry and shouted at a meeting with her team, which resulted in some of the team crying." The claimant described how the Stockton office "had become a hostile environment for me, causing me additional stress".
17. On 22nd May 2019 the claimant learned that Sharon Barnett was no longer to be her manager and that Sandra Clement would take her place. The claimant says that her concerns about Sandra Clement "increased my stress and anxiety".

18. On 23rd May the claimant reported at work at 7.30am to prepare for a parole hearing. The claimant described how she became “unwell with a severe stress headache, was not able to concentrate and became very anxious”. The claimant was unable to attend the parole hearing, having informed a colleague to contact the prison to advise them accordingly. The claimant went home and began her period of sickness absence and e-mailed Sandra Clement the same day to inform her.
19. On 28th May, Sandra Clement contacted the claimant by telephone to enquire about her whereabouts on 22nd May, as a solicitor had contacted the respondent about a problem with a parole hearing. The claimant explained that she had been present in the office throughout that day and then became “very anxious as I thought it must be something serious if the Head of Area (Ann Powell) was e-mailing me direct whilst on sick leave.” The claimant retrieved an e-mail from Ms Powell dated 28th May, which suggested that the claimant may have missed attending a parole hearing. The claimant could not, and did not, understand what the problem was and says that this caused her “even greater anxiety. I needed to know what was being inferred and if I had failed professionally in some way as I’d never missed a parole hearing during all of my career.”
20. The claimant attempted to return to work on 17th June and the following day received an e-mail from Sandra Clement inviting her to a “return to work meeting”. The claimant could not locate her diary and telephoned Ms Clement to enquire as to its whereabouts. The claimant described Ms Clement’s attitude as “dismissive and showed no concern about a missing diary. I became very anxious, as after checking back through my e-mails there was no evidence of a problem on 22nd May. I became unwell at lunchtime as a result and left work.” The claimant did not return to work thereafter.
21. The claimant alleges that Ms Powell enquiring as to her whereabouts, amounted to “harassment”, because it was unwanted conduct related to her disability and which had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The tribunal found that there had been a genuine enquiry raised of the respondent in respect of the meeting in question. Copies of the e-mails appear at pages 142 – 148 in the bundle. The tribunal found that the tone of those e-mails from the respondent was reasonable in all the circumstances and that Ms Powell was entitled to make enquiry of the claimant. No reasonable person would associate any of the contents with the claimant’s disability.
22. The claimant complains that Sandra Clement “ignored the claimant’s concerns about having meetings with her and insisted that such meetings take place.” This relates to Ms Clement having followed the respondent’s absence management policy by inviting the claimant to attendance management meetings on 28th June 2019 and 19th July 2019. On 18th June the claimant had sent an e-mail to Ms Clement stating, “because of how I perceive your attitude to me, I feel unable to meet with you today as you requested.” The claimant accepted that neither of the meetings which Ms Clement tried to organise actually took place. The claimant subsequently asked that any meetings should be between herself and a member of HR, and that is what eventually happened. The claimant says, “because of her

persistence I regarded as this as bullying and harassment". The tribunal found that there had been no such persistence. The requests for the claimant to attend attendance review meetings were entirely appropriate and reasonable in all the circumstances. The meetings were cancelled as soon as the claimant objected to them and alternative arrangements were made.

23. The claimant was invited to attend an occupational health assessment on 12th July. A copy of the OH report appears at page 153 – 154 in the bundle. The relevant extracts are as follows:-

- It is my opinion that Ms Douglas is likely to be fit to return to work in mid-August 2019.
- I suggest a phased return to work to help with her disturbed sleep pattern.
- In the short-term (3 months) with the continued support from her GP and accessing counselling to explore her emotions, Ms Douglas should hopefully be able to manage her anxiety and low mood.
- In the mid-term (6 months) it is advised to monitor to stress and anxiety manifesting in the workplace and for Ms Douglas to monitor self and register her own red flags in working and personal life.
- In the long-term (12 months) I would foresee a potential shift on how they can self-manage anxiety and well-being.
- My interpretation of the relevant UK legislation is that Ms Lynn Douglas' condition/impairment is likely to be considered a disability, because it has lasted longer than 12 months or is likely to last longer than 12 months/is likely to recur.

That was the very first indication that the claimant's stress/anxiety condition could last for more than 12 months and may satisfy the definition of "disability" in Section 6 of the Equality Act 2010. Prior to that, the only information in the possession of the respondent relating to the claimant's condition were her fit-notes referring to work-related stress.

24. On 12th September 2019 the claimant submitted a formal grievance about the behaviour of Ann Powell and Sandra Clement. The grounds of the grievance run to 10 pages, but may be distilled into the following complaints:-

- (i) The claimant objected to Sandra Clement being allocated to her as manager.
- (ii) The claimant was being micro-managed by Ms Clement and Ms Powell.
- (iii) Ms Powell's e-mail of 24th May enquiring as to her whereabouts.
- (iv) Ms Clement was angry with the claimant for being off sick.
- (v) Ms Clement sent the claimant invitations to attend 2 formal attendance meetings whilst she was on sick leave, which increased the claimant's stress, anxiety and depression symptoms.

The claimant's "requested outcome" was that her grievance be examined by an external person. Regarding Ms Powell, the claimant wanted "transparency regarding why Ms Powell did not trust my account of where I was on 22nd May 2019 and why she felt it necessary to scrutinise me during my sick leave, especially when my leave is directly linked to work-related stress. I would like to make Ms Powell aware of how her actions during my sick leave had impacted upon my mental health. Ms Powell questioned my honesty and professional integrity and from information she sent to me she'd led me to believe I'd not performed my work satisfactorily. This caused me significant stress and her claims now appear unfounded."

Against Ms Clement the claimant wanted "transparency with regard to Ms Clement's role in questioning my honesty about my whereabouts on 22nd May 2019. I want Ms Clement to be made aware of how her actions have impacted upon me negatively during my sick leave. I believe Ms Clement needs to undertake some training to address her anger and hostile presentation to her staff and offenders, those she has power over."

25. The meeting to consider the claimant's grievance took place on 4th October 2019. The grievance outcome report by Ian Cavanagh appears at page 264 – 269 in the bundle. The complaints against Ann Powell were rejected, but those against Sandra Clement were upheld in part, as Mr Cavanagh "identified failings on the part of Sandra Clement in her line management of you. I find that these failings were the result of Sandra Clement's inexperience as an SPO and not intentional bullying or harassment."
26. The claimant appealed against that outcome on 29th November 2019. The letter of appeal appears at pages 270 – 274 in the bundle. The basis of the appeal was that the original grievance "had not been properly investigated or considered". At page 274, at paragraph 19 of the appeal letter, the claimant clearly states, "I would also like to point out that the actions of both Ann Powell and Sandra Clement have been very damaging to my health and my trust in HMPPS. The grievance process which has been extended because of the need for this appeal is also impacting very negatively on my health. I am finding the process stressful and worrying."
27. The grievance appeal meeting took place on 14th January, at which the claimant was told that it would take approximately 28 days to conclude the grievance appeal. The claimant at that meeting made no complaint about that indication of 28 days. The final grievance appeal meeting, when the claimant was given the outcome of the appeal, took place on 10th February 2020. The appeal was chaired by Karin O'Neill. The outcome report (page 275 – 280) upheld in part the claimant's appeal regarding Ann Powell. Ms O'Neill recommended that any issues between Ann Powell and the claimant should be referred to mediation. At page 279 of her report, Ms O'Neill states as follows:-

"Delays during the grievance investigation were due to annual leave and individual availability. Ian Cavanagh says he informed them of the reasons for the delays and she accepted the delays as being reasonable. The delay in concluding the appeal stage was in part due to availability of

staff and in part due to an error which resulted in the letter notifying Lynn of the hearing date on the 2nd of January, not being sent. A balance had to be struck between the need to minimise the time taken and the need for a detailed and proper investigation into the complaint.”

28. There is no complaint raised by the claimant in these employment tribunals proceedings about the conduct of the grievance procedure and the appeal procedure, other than the length of time taken. The claimant alleged that the respondent applied a provision, criterion or practice of following its normal grievance process and that this put her at a substantial disadvantage because of her mental health condition. The claimant alleges that it would have been a reasonable adjustment to expedite the time taken to complete the process. What the claimant made clear to the respondent throughout the process was that she required a “thorough investigation” into her complaints. The claimant appears to have accepted at the end of the first appeal meeting that it would take up to 28 days to undertake and complete that investigation. No complaint was raised by the claimant at the time. The tribunal found that the time taken by the respondent was reasonable in all the circumstances. The tribunal accepted the respondent’s explanation that the entire process could not have reasonably been completed within a shorter period of time. Indeed, the claimant’s evidence to the tribunal was that the respondent had failed to follow its normal grievance process and had, in fact, taken longer than was allowed by the policy. That also is incorrect.
29. The claimant’s complaints against Sandra Clement, as set out in her grievance, are the reasons why the claimant did not wish to be managed by Sandra Clement. One of the complaints raised before the tribunal by the claimant is that the requirement for her to work under Sandra Clement was a provision, criterion or practice which placed her at a substantial disadvantage because it adversely affected her stress, anxiety and depression. The tribunal found that the claimant was never required to work under Sandra Clement. The claimant was notified that Sandra Clement was to be her manager on 22nd May 2019 and the claimant was, thereafter, on sick leave until she was dismissed. Joe Howard became the claimant’s line manager from approximately 14th August 2019. Between 23rd May 2019 and 14th August 2019, the claimant was at work for only one day. The tribunal was not satisfied that she was required to work under Sandra Clement.
30. During her period of absence, the claimant underwent formal attendance review meetings in accordance with the respondent’s absence management policy on 17th October 2019, 27th January 2020, 13th March 2020 and 29th April 2020. Occupational health assessments took place on 12th July 2019, 13th January 2020, 20th March 2020 and 7th April 2020. At the formal meeting on 29th April 2020, the claimant acknowledged and accepted that she had been continuously absent for almost 11 months (save for 2 days) and that, at that date, there was no indication whatsoever as to when she may be fit enough to return to work. The claimant explained at that meeting that she felt unable to return to work and did not want to return to work, as she no longer had any trust in the organisation. The claimant said she did not want to apply for ill-health retirement. The claimant was asked whether she would agree to release her medical notes so that there could be a further occupational health assessment as to whether the claimant would be able to return to work in the future. The claimant confirmed that she did not wish

to proceed in that manner. The claimant was told that she would qualify for a medical inefficiency payment and would be granted 100% entitlement, which amounted to £17,586.16. The claimant was told at the end of the meeting that her contract was being terminated on the grounds of medical inefficiency and that she would receive 13 weeks pay in lieu of notice together with the medical inefficiency payment. The claimant did not appeal against that decision.

31. The claimant has complained about things which were said during the formal attendance review meeting which took place on 13th March 2020. The claimant alleges that during that meeting, she was told that, if her period of sickness absence continued, her contract of employment could be terminated on incapability grounds due to ill-health. The claimant alleges that she was told she may receive up to 2 years' salary as compensation and that it may be more beneficial for her mental health, as that would be a more speedy resolution than going to a tribunal. The claimant alleges that this amounted to a detriment because she had done a protected act by commencing ACAS early conciliation. The respondent concedes that the claimant had, in fact, commenced ACAS early conciliation, that it was aware of that act at the time of the meeting on 13th March and that, in so doing, the claimant had done a protected act. The tribunal was not satisfied that the claimant had been subjected to a "detriment" by being told that she was likely to lose her job if she was unable to return to work. The tribunal found that it was entirely reasonable in all the circumstances for the respondent to explain to the claimant exactly what the consequences were of her long-term absence once the stage was reached when the respondent could not be expected to wait any longer for her to return to work. The comment was made because at that meeting the claimant gave a first indication that she did not believe she was ever likely to return to work for the respondent.
32. At the second appeal meeting which took place on 10th February 2020, the claimant was accompanied by someone described as the "mental health ally", who was Ms Fiona O'Neill. The purpose of the mental health ally is to give support to an employee who suffers from a mental health condition and who may otherwise be unaccompanied at a formal meeting. During the course of the meeting, the mental health ally is recorded as having said to the claimant, "Sometimes when you are stressed you can feel a bit paranoid." The claimant replied, "No I'm not paranoid. I know the process - why didn't she speak to me on my day off?" The claimant alleges that this comment amounted to harassment in that it was unwanted conduct related to her disability which had the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The tribunal found that this was an inappropriate comment which may have had a tenuous connection to the claimant's disability. However, the allegation itself is that Karin O'Neill (who was chairing the meeting) failed to challenge the mental health ally when the comment was made. The claimant does not allege that the comment itself was an act of victimisation by Karin O'Neill and not Fiona O'Neill. Later in that meeting, Karin O'Neill is recorded having said, "I think given the mental health issues you have described, that these concerns may have become bigger than they are to you and you have an idea of a vendetta". The claimant immediately replied by denying that there had been a vendetta, whereupon Karin O'Neill said, "No, that's my word, but you alleged the grievance was around bullying." The claimant's complaint is that, "I

felt I was being pressured to forget about my complaint and they seemed to be blaming my mental health.” The tribunal found that Karin O’Neill’s failure to reply to the comment made by Fiona O’Neill was in no sense whatsoever related to the claimant’s disability. The claimant found that Karin O’Neill’s comment to the claimant about the vendetta was unwanted conduct, which potentially could relate to her disability. However, the tribunal was not satisfied that they had either the purpose or effect set out in the definition of Section 26.

The law

33. The remaining claims brought by the claimant engage the provisions of the Equality Act 2010. The relevant sections are set out below:-

Section 6 Disability

- (1) A person (P) has a disability if--
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability--
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
 - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)--
 - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

Section 20 Duty to make adjustments

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

- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (4) The second requirement is a requirement, where a physical feature 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.
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.
- (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
- (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
- (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
- (9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to--
 - (a) removing the physical feature in question,
 - (b) altering it, or
 - (c) providing a reasonable means of avoiding it.
- (10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to--
 - (a) a feature arising from the design or construction of a building,
 - (b) a feature of an approach to, exit from or access to a building,
 - (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
 - (d) any other physical element or quality.

- (11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
- (12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
- (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	Applicable Schedule
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

Section 21 Failure to comply with duty

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Section 26 Harassment

- (1) A person (A) harasses another (B) if--
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of--
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if--
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).

- (3) A also harasses B if--
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are--
- age;
 - disability;
 - gender reassignment;
 - race;
 - religion or belief;
 - sex;
 - sexual orientation.

Section 27 Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because--
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act--
- (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;

- (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- (4) This section applies only where the person subjected to a detriment is an individual.
- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Section 39 Employees and applicants

- (1) An employer (A) must not discriminate against a person (B)--
- (a) in the arrangements A makes for deciding to whom to offer employment;
 - (b) as to the terms on which A offers B employment;
 - (c) by not offering B employment.
- (2) An employer (A) must not discriminate against an employee of A's (B)--
- (a) as to B's terms of employment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
 - (c) by dismissing B;
 - (d) by subjecting B to any other detriment.
- (3) An employer (A) must not victimise a person (B)--
- (a) in the arrangements A makes for deciding to whom to offer employment;
 - (b) as to the terms on which A offers B employment;
 - (c) by not offering B employment.
- (4) An employer (A) must not victimise an employee of A's (B)--
- (a) as to B's terms of employment;

- (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
 - (c) by dismissing B;
 - (d) by subjecting B to any other detriment.
- (5) A duty to make reasonable adjustments applies to an employer.

Section 136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

1. Impairment

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

2. Long-term effects

- (1) The effect of an impairment is long-term if--
 - (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.
- (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
- (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.
- (4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

3. Severe disfigurement

- (1) An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities.
- (2) Regulations may provide that in prescribed circumstances a severe disfigurement is not to be treated as having that effect.
- (3) The regulations may, in particular, make provision in relation to deliberately acquired disfigurement.

4. Substantial adverse effects

Regulations may make provision for an effect of a prescribed description on the ability of a person to carry out normal day-to-day activities to be treated as being, or as not being, a substantial adverse effect.

5. Effect of medical treatment

- (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if--
 - (a) measures are being taken to treat or correct it, and
 - (b) but for that, it would be likely to have that effect.
- (2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.
- (3) Sub-paragraph (1) does not apply--
 - (a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;
 - (b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

6. Certain medical conditions

- (1) Cancer, HIV infection and multiple sclerosis are each a disability.
- (2) HIV infection is infection by a virus capable of causing the Acquired Immune Deficiency Syndrome.

7. Deemed disability

- (1) Regulations may provide for persons of prescribed descriptions to be treated as having disabilities.

- (2) The regulations may prescribe circumstances in which a person who has a disability is to be treated as no longer having the disability.
- (3) This paragraph does not affect the other provisions of this Schedule.

8. Progressive conditions

- (1) This paragraph applies to a person (P) if--
 - (a) P has a progressive condition,
 - (b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but
 - (c) the effect is not (or was not) a substantial adverse effect.
- (2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.
- (3) Regulations may make provision for a condition of a prescribed description to be treated as being, or as not being, progressive.

9. Past disabilities

- (1) A question as to whether a person had a disability at a particular time ("the relevant time") is to be determined, for the purposes of section 6, as if the provisions of, or made under, this Act were in force when the act complained of was done had been in force at the relevant time.
 - (2) The relevant time may be a time before the coming into force of the provision of this Act to which the question relates.
34. Before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person. For that purpose, the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in **Section 6 of the Equality Act 2010**. Those facts can be regarded as having 3 elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day to day activities. Whether those elements are satisfied in any case depends also on the clarification as to their sense. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a disabled person as defined in Section 6. [**A Limited v Z – UKEAT-0273/1ARN**].
35. In cases where there is an allegation of failure to make reasonable adjustments contrary to Sections 20 – 21, the duty to make any such adjustment arises in the following circumstances:-

- (i) The employer imposes a provision, criterion or practice which puts the disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The requirement is to take such steps as it is reasonable to have to take to avoid the disadvantage. The burden is upon the claimant to establish the following:-
- (a) What is the provision, criterion or practice?
 - (b) How does that put disabled persons at a disadvantage?
 - (c) Does it put the claimant at a personal disadvantage?
 - (d) What is the proposed adjustment?
 - (e) How would that adjustment remove the disadvantage?

[Archibald v Fife Council – 2004 IRLR651] and [Griffiths v Secretary of State for Work and Pensions – 2016 IRLR216]

36. The definition of harassment in Section 26 covers harassment which “relates” to the relevant protected characteristic and not mere harassment which is “because of” the characteristic. That requires a consideration of the mental processes of the putative harasser **[GMB v Henderson – 2017 IRLR340]**. In determining whether the conduct has the effect of violating the employee’s dignity or creating the relevant environment for the purposes of Section 26, the tribunal must take into account the employee’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. In **Land Registry v Grant [2011 IRLR748]** the Court of Appeal focussed on the words, “intimidating, hostile, degrading, humiliating or offensive” and observed that:-

“Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”

37. Victimisation under Section 27 effectively provides protection from retaliation to employees who complain about contravention of the Equality Act 2010. Employees are protected from being subjected to detriment as a result of having performed a protected act. The complainant need only show that she has been treated badly, not that others have been treated better. However, the treatment which amounts to a detriment must be because of the protected act. The protected act thus has to be an effective and substantial cause of the employer’s detrimental actions, but does not have to be the principal cause **[Chief Constable of West Yorkshire Police v Khan – 2001 IRLR830]**.
38. The tribunal sets out below its conclusion on the remaining claims brought by the claimant for having applied the law as set out above to its findings of fact as set out above.

Conclusions

Disability/Knowledge

39. The respondent concedes that the claimant is and was at all material times suffering from a mental impairment which amounts to a disability as defined in Section 6 of the Equality Act 2010. The tribunal found that the respondent did not know, and could not reasonably have been expected to know, that the claimant suffered from that disability, until it received the Occupational Health report dated 12h July 2019. Until then, the respondent was not in possession of facts which tended to show that the claimant suffered from a mental impairment which had a substantial and long-term adverse effect on her ability to carry out normal day to day activities. The impairment had by then not lasted for 12 months. In considering whether it was likely to last for more than 12 months, the respondent would have to be in possession of facts which tended to show that it could well happen that the claimant's impairment would last for more than 12 months. **[SCA Packaging v Boyle – 2009 ICR1056]**. The tribunal found that the respondent did not know and could not reasonably have been expected to know that the claimant suffered from a disability until it received the Occupational Health report dated 12th July 2019.

Failure to make reasonable adjustments

- A. Failing to agree to the claimant's request for her to be allocated to a different manager or office.

The tribunal found that the claimant had failed to establish that the respondent had applied to her a provision, criterion or practice which placed her at a substantial disadvantage. The tribunal found that the claimant was not required to work under Sandra Clement and did not do so from the time she went on long-term sick leave. Sandra Clement was, in any event, replaced as the claimant's manager on 14th August 2019. The allegation of failure to make reasonable adjustments in that regard is not well-founded and is dismissed.

- B. Unreasonably delaying and failing to expedite the grievance process.

The claimant originally maintained that the provision, criterion or practice applied to her by the respondent was failing to follow the normal grievance process, knowing that the adverse effect that would have on the claimant's mental health. The claimant's evidence to the tribunal was that the respondent actually failed to follow the normal grievance process, and this was what placed her at a disadvantage. The tribunal found that the claimant had failed to properly establish exactly what was the provision, criterion or practice that was applied to her and which placed her at a disadvantage. The claimant's complaint was that the grievance process took too long. That ignores the claimant's own acknowledgment at the first appeal meeting that the process was likely to last for 28 days and was in fact completed within 28 days. The claimant has failed to show how the process could have been expedited, particularly when it was her insistence that there be a thorough investigation into the numerous complaints which she had raised. The complaint of failure to make reasonable adjustments is not well-founded and is dismissed.

Harassment

- A. Sandra Clement ignoring the claimant's concerns about having meetings with her and insisting that meetings take place.

The tribunal found that there were only 2 requests for the claimant to attend a meeting with Ms Clement. The tribunal found that the claimant did not in fact attend either of those meetings. The tribunal found that Ms Clement was entitled to ask the claimant to attend absence review meetings and that she acted entirely reasonably in so doing. Whilst the claimant may well not have wished to attend those meetings, the tribunal was not satisfied that the claimant had established that the requests were in any way related to her disability, about which the respondent only learned when they received the occupational health report dated 12th July 201p. The complaint of harassment is not well-founded and is dismissed.

- B. Ann Powell and Sandra Clement repeatedly contacting the claimant while she was on sick leave to question her about her whereabouts on 24th May and failing to explain the reason for the questioning.

The tribunal found that Ms Powell or Ms Clement were entitled to enquire as to the claimant's whereabouts on that date, because there was an element of uncertainty due to an enquiry being raised about a parole hearing. The tribunal found it was entirely reasonable for Ms Powell and Ms Clement to make those enquiries. The tribunal found that there was nothing in those enquiries which could reasonably be described as violating the claimant's dignity or creating the relevant environment for the purposes of Section 26. The tribunal acknowledges that it must take into account the employee's perception, but it must also consider all the circumstances of the case and whether it is reasonable for the alleged conduct to have that effect. The tribunal found this allegation of harassment to be not well-founded and it is dismissed.

- C. Ann Powell intimating to the claimant that partner agencies had expressed concern about the claimant, but that she repeatedly refused to tell the claimant what those concerns were.

This allegation follows on from the one referred to in B (above). The tribunal was satisfied that the contents of the exchange of e-mails between Ms Powell and the claimant was a sufficient explanation in all the circumstances as to why the claimant was being asked to explain her whereabouts on that date. The tribunal found that the questions and the manner in which they were put did not violate the claimant's dignity nor create the relevant environment for the purposes of Section 26. No reasonable person in all the circumstances would consider that those requests amounted to harassment under Section 26. The complaint is not well-founded and is dismissed.

- D. Karin O'Neill failed to challenge the mental health ally at the meeting on 10th February when the ally said, "sometimes when you are stressed you can feel a bit paranoid."
- E. It was not Karin O'Neill who made that comment. It was the mental health ally. The tribunal was not satisfied that Karin O'Neill's failure to challenge the mental health ally about that comment could reasonably be interpreted as harassment contrary to Section 26. The claimant also says that Karin O'Neill's comment, "you

have an idea of a vendetta” was itself an act of harassment. The tribunal noted that the claimant immediately replied and denied that she had a vendetta. Whilst Ms O’Neill subsequently accepted that hers was an inappropriate comment, the Tribunal (following the guidance in **Land Registry v Grant** above) found that any minor upset caused to the claimant by this comment could not and did not amount to harassment contrary to Section 26. That complaint is not well-founded and is dismissed.

Victimisation

- A. The claimant alleges that being told that her employment may be terminated due to capability as a result of her sickness absence amounted to an act of harassment. The tribunal found that it was entirely appropriate for Ms Hutchinson to inform the claimant as to the potential consequences of her continued absence and the lack of any information as to when the claimant may be in a position to return to work. The tribunal found that no reasonable person would consider that information being imparted could amount to an act of harassment contrary to Section 26. That complaint is not well-founded and is dismissed.

EMPLOYMENT JUDGE JOHNSON

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
24 March 2022**

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