



EMPLOYMENT TRIBUNALS

Claimant: Mrs P Waller

Respondent: Sainsbury's Supermarkets Ltd

Heard at: London Central

On: 18, 19, 20, 21, 24, 25
and 26 January 2022

Before: Employment Judge H Grewal
Mr R Baber and Mr P Schofield

Representation

Claimant: In person

Respondent: Ms E Wheeler, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

- 1 It considers it just and equitable to consider all the complaints of discrimination about acts that occurred before 12 June 2020;
- 2 The complaints of direct race discrimination are not well-founded;
- 3 The complaints of direct and indirect sex discrimination are not well-founded;
- 4 The complaints of direct disability discrimination, discrimination arising from a disability, failure to make reasonable adjustments and harassment related to disability are not well-founded; and
- 5 The complaints of victimisation are not well-founded.

REASONS

1 In a claim form presented on 12 October 2020 the Claimant complained of race, sex and disability discrimination. Early Conciliation (“EC”) was commenced on 29 July 2020 and the EC certificate was granted on 29 August 2020.

The Issues

2 We confirmed with the parties at the outset of the hearing that the issues we had to determine were those that had been identified at the preliminary hearing on 21 July 2021. They are as follows.

Jurisdiction

2.1 Whether the Tribunal has jurisdiction to consider complaints about any acts that occurred before 12 June 2020.

Direct race discrimination

2.2 The Claimant is a Polish national. Whether the following acts occurred and, if they did, whether they were direct discrimination on the grounds of race:

- (a) The Respondent told her direct report not to accept her calls;
- (b) The Respondent told the Claimant that she needed to leave the job as her manager was just “irritated with the way she is” and referred to “the thing in her head” that is managed with medication;
- (c) The Respondent ridiculed her language skills and told her that she was unintelligent due to being a foreigner;
- (d) The Respondent gave false and misleading reports about the Claimant which were aimed to convince her and other staff that she was just paranoid, in particular, a manager said that she had no Excel skills, was working from home with her children there and that she was not being signed off probation due to performance.

Direct sex discrimination

2.3 Whether the following acts occurred and, if they did, whether they were direct sex discrimination:

- (a) The acts set out at paragraph 2.2 (a), (b) and (d) (above);
- (b) The Respondent made comments about the Claimant being a mother and a working mother and did not treat her as a regular employee;
- (c) The Respondent assigned to the Claimant workload that was previously shared between four people so that she had to work evenings and weekend and, in response to her telling her manager that that affected her attention to detail and that she was tired, he told her that she was not passionate about the role and reported back to the business that she lacked attention to detail;

(d) The Respondent told her not to work evenings and weekends but did not reduce her workload;

(e) The Respondent put the Claimant under pressure to move on quickly.

Indirect sex discrimination

2.4 Whether the Respondent applied the following provisions, criteria or practices (“PCPs”) to its employees:

(a) They had to go through management and interview processes to be appointed to a different role;

(b) They had to work in the office.

2.5 If it did, whether the PCP put women at a particular disadvantage when compared with men;

2.6 Whether the PCP put the Claimant at that disadvantage;

2.7 Whether the PCP was a proportionate means of achieving a legitimate aim.

Direct disability discrimination

2.8 The Claimant was disabled between (at least) May 2019 and June 2020 by reason of depression/anxiety disorder (Judgment of EJ Segal on 7 September 2021).

2.9 Whether the following acts occurred and, if they did, whether they amounted to direct disability discrimination:

(a) The acts set out at paragraphs 2.2(a), 2.2(b), 2.2(d) and 2.3 (e) above;

(b) The Respondent regularly humiliated the Claimant;

(c) The Respondent excluded the Claimant from meetings that were relevant to her role;

(d) The Claimant’s manager told her that he could see that her mental health was deteriorating and told her to just give in her notice and leave immediately, otherwise she would be put on performance management and she would not pass the review;

(e) Her manager told her that she was being put on a performance review;

(f) In a mediation session, her manager did not deny that he was threatening her and said that the root of their poor communication was the fact that she did not speak English or understand him when meant things “laterally”;

(g) The Respondent cut off her communication with her manager;

(h) Redeployment suggestions were not considered seriously and were eventually refused;

- (i) the performance review process was carried out unfairly;
- (j) No action was taken on the recommendations made in the welfare report;
- (k) The Respondent required her to seek other roles without any help or reasonable time frame;
- (l) The Respondent failed to provide adequate Occupational Health assistance;
- (m) The Respondent dismissed her.

Discrimination arising from disability

2.10 Whether the Respondent treated the Claimant unfavourably by doing any of the following:

- (a) The acts set out at paragraphs 2.3(c), 2.3(d), 2.9(c), 2.9 (g) and 2.9(h) (above);
- (b) Deliberately exacerbated her anxiety by putting her through either management or interview processes;
- (c) Gave her unrealistic deadlines for completion of tasks.

2.11 Whether the following things arose in consequence of the Claimant's disability:

- (a) The Claimant "zoning out";
- (b) The Claimant rambling when speaking;
- (c) The Claimant's inability to perform to a high level of intensity or productivity.

2.12 Whether the unfavourable treatment was because of any of the things at paragraph 2.11;

2.13 If it was, whether the treatment was a proportionate means of achieving a legitimate aim;

2.14 Whether the Respondent knew, or could reasonably have been expected to know, that the Claimant was disabled and, if so, from when.

Failure to make reasonable adjustments

2.15 Whether the Respondent knew, or could reasonably have been expected to know, that the Claimant was disabled and, if so, from when.

2.16 Whether the Respondent applied the following provisions, criteria or practice ("PCPs"):

- (a) Required employees to deal with managers on sensitive issues;
- (b) Required employees to apply for internal jobs;

(c) Required employees to attend the office;

(d) Required employees to complete tasks within a fixed time.

2.17 Whether the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability;

2.18 Whether the Respondent knew or could reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage;

2.19 Whether the Respondent failed to take reasonable steps to avoid the disadvantage. The Claimant suggests that the Respondent should have:

(a) Transferred her to a different manager;

(b) Transferred her to a different team;

(c) Allowed her to work from home;

(d) Appointed a safeguarding individual;

(e) Given her extra time for tasks.

Harassment related to disability

2.20 Whether the Respondent did the following things and, if it did, whether they amounted to harassment related to disability:

(a) Humiliated her regularly by questions about "the thing in her head", telling her she has "paranoia" and how useless she was in interviews;

(b) In a meeting a manager threatened her not to leave the meeting room by raising his voice, becoming agitated and swinging his hands;

(c) A Manager threatened her when she needed to leave the office to see her GP saying that he had to let her go but that he was irritated by it and she would hear about it the next time he was alone with her in a room where no one could hear him;

(d) The act set out at paragraph 2.9(f).

Victimisation

2.21 Whether the Claimant did a protected act by doing the following:

(a) Raising a grievance on 27 November 2019;

(b) Appealing against the grievance outcome on 5 January 2020.

2.22 Whether the Respondent did any of the following acts and, if it did, whether they amounted to "detriments":

- (a) Put the Claimant on a performance management process;
- (b) Gave her unsuitable tasks;
- (c) The acts set out at paragraphs 2.9(f) and 2.20(b) above.

The Law

3 **Section 13(1)** of the **Equality Act 2010** (“EA 2010”) provides,

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

Race, sex and disability are protected characteristics. On a comparison of cases for the purpose of section 13 or 19 there must be no material differences between the circumstances relating to each case (**section 23(1) EA 2010**).

4 **Section 15 EA 2010** provides,

*“(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B’s disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

5 **Section 19 EA 2010** provides,

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.

*(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if –
(a) A applies, or would apply, it to persons with whom B does not share that characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage; and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”*

6 **Section 20(3) EA 2010** provides that there,

“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 person who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

The duty to make reasonable adjustments does not arise if A does not know and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to in section 20(3) – **EA 2010 Schedule 8 para 20**.

9 **Section 26 EA 2010** provides,

- “(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.

...

(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 circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

10 **Section 27 EA 2010** provides,

«(1) A person (A) victimises another (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 the 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 any allegation (whether or not express) that A or another person has contravened this Act.”

11 **Section 123 EA 2010** provides,

“(1) Subject to section 140B proceedings on a complaint under section 120 may not be brought after the end of –

- (a) The period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.

...

(3) For the purposes of this section –

- (a) conduct extending over a period is to be treated as done at the end of that

period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

Section 140B(3) EA 2010 provides that in working out when the time limit set by section 123(1)(a) expires the period beginning with the day after Day A (the day on which the Claimant commenced Early Conciliation) and ending with Day B (the date on which the Early Conciliation Certificate was granted) is not to be counted. **Section 140(B)(4)** provides that if the time limit set by section by 123(1)(a) would (if not extended by that subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit instead expires at the end of that period.

12 **Section 136 EA 2010** provides,

“(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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

The Evidence

13 The Claimant gave evidence in support of her claim. The following witnesses gave evidence on behalf of the Respondent (the positions indicated in brackets are those that they held at the relevant time) – Craig Newsome (Category Planner), Keith Black (Category Manager), Elizabeth Newman (Category Manager), Joanna Hargreaves (Category Manager), Patrick Miller (Head of Supply Chain – Grocery) and Ria Konkon (Category Manager). Ms Konkon was unable to attend the hearing to give evidence. The Claimant did not object to her witness statement being admitted in evidence. The Tribunal admitted her witness statement. The documentary evidence in the case comprised a little over 1,000 pages. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact. For the avoidance of doubt, if we have not made a finding that something occurred, it is because we have found that it did not occur. It does not mean that we ignored the evidence given in relation to it. We considered all the evidence before us.

Findings of fact

14 The Claimant is a Polish national. She studied English at university in Poland and speaks it fluently. She has lived and worked in the UK since July 2011. Between 2011 and May 2017 she worked for different organisations as a Buyer and as a Category Manager. Following the birth of her child, she took a career break from

June 2017 to November 2018.

15 On 5 November 2018 the Claimant commenced employment with the Respondent as a Category Planner (Grade C5) in the Packaged and Speciality department in Grocery. The Claimant's evidence was that she had applied for a Senior Buyer/Buying Manager role. The Claimant's role was to develop promotional strategy and to implement the promotion of the products within Packaged and Speciality across secondary space (spaces used by the Respondent to display its promotions). That entailed her having to present findings to senior management, explaining her reasoning and putting forward strategic decisions to further the Respondent's business.

16 The Claimant's contract provided that she would be based at the Respondent's Holborn Store Support Centre in London and that she would work 37 hours a week. She reported to Craig Newsome and her basic annual salary was £50,000 per annum. It also provided that her performance would be assessed during an initial 12 week probationary period and that her employment would be confirmed at the end of that period if her performance had been satisfactory. The Respondent's Capability and Performance policy stated that during the probationary period the line manager would meet regularly with the new employee to discuss how he or she was performing; the employee would be made aware of any shortfalls and what he or she could do to improve. If performance did not come up to expectations, the Respondent could extend the probationary period up to a maximum of four weeks.

17 When the Claimant started in her role, there were three Category Planners and two teams (Packaged and Speciality and World Foods and Regional) in the department. The Claimant was responsible for the whole planning process for Packaged and Speciality and Sid Dunford, her predecessor, for World Foods and Regional. At the start of 2019, the two teams were merged and the responsibilities of the C5 Category Planners were changed. The Claimant was responsible for the development of the price and promotional strategy and management of the Promotional Planning process in respect of the products in both teams. Mr Dunford was responsible for Value Simplicity, the reporting of consumer trends, insights and analysis, and the management and delivery of the ABC process for the products in both teams. A third Planner, Leticia, was responsible for customer planning and the category activation plan and events. She reported in to the Claimant. Leticia left in February 2019 and Lucy, who replaced her, started in the role in April 2019.

18 During the Claimant's probationary period Mr Newsome had regular discussions with her about her performance and highlighted areas of concern and what needed to be done to improve. These were not formal meetings and they were not documented. The Claimant's probationary period was extended twice by four weeks because Mr Newsome was not satisfied that she was performing to the expected level. There was no documentary evidence recording these extensions. A performance assessment of 57 C5 roles in Grocery ("personal performance matrix") in February 2019 showed the Claimant as having the second lowest score (20 out of 50). The Claimant was subsequently confirmed in her role.

19 In February 2019 Mr Newsome and the Claimant attended a meeting with the supply chain. They presented data which the Claimant had prepared. The supply chain meeting challenged the data and said that it was inaccurate. The Claimant got upset and started crying. Mr Newsome did not end the meeting at that stage.

20 Following the completion of the Claimant's probationary period Mr Newsome continued having concerns with the Claimant's performance which he raised at informal meetings with her. The key issue with her performance, in his view, was that she was not able to substantiate the decisions that she had made by clear evidence or by showing her reasoning. She was not able to simplify complex concepts and to communicate them clearly. There were also concerns about time management and deadlines. In an email to Mr Newsome on 9 May 2019, Mr Black (Mr Newsome's line manager) said,

"I need some reassurance through seeing a plan that is structured, detailed and strategic and at the moment that is not what I am getting – it's just words and reassurances. Whilst I have confidence in you, I don't have confidence in Paula delivering what is needed at the moment."

21 Under the Respondent's Group Bonus Scheme the amount awarded was based on the performance of the Group and the performance of the individual. The former was the more important factor. In the 2019-2020 Scheme the maximum that could be awarded to a C5 role was 20% (12% for Group performance and 8% for personal performance). We did not have in the documents before us the Scheme for 2018-2019, but we accept that it was broadly similar. In May 2019 the Claimant received a bonus of £1,662. That equates to under 7% of her salary for six months. That does not indicate to us that the Claimant's performance was good or that there were no concerns about it.

22 Mr Newsome was due to have a meeting with the Claimant on 21 May 2019 and he asked for it to be extended to last one hour as he wanted to discuss the Claimant's performance with her. It is very likely that the Claimant knew that he was going to raise concerns about her performance at that meeting. At the start of the meeting, the Claimant said that she wanted to speak first to raise certain issues. The Claimant raised three main issues. The first related to the level of her workload – she said that she had not been given a proper handover from Sid, she was getting Lucy up to speed which put additional pressure on her and that she was working evenings and weekends to stay on top of her workload. The second issue that she raised was her relationship with Mr Newsome. She said that that was reflected in the way that he spoke to her on occasions and that he had publicly put her down in the meeting with the supply chain. She felt that the mix up in the data that she had sent him was due to the poor relationship between them. Thirdly, she said that she had been diagnosed with PTSD which had been caused by a previous employer placing her into a redundant role at the end of her maternity leave. She said that she was on medication as a result of that and that it explained some of "giddy" behaviour in the office (that was the word she used to describe her behaviour). That was the first time that the Claimant raised with Mr Newsome any concerns about his management style. The Claimant was upset and crying during the meeting and Mr Newsome offered her breaks. As the Claimant was upset, Mr Newsome did not raise the performance concerns that he had wished to raise.

23 There was nothing in the Claimant's medical records to indicate that she had ever been diagnosed as having Post Traumatic Stress Disorder. There was evidence that she had suffered from post-natal depression in 2017 and that she had been prescribed anti-depressant medication and that she was still on it.

24 Mr Newsome set out the issues that the Claimant had raised with him in an email to Mr Black on 30 May 2019. He also spoke to the Claimant and asked her whether she needed any additional support because of her medical condition and she assured him that she did not. Mr Black informed his line manager of the issues that the Claimant had raised.

25 In June 2019 Mr Black spoke to the Claimant about the performance issues in her current role and the issues that she had raised. She was obviously struggling in the role and not happy in it. There was a discussion about whether her skillset was best suited to her current role or might be better suited to a buying role. The Claimant's view was that she was better suited to a C6 Buying Manager role. Mr Black took the view that she should aim for a C5 Buyer role if she wished to move into a Buying role. He also made it clear to her that the Respondent could not just move her into such a role and that she would have to apply and be interviewed for any vacant roles in the business.

26 In early July 2019 the Respondent's HR department and senior managers had a meeting to identify vacant roles that were business critical and needed to be filled and internal employees who were looking to move to different roles. Mr Black, as the "People person" in Grocery, maintained a spreadsheet of employees looking to move. He identified the Claimant as someone looking to move to a Buyer role. On 30 June he sent the Claimant an email to say that following their meeting he had been looking at opportunities in Buying for her and that there might be some possibilities. The Claimant responded by thanking him and saying that it was much appreciated. On 5 July 2019 Mr Black identified to HR three potential C5 Buyer roles for which the Claimant could be considered. He said that she could move immediately as she was in wrong role for her skill set and was better placed as a Buyer. He attached her CV. On 9 July Mr Black informed the Claimant that some of the Buyer roles had been signed off as business critical and that the hiring managers might start contacting her soon to discuss the roles. She again responded that she really appreciated it. Mr Black also contacted the individual recruiting managers and put the Claimant forward as someone interested in those roles.

27 The Claimant applied for and was interviewed for a C5 Buyer role in Laundry and Detergent in the first week of August and was not successful. The manager recruiting into that role provided feedback to the Claimant and shared it with HR and Mr Black. Some of the feedback was positive but he said that the Claimant needed to show more detailed technical understanding, she had a lot of experience but had struggled to articulate in a structured and concise manner and that her answers needed to be focused on the specific question.

28 On 5 August 2019 the Claimant saw her GP because of anxiety. She told her managers that she was suffering from anxiety and they referred her to Validium Counselling and Therapy and the Claimant had six physiotherapy sessions with them. Some time in August the Claimant started sitting in a different part of the building, way from her team. It was clear to her managers and her team that she was unhappy and distressed around that time.

29 The Claimant also applied for a C5 Buyer role in Personal Care and was interviewed for that role on 23 August. Mr Black asked the recruiting manager how she had performed in the interview. He replied that it was only initial feedback as he still had two more interviews to conduct. He said that he would have expected a C5

Buyer to be able to explain complex situations more clearly and to have a deeper understanding of the Respondent's commercial strategy. As things stood he did not think that she had showed enough to be "above the line" for a C5 Buyer. On 27 August the manager told the Claimant that she had not been successful. He gave her feedback which highlighted her strengths and her weaknesses. The latter included judgment and explaining clearly and commercial knowledge and skills.

30 As the performance issues that Mr Newsome had wanted to discuss with the Claimant on 21 June remained ongoing and the Claimant had not succeeded in being appointed to a Buyer role, Mr Black sought advice from HR as to how to progress the performance concerns. The advice was to have an informal conversation with the Claimant to discuss the concerns, to agree what needed to be improved and by when and to schedule a further meeting to measure progress against what had been agreed. He was advised to document the discussion.

31 The Respondent's Capability and Performance policy provide that there should be a Link conversation to review performance at least three times a year. These normally took place in February, June/July and in October/November. There are two steps in dealing with performance concerns. The first step is to have an informal conversation to discuss concerns with the employee's performance and what support is needed to improve performance. If the performance does not improve, the next step is to move to Managing for Improved Performance ("MFIP") process. That involves discussing what the shortfalls are, what needs to be done differently, identifying any training or coaching that is needed and setting short-term goals, how they will be measured, when they will be reviewed and then reviewing them. The policy states,

"The discussion may also include talking to you about redeployment to another role, team, department or work location if appropriate... They might also discuss workplace adjustments with you, depending on the reasons identified for the shortfall in performance."

It also states,

"If you have a disability or health condition and it's affecting your performance we'll take all reasonable steps to support you. We will meet with you and discuss what support or workplace adjustments you may need to help you perform. This may be a change in your hours, types of tasks you complete, change to your working conditions, deployment to another role, equipment, training or an interpreter"

32 Mr Newsome arranged to have a meeting (a Link conversation) with the Claimant on 28 August to discuss the performance concerns as advised by HR. Mr Black arranged to meet with her after that session to offer support. On 28 August the Claimant said that she was not feeling well and left work early. As a result, neither meeting took place on that day.

33 The meeting with Mr Black took place on 29 August 2019. At that meeting Mr Black said that it was clear her skill-set did not match the role and, despite a lot of time and effort being put into trying to improve her performance (9/10), her performance was still poor (4/10). He was not convinced that more effort would change the result. The Claimant said that she and Mr Newsome did not work well

together and his style of management did not bring out the best in her. She said that her anxiety was visible and was connected to her performance. The Claimant asked what her options were and whether she was “done at Sainsbury’s”. Mr Black said that they could not simply “fire” people and that there were three options – she could continue to apply for other roles in the business and he would continue to alert her to roles that were suitable for her; she could continue in her current role which, depending on the outcome of the meeting with Mr Newsome, might lead to her being put on performance management or she could choose to leave, in which case she would be put on garden leave during her notice period and would not be required to work. The Claimant said that she wanted to remain at Sainsbury’s and could not afford to resign.

34 Following the meeting Mr Black sent the Claimant an email that if she needed to talk to him at any time for support she should call him on his mobile number which he gave her. The Claimant responded that Mr Black had agreed with her that she had been getting progressively worse with her anxiety due to the way she was being managed (he had not), she was being put under pressure to move (she was not) and asked for his support to decrease her anxiety levels by “*building me up and not highlighting my mental state.*” Mr Black responded that her understanding of the conversation was not the same as his. He assured her that their primary concern was her and her welfare and the conversation had been intended to be a supportive conversation. He also forwarded her email to Mr Newsome and advised him not to mention the Claimant’s anxiety at his meeting with her that day unless she brought it up. On 30 August Mr Black informed HR of the history of the case, his meeting with the Claimant on 29 August and her response to his email, and sought advice. He said that he was conscious that it was a complicated situation threading together the mental health of one of their colleagues with clear underperformance. However, the Claimant’s poor performance was having a detrimental impact on their ability to manage and run effective promotions and was impacting on colleagues in various areas.

35 On 30 August Mr Newsome had a return to work meeting with the Claimant to discuss her absence on 28 August. The reason recorded for the absence was “mental health”. The Claimant said that she had spoken to a psychologist who had confirmed that the reason for the absence was anxiety. She said that she was on anti-anxiety medication that could make it difficult to control her emotion/crying. The Claimant confirmed that she was able to return to her normal duties.

36 Mr Newsome also had the Link meeting with the Claimant to discuss the concerns about her performance. Mr Newsome identified the main areas of concern as being lack of data analysis and reporting to inform the team of performance, lack of process within Promcomm (the computer programme used by the Respondent) and lack of strategic planning. He gave examples in respect of each of the three areas. It was agreed that in the next two weeks the Claimant would focus on getting the promotions for the third quarter (Q3) finalised and signed off by the leadership team.

37 On 2 September Jo Oakley in HR responded to Mr Black’s email. She said that although she had previously had discussions with him about the Claimant at their talent review meetings, she had not realised the full severity of the situation (that was a reference to the extent of the Claimant’s underperformance). Her advice was to move the Claimant to MFIP (the Managing for Improved Performance process).

38 On 3 September Mr Newsome completed a “Work Impact Checklist” for the Claimant. It entailed Mr Newsome asking the Claimant a limited number of questions and her giving very brief responses. One of the questions was whether she was coping with the physical and mental demands of her role and the Claimant’s response is recorded as “okay”. The form was signed by the Claimant.

39 Later that evening the Claimant sent Mr Black an email saying that she had just discovered that the following day was the 30th anniversary of Mr Newsome having joined the Respondent. She said that she would get a card and get as many people to sign it as possible and asked him to organise a “quick huddle” in the afternoon and to say something.

40 The Claimant applied for another internal role and was interviewed in the beginning of September but was unsuccessful. Mr Black asked her how she had got on and was generally supportive.

41 On 18 September the Claimant presented the forecast for the third quarter (“Q3”) promotions to Mr Black and leadership team. Mr Newsome had a meeting with the Claimant on 20 September to discuss her presentation. The Claimant and Mr Newsome were in agreement that it had not gone well. The Claimant attributed it to a number of factors which included the following – it was the first time that she had done it, the data had been incomplete, the buyers’ forecasts were late, she had not been coached enough and Mr Newsome had not pointed out the errors in time. Mr Newsome disagreed. He said that he had spent three hours the previous week coaching and checking the data with the Claimant. He had spotted and highlighted to the Claimant errors in the data the day prior to the presentation. During the presentation there were still errors in the data. He said that a summary of the year on year forecast was the simplest piece of work the Claimant could be expected to do in her role and comprised just 10% of the task that he had set her. He said that the presentation had not gone well because the Claimant did not understand what was being presented and was unable to understand what was driving the variances year on year. He said that the Claimant found it difficult to collate and present the data and to ensure the integrity of the data. He suggested that she attend a training course in storytelling in business.

42 Mr Newsome arranged to meet with the Claimant on 25 September to start the Managing for Improved Performance process with the Claimant. The Claimant left work early that morning as she had obtained an appointment to see her GP because her blood pressure was very high. Her GP certified her as unfit to work until 9 October 2019 because of “stress at work.” On 10 October the Claimant was certified as unfit to work for a further week until 17 October.

43 The Claimant returned to work on 18 October 2019. Mr Newsome conducted a return to work interview with her, updated the Work Impact Checklist and agreed a Workplace Adjustment Plan with her. In the Work Impact Checklist, in response to a question about the demands of her role, the Claimant said that the demands were ok and that she was managing with that. When asked about relationships with colleagues and managers, she said that her relationship with her line manager was a bit strained. In discussions for the Workplace Adjustment Plan the Claimant said that she needed to remove herself from a stressful environment and that she required a four week plan to adjust to working five days a week in the office. It was agreed that the Claimant would have a five week phased return to work, with her working one

day in the office in the first week and that being increased by a day each week.

44 The Claimant was interviewed for another Buyer role on 21 October 2019 but was unsuccessful.

45 At a meeting on 29 October 2019 Mr Newsome told the Claimant that he was starting the Managing for Improved Performance (MFIP) process with her. He started to explain why he was starting the process and what the areas of concern were. The Claimant became agitated and said that she wanted to leave the meeting. Mr Newsome insisted that she stayed so that he could explain the reasons for starting the process and what it entailed. The Claimant had not been performing to the standard expected for a while and they needed to start the process to try to improve her performance. The Claimant said that she wanted someone from HR present and Mr Newsome said there was no requirement for HR presence at such a meeting. Mr Newsome said that there were three main shortcomings in the Claimant's performance – lack of attention to detail and presentation of inaccurate data, inability to communicate complex messages in a simple way and confusion on how she was driving projects forward and coming to meetings unprepared. The Claimant said that any issues with her performance were attributable to Mr Newsome's management style and the way that he had spoken to her on occasions. Mr Newsome set five specific tasks for the Claimant to complete and specified the timescale within which each of them had to be completed. In respect of each task, he spelt out in detail what the Claimant was expected to do. Each of the tasks was derived from the Claimant's job description. The first two tasks (preparing a Quarter 4 forecast for the leadership team and a plan for what promotional reporting they should have) were to be done in two weeks' time.

46 On 30 October Mr Newsome sent the Claimant an email setting out in detail the two tasks that she was expected to complete in two weeks' time. The Claimant responded that one of the problems was their relationship and that before they started the process they needed an independent facilitator from HR in attendance. She suggested starting the process all over again with HR in attendance.

47 Mr Newsome took HR advice and responded that at the initial stages of the MFIP process there was no entitlement for the employee to have another person present. However, if the Claimant wished to be accompanied by a colleague, that would be accommodated. As far as his relationship with her was concerned, he said that he was happy to have a meeting with a facilitator to facilitate a conversation between them as to what they could do to improve communication between them. He asked her to suggest a colleague who she believed could facilitate such a conversation.

48 A mediation meeting between the Claimant and Mr Newsome took place on 4 November. The facilitator/mediator was Will Case, a Buying Manager. At the meeting Mr Case asked each of them what did not work about the way the other one communicated, what worked and what each one would like done differently. Mr Newsome said, and the Claimant accepted, that she sometimes took what he said literally and might have interpreted things differently from what he meant. The Claimant that she had felt that she was being threatened when she had been challenged at meetings. At the end each of them agreed to do certain things in respect of their communications.

49 Once the Claimant was put on the MFIP process, when the Claimant applied for

internal roles and the recruiting managers sought Mr Black's opinion, he informed that he could not recommend her as she was on MFIP.

50 Between 30 October and 12 November 2019 the Claimant was absent from work on a number of days – she took holidays when her children were sick and she was sick on one day. As a result, the time for completing the first two tasks in the MFIP process was extended to 27 and 28 November. Mr Newsome told Lucy to contact him if she had any queries so that the Claimant could focus on her MFIP. It was not always possible to include the Claimant in meetings when she was not working in the office. In any event, Mr Newsome wanted her to focus at that time on the tasks that she had been set for the MFIP. Mr Newsome's feedback on those two tasks, which was recorded on the MFIP, was as follows. In respect of the first task, he noted that the Claimant's presentation style had improved but that the data was still inaccurate (he gave examples of the inaccurate data) and the feedback from the Leadership team was that the presentation did not give them clarity of the forecasted performance for Q4. He also noted that the Claimant could not make the complex simple (he gave an example of that). In respect of the second task, he noted again that the presentation style had come across as more confident. However, the Claimant had not displayed an understanding of the key metrics that drove secondary space performance and hence her report recommendations had come across as disjointed. There had been no clear structure and when actions had been recommended they were inconsistent with what the actions required and were not relevant.

51 On 20 November the Claimant sent an internal email in which she said that her team was not keen on having two brands per shelf as that was "*in violation*" of their merchandising rules, which were one brand per shelf. Mr Newsome forwarded that email to Mr Black with the comment "*Her language is terrible – 'violation'*"

52 On 27 November, shortly after the Claimant was given feedback on the first task under the MFIP, she raised a formal grievance. She said that the way that she was being managed constituted bullying and harassment and that she was also being discriminated against. The allegation of discrimination was that she was the only member of her team who was not allowed to work from home although she had made it clear that that affected her mental health and increased her anxiety. The allegations of bullying and harassment were that her manager (Mr Newsome) deliberately caused her additional stress and anxiety, persistently used threatening behaviour against her (an example of which was that he told her that she did not have the skills to do her job). She said that after she had raised that with her manager, she was told that it would be best if she moved from the team. When she had raised it with his manager, he had explained that her manager was annoyed with her because he was "not going anywhere" and it would be best if she started applying for jobs internally. She had frequently been told that if she did not secure another internal role, she would be managed out of the business. She said that after she returned to work following a sickness absence for anxiety she was told that she was being out on performance management. She said that there had been no problems with her performance prior to her disclosing that she suffered from mental health issues. She had experience threatening behaviour when her manager had told her that she could not leave the team. She asked for her grievance to be heard from someone outside her division.

53 The Claimant was referred to Occupational Health in November and the report

was provided on 2 December 2019. The OH Advisor reported that the Claimant had said that the role was not what she had expected when she started and that her perception was that she was being bullied and belittled by her manager. The OH Advisor recommended that regular one-to-one welfare reviews be taken with the Claimant by a manager that she felt that she could trust to ensure that her workplace issues were addressed satisfactorily. She said that she was fit to work and that she had reported that she had no long term underlying medical conditions. She said that it would help her situation if she could work from home one or two days per week and advised that a workplace stress risk assessment be carried out. She advised that the Claimant did not have any long term health conditions that were likely to impair her performance. She was fit to attend any meeting as long as she could take someone for moral support.

54 The Claimant's third task on the MFIP was due to be presented on 4 December. The task was to report on how competitive the section was in the market. On 3 December Mr Newsome had a coaching session with the Claimant where he reviewed what she had done on that task. He suggested that to improve the presentation she could include pictures of what their competitors were doing. On 4 December the Claimant sent Mr Newsome an email that she had been involved in a car accident the previous day and she needed to arrange car hire and get car seats and a pushchair and to book an appointment with her doctor as she was "*shook up and sore*." She asked if she could take that day as annual leave. He agreed that she could. The date for presentation of task 3 was put back to 12 December 2019. The Claimant spoke to her doctor on the telephone about her whiplash injury at 6.18 p.m. that day.

55 On the evening of 4 December the Claimant attended the Respondent's 150 anniversary ball for which she had bought tickets at £600 a head some months before. At the ball the Claimant approached several members of her team and asked them to support her in her grievance against Mr Newsome. They told Mr Black about it as it made them feel uncomfortable. Mr Black spoke to the Claimant about it informally after the ball and told her that her conduct had been inappropriate.

56 On 3 December Jo Hargreaves invited the Claimant to a grievance hearing on 5 December. The Claimant objected to HR about Ms Hargreaves hearing her grievance. She said that Ms Hargreaves was not impartial as she had a personal and professional relationship with Mr Newsome. HR responded that she was an impartial manager and that while she had a working relationship with Mr Newsome she did not work directly within his team. The Claimant responded that she was on annual leave until the following Wednesday (11 December) but also said that she was working from on the Monday. She asked for the meeting to be postponed as she could not get her trade union representative to attend at such short notice. The meeting was postponed to 16 December 2019.

57 On 11 December at 7.10 a.m. the Claimant sent Mr Newsome a text message. She said that she was suffering "*really badly with anxiety*" and that driving to visit the stores over the previous two days had contributed to it. She asked if she could work from home that day to pull together her presentation for the next day. He agreed that she could work from home that day. Later the Claimant sent him another text that she was taking muscle relaxants for her whiplash injury which she could not take if she travelled into work. It was agreed that the Claimant could work from home and that the presentation on the following day would take place over Skype.

58 The presentation took place on 12 December 2019. Mr Newsome's feedback was that the presentation lacked any substance and did not cover the key points required and that it looked as though it had been put together in an hour without any clear thought or care.

59 On 12 December the Claimant presented Mr Newsome with a medical certificate from her doctor that suggested that working from home would help her with her whiplash injury as she had a long commute and carried a heavy bag. The certificate covered the period 12 to 26 December 2019.

60 On 16 December Ms Hargreaves met with the Claimant to discuss her grievance. The Claimant was accompanied by a representative from UNITE. Ms Hargreaves also interviewed the following employees as part of her investigation – Messrs Newsome and Black, Will Case and Lucy Barber.

61 The Claimant's next task in the MFIP was due to take place on 20 December 2019. On 17 December the Claimant sent Mr Newsome an email that she could not work that day as she was not feeling well. She also said that she could not access from home a certain computer programme that the Respondent used, and would, therefore, not be able to complete task 4 until she was back in the office which would not be until the third week of January. She had booked a week's annual leave from 6 to 10 January 2020. Mr Newsome called the Claimant to discuss her email but there was no answer. He left her a voicemail and sent her an email asking her to call him when it was convenient for her.

62 The Claimant did not call him and did not attend work the next day. At 10.06 Mr Newsome sent her an email asking her to make contact to let him know whether she was working or still unwell. The Claimant responded "Yes I am." It was not clear from that whether she was still unwell or working from home. Mr Newsome later sent her further emails to explain that all their systems were accessible remotely if she had VPN on her laptop and that he had asked her to confirm at the start of the MFIP process that she had VPN.

63 On 23 December 2019 the Claimant sent to Mr Newsome her presentation for task 4 on the MFIP which was due to take place that day. The task was to present an understanding of how she could optimise the performance of aisle deals. The feedback from Mr Newsome on that was that the presentation had not covered any of the strategic elements of how to develop and measure the strategy for aisle promotions. He set out what he believed should have been included and concluded that the goal had not been achieved.

64 Ms Hargreaves sent the Claimant the grievance outcome on 31 December 2019. She did not uphold her grievance. She concluded that there had been no clear evidence of discrimination, bullying or harassment of the Claimant. She said, however, that there were some learnings that could be taken from the situation and she would forward her recommendations to Mr Black. She did not set out in her outcome letter what they would be. As it had been clear to her that the Claimant was not happy in her team, she suggested to Mr Black that the Claimant be moved to a different team. Mr Black's view was that as the Claimant's grievance had not been upheld and she was in the middle of the performance management process, it would not be appropriate to move her to a different team.

65 On 2 January the Claimant emailed Mr Newsome that she would not be working the following day as she was sick. She was due to report on task 5 in the MFIP in 3 January 2020.

66 On 5 January 2020 the Claimant appealed against the grievance outcome.

67 On 8 January 2020 Mr Newsome sent the Claimant an email. He said that after her email of 2 January he had tried to contact her but she had not responded. He emphasised to her the importance of reporting her absence correctly and having open lines of communication. He said that it was not clear to him whether she had been on annual leave from 6 to 10 January, as she had previously booked, or was absent sick. He said that he had intended to review the Claimant's MFIP targets on 3 January. It was clear from the reviews of the first four tasks, that there had been a gap between what had been achieved and the goal that had been set. He said that on her return to work they would move to the next step in the process – she would be invited to a capability hearing with an independent manager who would review the MFIP process, documentation and evidence with her.

68 Elizabeth Newman was asked to deal with the capability hearing and on 9 January 2020 Mr Newsome sent her an email setting out the history of the process and all the relevant documents.

69 On 10 January Ms Newman invited the Claimant to a formal capability hearing. She said that the purpose of the hearing was to review her performance on the four goals that she had completed in the MFIP process. She sent her the MFIP documentation. The Claimant was advised of her right to be accompanied and was warned that the outcome of the hearing might be a warning.

70 Between March 2019 and 10 January 2020 the Claimant worked from home on 40 days. There was only other employee in Mr Black's team who worked more days from home than the Claimant. She worked from home on 41 days.

71 On 10 January the Claimant was certified as unfit to work from 10 to 24 January 2020 because of "*stress at work*." The Claimant remained certified as unfit to work until she was dismissed on 17 June 2020. On 24 January she was certified as unfit to work until 7 February because of "*stress at work*". On 7 February she was certified as unfit to work until 8 March 2020 because of "*anxiety and depression*", on 5 March she was certified as unfit to work until 2 April because of "*mixed anxiety and depressive disorder*", on 3 April she was certified as unfit to work until 8 May 2020 because of "*mixed anxiety and depression*". On 8 May and 18 May she was certified as unfit to work until 25 May because of "*anxiety/depression/labile blood pressure*", on 2 June she was certified as unfit to work from 26 May to 9 June because of "*anxiety/depression/sinusitis*" and on 5 June she was certified as unfit to work from 26 May to 23 June 2020 because of "*anxiety/depression/sinusitis*".

72 The Claimant's appeal against the grievance outcome was heard by Patrick Miller on 26 February 2020. Following the meeting with the Claimant, Mr Miller spoke to the following people – Joanna Hargreaves, Gareth Evans, James Poole and Craig Newsome. He sent the Claimant his decision on 10 March 2020. He did not uphold her appeal. He was satisfied that Ms Hargreaves and Mr Newsome did not have a personal relationship inside or outside of work and that she had been impartial. He

said that it was clear that there was a breakdown in the relationship between her and Mr Newsome but did not believe that that was indicative of bullying or victimising behaviour. He found that there was no gender bias in the MFIP process and no evidence that the Claimant had been treated differently from colleagues within the team who did not have children. He did not support her request for redeployment within the business but made two recommendations for when she felt able to return to work – a rehabilitation plan inclusive of workplace adjustments to support her return to work as per any advice from Occupational Health and a facilitated mediation between her and Mr Newsome. He also recommended that an independent manager should be her point of contact during her period of absence.

73 The Respondent's Long Term Ill Health policy provides that an absence of more than four weeks is considered to be long term. The procedure provides for the holding of absence review meetings at regular intervals to discuss how the symptoms of the health condition affect the employee's ability to do his/her job, when the employee will be able to return and to discuss if any workplace adjustments could help to facilitate an earlier return to some kind of work. If the employee remains unable to return to work, he/she might be invited to a final absence review meeting. At the hearing the manager will explore all options to support the employee return to work such as workplace adjustments and redeployment. It could involve moving to a different role where practicable. If redeployment is proposed, there needs to be a suitable vacancy available and the employee will need to meet the essential requirements of the role.

74 George Karayianis, Senior Talent Partner, was asked to be the independent manager during the Claimant's sickness absence, and he conducted Absence Review Meetings with the Claimant on 23 April, 15 and 22 May 2020. He told the Claimant on 23 April that he was acting as an independent manager to have welfare conversations with her to ensure that they could support her return to work in the best possible way. The Claimant said that there had not been much progress with her anxiety and depression. Mr Karayianis said that they had not had the opportunity to implement the adjustments recommended in the OH report of 2 December 2019 and that when the Claimant was able to return to work a full workplace risk assessment would be carried out. The Claimant said that she was not at all happy with the idea of mediation with Mr Newsome and that her preference would be to return to another team. He explained that it was not possible to get a further OH report at that stage as the service had been suspended and their staff had been furloughed.

75 On 15 May 2020 the Claimant said she was not ready to work but that she felt much better than the previous week. The Claimant reiterated her desire to move into another team on her return to work and asked whether she could apply for other roles in the business. Mr Karayiannis said that he would check on that and let her know, He said that when she was fit to return to work he would meet with her and agree with her how to support her return to work. He would agree with her the hours she would work in the first couple of weeks and after initial catching up with he would support her in opening up lines of communication with her manager through mediation. Mr Karayiannis sent her his notes of the conversation that they had had. These were headed "Absence Review Meetings."

76 On 20 May 2020 the Claimant sent Mr Karayiannis a short letter from her GP. The doctor said that the Claimant was undergoing treatment for stress, anxiety,

depression and labile blood pressure. The letter continued,

“From her account, her work environment is extremely stressful in terms of the alleged behaviours of colleagues. This seems to be having a big negative impact on her health and as such I would recommend that she does not go back to work in the team she is currently in.”

Mr Karayiannis wrote to the Claimant the next day that he had spoken to HR and redeployment was not something that the Respondent would consider exploring. **623** However, she was free to apply for any advertised vacancies that she believed were suitable for her as per the usual recruitment process. Mr Karayiannis repeated that at the next Absence Review meeting on 22 May 2022. The Claimant said that she was still not ready to return to work and that her relationship with her line manager was not healthy.

77 On 28 May 2020 Ms Newman invited the Claimant to attend a formal attendance review meeting on 3 June 2020. She said that the purpose of the meeting was to make a decision regarding the Claimant’s continued employment and warned her that a potential outcome could be dismissal for capability. She said at the meeting they would discuss the Claimant’s continued absence from work, whether there had been any changes to her medical condition and consider her expectations to be able to return to work. The Claimant was advised of her right to be accompanied.

78 The meeting took place on 12 June 2020 and the Claimant was accompanied by a trade union representative from UNITE. The Claimant said that she wanted to return to work on 24 June when her latest medical certificate expired. Ms Newman said that she had been told previously the kind of support that could be provided when she was ready to return to work. The Claimant asked why she could not be redeployed. Ms Newman responded that the decision in respect of that had been dealt with at the grievance appeal. The Claimant said that she was fit for work but that if she returned to the same environment, it would be detrimental to her health. The Claimant’s trade union representative questioned why the Claimant could not be moved and asked whether the Respondent was going to ignore medical advice and put someone into an environment that was detrimental to her health. The Claimant said that she was proposing to return to work on 24 June but would appreciate a more specific structured return to work plan and more clarity around deployment.

79 On 15 June Mr Newsome sent Ms Newman a summary of the MFIP process with the Claimant.

80 Ms Newman sent the Claimant the outcome letter on 17 June 2020. She said that the Claimant’s continued period of absence had commenced on 12 January 2020. Having considered all the information and discussion during the meeting, her decision was to terminate the Claimant’s employment with effect from 17 June 2020 on the grounds of ill-health capability. The Claimant had been absent for a sustained period of time. The recommendation from her GP had been that she was fit to return to work but should be placed in a different team. She had confirmed at the meeting that she would return to her current team. As the outcome of her grievance had been that she had not been treated unfairly by her manager and there was an ongoing MFIP process it was not feasible to deploy her to another team. MFIP would resume when she returned to work and she believed that would result in further absence. The Claimant had been unsuccessful in securing other roles in the Respondent group. Ms

Newman was of the opinion that the business could not support the sustained level of absence and she did not feel that the Claimant was capable of returning to her role in her current team and as redeployment was not an option, for the reasons that she had given, her decision was to terminate the Claimant's employment. She would be paid twelve weeks' pay in lieu of notice. She was advised of her right to appeal within seven working days of the receipt of the letter.

81 On 26 June the Claimant appealed against the decision to dismiss her on the grounds that the decision to dismiss her constituted discrimination on the grounds of mental health/victimisation and that her dismissal was both substantively and procedurally unfair. The appeal was heard by Ria Konkon, Category Manager, on 15 July 2020. Ms Konkon sent the Claimant her decision on 21 July 2020. She did not uphold the Claimant's appeal.

Conclusions

Jurisdiction

82 The effect of sections 123 and 140B of the Equality Act 2010 is that the complaints about any acts or omissions that occurred before 12 June 2020 were not presented within the primary time limits. The only acts that occurred after that date were the Claimant's final attendance review meeting on 12 June 2020 and her dismissal on 17 June 2020. It would appear from that that the only complaints that were presented in time are those that relate to the failure to redeploy her to another role and the requirement for her to apply for different roles, the failure to provide Occupational Health assistance (which were matters that were discussed at the final attendance review) and her dismissal. Almost all the other complaints were about acts or omissions that took place before the Claimant commenced her continuous period of sickness absence on 10 January 2020. They would clearly be out of time unless we found there to be acts of discrimination after 12 June and they were part of a continuing act with those acts of discrimination.

83 We considered whether it would be just and equitable to consider them if they were not part of a continuing act of discrimination that ended after 12 June 2020. In considering that we took into account the following matters. It is not always easy to put a date to all the Claimant's complaints, but she appears to have been complaining about conduct that started very soon after the commencement of her employment. That means that her earliest complaints are nearly 18 Months out of time. The Claimant was disabled by reason of depression/anxiety disorder from at least May 2019 to June 2020. EJ Segal found that the Claimant's symptoms had worsened in August and September 2019, with the panic attacks becoming more frequent and overwhelming and partial loss of control over her legs. Additionally from November the Claimant had problems with breathing, high blood pressure and swallowing and eating. The Claimant was absent sick from 25 September to 18 October 2019 because of stress at work. The Claimant was unfit to work from 10 January 2020 until her dismissal on 17 June 2020, initially for stress at work and later from depression and anxiety. From 29 October 2019 to 10 January 2020 the Claimant was undergoing the MFIP process. The Claimant tried to resolve matters internally by raising a formal grievance on 27 November 2019. The grievance process concluded on 10 March 2022 when Mr Miller sent her the grievance appeal outcome. Some of the more historic issues before us were the subject matter of the grievance and people were asked about them at the time. Some of the matters of

which the Claimant complains were documented at the time. Having considered all the above matters, we concluded that it would be just and equitable to consider the complaints that had not been presented in time.

Direct race discrimination

84 We have not found that any of the acts alleged by the Claimant occurred. We found that during the MFIP process Mr Newsome told Lucy to contact him if she had any queries so that the Claimant could focus on the tasks that she had been set. He did not tell her not to accept the Claimant's calls. Mr Black did discuss the Claimant's health with her but did not make the comments alleged by her. He did not tell the Claimant that she needed to leave her job, but discussed with her the possibility of applying for different roles which might fit better with her skill set. The Claimant had always wanted a Senior Buyer/Buying Manager role and believed that that was more suitable for her. She was very keen to find such a role and Mr Black supported her in trying to get one, and she was very grateful for the support that he provided.

85 Neither Mr Black nor Mr Newsome ridiculed the Claimant's language or told her that she was unintelligent due to being a foreigner. They did raise issues with the Claimant about her inability to explain how or why she had reached the decisions that she had and to simplify complex concepts and communicate them clearly. These had nothing to do with her command of the English language. They did not give false and misleading reports about the Claimant. They did inform managers involved in various processes that the Claimant's probation had been extended twice. That was true. Mr Newsome told Ms Hagreaves that the Claimant did not have Excel skills and gave "vlook ups" as an example of that. He believed that to be the case.

86 There was no evidence before us that the Respondent had on the grounds of race treated the Claimant less favourably than it treated or would have treated others.

Direct sex discrimination

87 We have not found that any of the acts alleged by the Claimant occurred. There was no evidence before us that on the grounds of sex the Respondent had treated the Claimant less favourably than it treated or would have treated men.

Indirect sex discrimination

88 The Tribunal understands the first PCP (see paragraph 2.4(a) above) to be a reference to the Respondent's requirement that if an existing employee wanted a different role with the Respondent, he or she would have to apply for and be interviewed for any such vacant roles. The Respondent could not just move the employee to a different role. It is difficult to see how that requirement put women at a particular disadvantage when compared with men or how it put the Claimant at a disadvantage.

89 The Respondent does not require employees to work in the office all the time. Its flexible working policies provide for employees to work from home either by making a flexible working request for long-term changes to contracts or by agreeing with one's managers to do so on an ad hoc basis. Between March 2019 and January 2020 the Claimant worked from home on 40 days (an average of four days a month). The Claimant was allowed to work from home when she was going through the MFIP

process although Mr Newsome would have liked her to be in the office at that time so that he could assist and coach her. The only time that the Claimant was not allowed to work from home was during the period when she was having a phased return to work and slowly building up her time in the office.

Actual or constructive knowledge of disability

90 We considered when, on the evidence available to it at the time, the Respondent knew or could reasonably have been expected to know that the Claimant was disabled, i.e. that she had a mental impairment that had a substantial and long-term adverse effect on her ability to carry out normal day to day activities. In determining that issue we took into account the following facts. On 21 May 2019 the Claimant told Mr Newsome that she had been diagnosed with PTSD some time before, that she was on medication because of it and it explained some of her “giddy” behaviour at work. She was visibly upset at that meeting. The Claimant never provided any medical evidence to support her assertion. It appears that what she said was not correct because there is nothing in the medical evidence before us that she was ever diagnosed with PTSD. In August 2019 the Claimant told her managers that she was suffering from anxiety and they referred her to Validium Counselling. During August she was clearly unhappy and distressed. On 28 August, the day when the Claimant was due to meet Mr Newsome to discuss concerns about her performance, the Claimant went home early as she was not feeling well. On 30 August the Claimant gave anxiety as the reason for her absence on 28 August and said that was on medication for that and that it made it difficult to control her emotion/crying. She confirmed that she was able to return to her normal duties. On 25 September, the day when Mr Newsome was due to meet the Claimant to start the MFIP process, she commenced a period of sickness absence which continued until 17 October. The reason given was “stress at work”. The Claimant had a five week phased return to work, starting with one day a week and increasing by one day each week. The Claimant applied for a number of roles between July and October 2019 but was not successful. The MFIP process started on 29 October 2019. An Occupational Health report on 2 December 2019 advised that the Claimant was fit to work, she had reported that she had no long-term underlying medical conditions and that she did not have any long term health conditions that were likely to impair her performance and that she was fit to attend any meetings. The feedback given to the Claimant on the four tasks that she completed as part of the MFIP proceed between 29 October and 23 December was that she had not completed the tasks to the standard expected. On 10 January 2020 the Claimant was invited to a formal capability meeting. The Claimant was absent sick from that date until the termination of her employment on 17 June 2020. The reason given on her certificates from 7 February 2020 was anxiety and depression.

91 Prior to the start of the Claimant’s long sickness absence on 10 January she had two period of sickness absence – one for one day and the other for about three weeks. The longer period was for stress at work. On a few occasions, she was visibly upset. None of that was particularly surprising. It was a stressful and difficult time for the Claimant – concerns were being raised about her performance and she was applying for other roles but not succeeding in securing them. The OH report on 2 December was clear that she did not have a long-term medical condition. On the basis of that evidence, the Respondent could not reasonably have been expected to know that the Claimant was a disabled person.

92 The question is whether at some point during the Claimant's sickness absence between January and 17 June 2020 it would have been reasonable for the Respondent to know that she had a mental impairment and that it had effects which were likely to last for at least 12 months. She was initially certified as unfit to work because of stress at work. Depression and anxiety were given as the reasons for the absence from 7 February 2020. By the time of her dismissal on 17 June the Claimant had been absent sick because of depression and anxiety for four months. We concluded that the Respondent could not on that basis of that have been reasonably expected to conclude that the effects of the depression and anxiety either had already lasted or were likely to last for 12 months. The Respondent did not know and could not reasonably have been expected to know that the Claimant was disabled while she was employed by it.

Direct disability discrimination

93 We have not found that the acts alleged at paragraph 2.9 (a) – (d) (above) occurred. Mr Newsome did start the MFIP process with the Claimant. He did not know she was disabled. He did not start that process because of what she had said to him about her mental health on 21 May or because she had told him that she was suffering from anxiety in August 2019. He had wanted to raise performance concerns with her before either of those matters occurred because he genuinely had concerns about her performance. Her probation had been extended twice and concerns about her performance had continued after that. The advice to move the Claimant to the MFIP process came from HR.

94 We have not found that Mr Newsome accepted at the mediation meeting that he had threatened her and that he had said that the root of their poor communication was that she did not speak English. We have found that the Claimant said that she had felt threatened when she was challenged at meetings and that Mr Newsome had said, and the Claimant had accepted, that she sometimes took what he said literally and might have interpreted things differently from what he meant. He did not say what he did because of the Claimant's anxiety or depression.

95 We have not found that the Respondent cut off the Claimant's communication with her manager. She said in cross-examination that this allegation was "a mistake."

96 The Respondent's Capability and Performance policy provides that during the MFIP the discussion may include talking about redeployment to another role if appropriate (my emphasis) and that if the employee has a disability or health condition and it is affecting his/her performance, the Respondent would take all reasonable steps to support the employee, which could include redeployment. Redeployment was not considered appropriate in the present case because there was no evidence or suggestion that the Claimant's disability or health condition was affecting her performance. Furthermore, the Claimant had, prior to the start of the MFIP process, applied for a number of different roles and had not been successful. As the Claimant's failure to perform her role to the standard required was not the result of any health condition or disability and she had not managed to demonstrate that she was a suitable candidate for different roles, it is not surprising that simply moving her to a different role was not considered appropriate. In any event, the failure to redeploy to her to a different role was not because of her depression or anxiety.

97 We do not accept that the MFIP process was carried out unfairly. The Claimant was given five specific tasks to complete. They were derived from her job description. In respect of each task, Mr Newsome spelt out in detail what the Claimant was expected to do. She was given reasonable timescales for the tasks and on several occasions the time was extended when the Claimant could not complete the tasks within the required timescales. Mr Newsome provided coaching in order for her to complete the tasks and clear feedback after she had completed the tasks. The Claimant was relieved of many of her normal duties so that she could focus on the tasks during the MFIP.

98 We do not accept that no actions were taken on the recommendation of the Occupational Health report. The report was dated 2 December 2019. It recommended that it would help the Claimant if she could work from home one or two days a week. Between 3 December 2019 and 10 January 2020 the Claimant worked from home on many days. It recommended that a stress risk assessment be carried out. A Work Impact checklist was carried out on 3 September 2019 and updated on 16 October 2019. The report had recommended regular welfare reviews by someone other than the Claimant's manager. The Claimant's sickness absence started on 10 January 2020 and the absence review meetings were conducted by Mr Karayianis. In the course of those meetings he discussed with her her concerns about returning to her role and working with her manager. Most of the recommendations were addressed. To the extent that any were not addressed, that was not because of the Claimant's depression or anxiety.

99 The Respondent did not require the Claimant to seek other roles. The Claimant was not happy in her role from the very beginning. Her evidence was that she had applied for a different role. She was interested in obtaining a Buyer role. Mr Black actively helped and supported her in trying to get such a role from May to October 2019. The Claimant appreciated and was grateful for his help. Once the MFIP process started, Mr Black could not recommend the Claimant for other roles and was obliged to inform recruiting managers that he could not do so because she was on MFIP.

100 The Respondent was not able to provide the Claimant with Occupational Health assistance when she was absent sick in April 2020 because at that time the service had been suspended and its staff had been furloughed. The Respondent did not fail to provide that assistance because of the Claimant's depression or anxiety.

101 The Respondent did not dismiss the Claimant because she suffered from depression or anxiety. It dismissed her because she had been absent from work for five months and the Respondent was not satisfied that the Claimant would be able to return to her role in the near future and continue in the role without further long periods of sickness absence. The Claimant was dismissed because she was not capable of carrying out the role that she had been employed to perform.

Discrimination arising from disability

102 As we concluded that the Respondent did not know, and could not reasonably have been expected to know, that the Claimant was disabled while she was employed by it (see paragraphs 90-92 above), section 15(1) of the Equality Act 2010 does not apply. In case we were wrong to reach that conclusion, we set out briefly what our conclusions would have been on the section 15 claims.

103 We have not found that the Claimant was given workload that had previously been carried out by four persons. We have not found that the Claimant was excluded from meetings or that the Respondent cut off her communication with her manager. We have found that the Respondent started the MFIP process with the Claimant, the Claimant was told that if she wanted to a different role she would have to apply for it and go through the selection process and that redeployment was not considered a viable option in her circumstances and was refused. We have not found that the Claimant was given unrealistic deadlines for completing tasks in the MFIP process.

104 We did not find that the Claimant either “zoned out” or rambled. We did find that she was not performing to the level that was expected of someone in her role. There was no evidence before us that the shortcomings in her performance were due to her disability. The Claimant was not put on the MFIP process, required to go through the selection process if she wanted a different role or refused redeployment because she “zoned out” or rambled or because she was not performing to a high level of intensity or productivity. She was put on the MFIP process because she was not performing to the expected level. The purpose of putting her through the process was to try to improve her performance. Redeployment was not considered appropriate in circumstances where the Claimant was not performing satisfactorily in her role, there was no evidence that her disability was affecting her performance and the roles that the Claimant wanted were different roles for which she had applied and not been deemed suitable. Had we considered the claims, we would have concluded that the Claimant had not established that she was treated unfavourably in respect of those matters because of something arising in consequence of her disability.

Failure to make reasonable adjustments

105 The duty to make reasonable adjustments did not arise because the Respondent did not know and could not reasonably have been expected to know that the Claimant was disabled. In case we are wrong in that conclusion, we set out briefly what our conclusions would have been on the complaints of failure to make reasonable adjustments.

106 The Respondent did not require employees to deal with managers on sensitive issues. It had a policy that if an existing employee wanted a different job with the Respondent, the employee had to apply for that role and satisfy the recruiting manager that he or she was suitable for that role. The Respondent’s employees were office based but they were not required to attend the office every day. They were permitted to work at other locations and from home (see paragraph 89 above). Deadlines were set for certain tasks, especially during the MFIP process. The Claimant’s deadlines were extended more than once. There was no evidence that any of the PCPs, which we have found, put the Claimant at a substantial disadvantage because of her disability and, if they did, that the Respondent knew or could reasonably have been expected to know that they did.

Harassment related to disability

107 We have not found that any of the acts alleged occurred. We found that the Claimant became agitated and wanted to leave the meeting on 29 October 2019 and that Mr Newsome insisted that she stayed (paragraph 45 above). If he was starting the MFIP process, he had to explain to the Claimant why he was doing it. We did not

find that he threatened her or that he raised his voice and was swinging his hands. Mr Newsome's insistence that the Claimant stay at the meeting was not related to her disability, nor did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It was a meeting at which the Claimant's line manager explained to the Claimant why he was starting at the MFIP process. The Claimant might not have wanted to hear that or find it easy listening, but it was not harassment related to disability.

Victimisation

108 It was not in dispute that the Claimant's grievance and grievance appeal were "protected acts" under section 27 of the Equality Act 2010. The Claimant suggested in her evidence and closing submissions that she was also relying on her discussion with Mr Newsome on 21 May 2019 and subsequent discussion with M Black as "protected acts". The Claimant did not make any allegation of discrimination under the Equality Act 2010 in either of those meetings. She said that she had been diagnosed with PTSD and complained about Mr Newsome's management style, but she did not make any link between the two. There was no protected act in those conversations.

109 We have not found that the Claimant was subjected to any of the detriments of which she complains. In any event, they all predate the protected acts and, therefore, she could not have been subjected to them because she had done the protected acts.

Employment Judge - Grewal

19th April 2022
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

19/04/2022.

FOR THE TRIBUNAL OFFICE