



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Miss J Appleby

**Respondent:** Secretary of State for Work & Pensions

**Heard at:** Newcastle upon Tyne Hearing Centre (in person)  
**On:** 28<sup>th</sup> February, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 30<sup>th</sup>, 31<sup>st</sup> March 2022  
1<sup>st</sup> April 2022 (Deliberations)

**Before:** Employment Judge Speker OBE DL

**Members:** Mr S Wykes  
Mr P Chapman

***Representation:***

**Claimant:** In Person (assisted by Mrs Alison Russell)

**Respondent:** Mr Robert Moretto of Counsel

## RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claims were presented out of time but the tribunal finds that it is just and equitable to extend time and accordingly the claims can proceed.
2. The claim of direct discrimination is unsuccessful and is dismissed.
3. The claim of failure to make reasonable adjustments is unsuccessful and is dismissed.
4. The claim of discrimination arising from disability is unsuccessful and is dismissed.
5. The claim of harassment is unsuccessful and is dismissed.
6. The claim of victimisation is unsuccessful and is dismissed.

# REASONS

## Background

1. The claimant, Miss Jane Appleby, brings claims of disability discrimination against her employer the Secretary of State for Work and Pensions. She remains employed by the respondent in the Department of Work and Pensions. The hearing in this case has lasted eight days. Witness evidence was heard during the first five days. On the sixth day, 30<sup>th</sup> March, detailed oral submissions were given by both sides to supplement their written submissions. Judgment was then reserved and the tribunal deliberated on the seventh and eighth days.
2. There had been a preliminary hearing on 25<sup>th</sup> May 2021 before me and case management orders were made and a preliminary list of issues as set out. Subsequently a separate list of issues was agreed between the parties and filed in the tribunal on 23<sup>rd</sup> February 2022. The tribunal used that list of issues as the basis for consideration of the case and our decisions are set out using those listed issues.
3. The tribunal was provided with a chronology and a cast list. There was also an agreed bundle of documents in three lever arch files running to 1,249 pages, in addition to which a third bundle of additional documentation was provided consisting of the respondent's policies and various advice papers as well as documents setting out definitions of terms such as bullying, harassment and discrimination and advice on impact. There were also various NHS advice sheets related to post-traumatic stress disorder and borderline personality disorder. This meant that the total of the documentation ran to 1,425 pages. In addition, there were detailed witness statements. The first morning of the hearing was spent in clarifying preliminary issues and setting out a reading list for the tribunal before commencing the evidence. During the preliminary session it was agreed that some additional documents in relation to grievances be added to the bundles and it was at that stage that the fourth bundle of documents was included. It was also agreed that Mrs Russell could assist the claimant during the giving of her evidence but it was made clear by the claimant that she would be representing herself during the hearing.
4. Disability had already been conceded by the respondent, namely that she is disabled with the statutory definition in Section 6 of the Equality Act 2010. The disabilities affecting the claimant were accepted as:
  - Borderline Personality Disorder
  - Post-Traumatic Stress Disorder
  - Anxiety
  - Depression
  - Endometriosis
  - Back problem
5. The claimant's case was presented first. The witnesses for the claimant were:
  - 5.1 The claimant herself

- 5.2 Alison Russell, Civil Servant – DWP and Trade Union Representative
  - 5.3 Philip Henry Le Marquand, formerly trade union representative at the Department of Work and Pensions and also mental health first aider
  - 5.4 David Appleby (brother of the claimant) who did not attend but whose written statement was received in evidence
6. For the respondent the following witnesses were called:
- 6.1 Gordon Thompson, HEO and manager at the DWP, line manager of Alan Carr, the claimant's team leader
  - 6.2 Deborah Watson, previously North-East service centre support lead in the DWP and now working in Operations for Counter Fraud and Compliance Directorate (decision maker on the claimant's first grievance)
  - 6.3 Philip O'Meara-Shields, third appeal decision maker (evidence given by CVP)
  - 6.4 Edmund Cybulski, service centre support lead at DWP – third grievance investigation manager

All of the witnesses were subjected to detailed cross examination.

### The claims

7. The claims brought by the claimant in relation to disability discrimination were as follows:
- 7.1 Direct discrimination
  - 7.2 Failure to make reasonable adjustments
  - 7.3 Discrimination arising from disability
  - 7.4 Harassment
  - 7.5 Victimisation

There was also a significant issue as to jurisdiction in that the respondent maintained that all of the claims were out of time, some of them being significantly so. Time was one of the matters set out in the agreed list of issues.

8. The tribunal found the following facts:-
- 8.1 The claimant is employed by the respondent as an administrative officer working in the DWP since 7<sup>th</sup> March 2005, As stated this employment is continuing and, at the present time, the claimant is working from home.
  - 8.2 Her claims of discrimination relate to matters approximately within the last two years of her employment prior to the presentation of her claim to the tribunal on 13<sup>th</sup> March 2021.

- 8.3 The claimant is a disabled person suffering from both physical and mental impairments. These include her back problem from 2007 and her gynaecological issue which became difficult during the 1990s. Her mental health issues were Borderline Personality Disorder, Post-Traumatic Stress Disorder, Depression and Anxiety. Various documents were produced including medical records giving particulars of dates when firm diagnoses were reached. Occupational health reports had also been obtained at various stages.
- 8.4 Adjustments were made by the respondent for the claimant in relation to her health problems. She was given a Disabled Extended Trigger Point (DETP) of fifteen days which was to reflect her mental health issues and her Endometriosis. The standard trigger point would be seven days based upon the claimant's hours but, in her case, this was extended to fifteen days. In 2009 an OHS report confirmed the diagnosis of PTSD and Borderline Personality Disorder (BPD) and referred to a history of suicide attempts and self-harm as well as traumas in early life. On a number of occasions the claimant requested that her DETP be extended but, in 2011, it was confirmed that it would remain at fifteen days but was also to include the identified back problems.
- 8.5 During 2013 and 2014, as a result of further occupational health reports, a further adjustment was made firstly that future occupational health assessments should be on a face-to-face basis but also that the work to be done by the claimant would be changed so that she would be required only to do limited telephony. This meant that she would not receive incoming telephone calls from service users but she would only be required to make out-going calls as identified and to concentrate on other work. She was also accommodated by late start times. This limited telephony role continued. The claimant raised issues with her employers with regard to problems at work. This included a grievance in July 2017 alleging harassment, bullying and discrimination against Pauline Sinclair who had taken attendance disciplinary against the claimant and made comments with which the claimant disagreed. The claimant maintained that her attendance absences related to problems affecting her in respect of a close friend who attempted suicide.
- 8.6 There were further reviews of the claimant's DETP and the claimant complained about the regularity of the reviews.
- 8.7 A number of stress management plans were made for the claimant early in 2018. During that year managers came out to the claimant's home because of concerns about the claimant and reports that she was self-harming and the managers accompanied the claimant to her GP. At that time the claimant was concerned as to whether she would be remaining with her current team – Employer Payment Team (EPT) and her stress management plan dated 10<sup>th</sup> April 2018 confirmed that she would remain with that team indefinitely because the role would accommodate her reasonable adjustment of limited telephony. In April 2018 she moved to Alan Carr's team in EPT. The

claimant had further absences which included a problem with a fractured ankle. The claimant was worried at that time that she would receive a warning about her attendance. The claimant also had an issue with a female colleague which appeared to have been resolved. The claimant attended an attendance meeting on 30<sup>th</sup> November 2018 and was issued with a first written warning on 7<sup>th</sup> December 2018. She appealed against the warning as she felt that it was unfair because she was only half a day over her DETP and that a warning would have a detrimental effect on her mental health. Her appeal was not upheld.

- 8.8 The claimant was absent for a period of time because of a car accident for which she was not responsible. She relied upon the respondent's policy as to absence in relation to third-party claims. She saw comments made in an e-mail by Mr Thompson, who was Alan Carr's line manager. He raised queries as to the applicability of the policy. The claimant was unhappy about Mr Thompson's comments but Mr Carr explained these to her using the expression that Mr Thompson was a "man's man" implying that he was straight-talking. The claimant did not have direct contact with Mr Thompson at this period. The claimant was given the benefit of the third-party claim policy with regard to certain days of absence not being adversely recorded in her attendance record.
- 8.9 In April 2019, there was an issue between the claimant and an employee called Gena which was resolved without any action being taken against either of the employees.
- 8.10 During March 2019 news was announced that the EPT would be closing. The claimant was upset by this. Uncertainty has a significant effect upon her because of her BPD and she wished to have early clarification as to what was to happen. There were rumours as to whether the claimant and members of her team would be moved to the legacy arrears department. The claimant expressed concerns to Mr Carr as to whether her needs and her part-time status (also made as a reasonable adjustment for the claimant) would be maintained and whether she would suffer a worse working environment or have no role at all. She sought the assistance of Mr Le Marquand in trying to obtain clarification. There were delays in such clarification being provided because decisions had not been made and neither Mr Thompson nor Mr Carr was able to provide reassurance until firm future plans had been announced. However frequent assurances were given to the claimant that her reasonable adjustments would be respected.
- 8.11 Discussions which the claimant had were regarding her problems with illness, how her absences of various kinds would be recorded and whether she would be able to move to the changes of circumstances department as she knew that she would be the only person not doing incoming telephony in that department. There were issues with regard to the training which would be needed for anyone moving to change of circumstances. The claimant had been told that the initial training which was to be provided for anyone involved in the move would be for full-time employees and that this could not be changed specifically for her; ultimately changes were made for

part-time employees to have training which could be adapted for them. In the event, the claimant did not take up that training and was not transferred to change of circumstances.

- 8.12 The claimant had a conversation with Gordon Thompson in April or May 2019 when she queried with Mr Thompson what was to happen with regard to change of circumstances. Mr Thompson was contacted from time to time by Alan Carr with regard to managing the claimant and her difficulties. Mr Thompson made comments with regard to these issues. Many of these were in e-mails which as will be stated later were not seen by the claimant until she made a subject access request. Some of these documents were not read by her until January 2020 even though they related to earlier issues.
- 8.13 The claimant had a reasonable adjustment passport. This was a document in which reasonable adjustments made for her were recorded and could be reviewed from time to time depending upon changes in circumstances and need. The workplace adjustment passport set out details of the claimant's back pain, Endometriosis, stomach pains, PTSD and BPD and details the way in which these difficulties were dealt with by medication, allowing appropriate breaks, extension of the DETP, therapies, adjustments to work such as no inbound telephony, allowing limited outbound calls and avoiding confrontational calls. Reference was specifically made to future OH assessments needing to be face-to-face. The workplace adjustment was detailed and was the subject of discussion between the claimant and Mr Carr.
- 8.14 Following agreement as to the workplace adjustment passport in October 2019 an assessment was arranged of the claimant's work place by Posturite, expert providers of adapted work places and furniture. The report produced indicated that the claimant should be provided with a new chair to accommodate her back problem. That recommendation was in an assessment report dated 4th November 2019 and stated that the current chair was unsuitable because of back problems. The claimant consulted her GP about severe pain in the back which led to other medical problems and mental health concerns. There were e-mails about this which the claimant did not see until January 2020.
- 8.15 There were delays with the provision of the special chair and communication issues between Christine Meaney of Posturite and Mr Carr. There was confusion as to whether the claimant's existing chair could still be used by her pending the arrival of the new chair or whether it could not. There was some delay by Mr Carr in formally requisitioning the chair. The communications between Mr Carr and Ms Meaney trying to clarify whether the claimant could use her existing chair went on for some time and were copied in to Mr Thompson who expressed some concerns with regard to what was happening. Mr Carr was seeking to investigate whether the existing chair could be used because the claimant had indicated that not working was causing her mental health problems and he was trying to facilitate an early return to work in the short-term. One of the comments which Mr Thompson made about the situation was "this is getting surreal".

The claimant had been off work for some weeks and returned on 2<sup>nd</sup> December 2019 as it was stated that the new chair was ready for her to try. In an e-mail Mr Thompson had commented to Mr Carr “the writing is on the wall”.

- 8.16 On 13<sup>th</sup> December 2019 the claimant attended an HAI meeting (Health Absence Investigation). This was held by Alan Carr. The claimant was accompanied by Mr Le Marquand. There was a note-taker present. The claimant was absent due to sickness with mental health issues and stomach flu for three days from 17<sup>th</sup> December and she expressed to her brother that she was concerned at having more time off work. On Friday 20<sup>th</sup> December the claimant heard that her friend, about whom she was concerned, had been missing was then found dead and she contacted Mr Le Marquand who notified Mr Carr shortly before 7.00pm that day. In his e-mail to Mr Carr he mentioned that the claimant was extremely anxious with regard to receiving the result of the HAIM attendance meeting which had not yet been sent out. Mr Carr forwarded the e-mail to Mr Thompson and stated that a final written warning letter had been prepared and was being sent out in the post. Referring to the distress being suffered by the claimant at not having not received the result as stated by Mr Le Marquand, Mr Carr stated that he had also placed a copy of the final written warning letter in the claimant’s desk drawer. It had not been expected that she would be working on Monday 23<sup>rd</sup> December.
- 8.17 On Monday 23<sup>rd</sup> December the claimant consulted her GP about her mental state and saw the practice nurse and discussed self-harm but also that the claimant was keen to remain at work. She rang her office and said she would be in late.
- 8.18 Steve McGregor, a team leader, reported to Alan Carr that the claimant had rung in an upset state but said that she would be coming into work. Steve McGregor had informed Gordon Thompson that Judith Norman, another team leader, would be carrying out the claimant’s return to work interview. This was required to be done on the day of her return. The claimant’s own team leader, Alan Carr, was not working on 23<sup>rd</sup> December. The claimant arrived at work at 3.00pm and found the final written warning letter in her drawer and was upset. Donna Hosey, an HEO, came to see the claimant with a mental health first aider. Donna Hosey advised the claimant to go home but the claimant said she did not want to add to her sickness record. She e-mailed Angela Marsh-Davies (Gordon Thompson’s line manager) and Philip Le Marquand about the warning and about the news of her friend. Angela Marsh-Davies e-mailed Gordon Thompson asking that the claimant be given the appropriate level of support.
- 8.19 The claimant then commenced her welcome back meeting with Judith Norman. While the meeting was in progress Mr Thompson entered the room which was in response to the e-mail asking that the claimant be given appropriate support. Mr Thompson intended to apologise for the warning letter having been left in the desk and to check on the claimant generally and offer support. The claimant became aggressive towards Mr Thompson and

took exception to his suggestion that adjustments had been made for her. She also referred to taking the matter to ACAS and asked how Mr Thompson would “bullshit” his way out of this situation. He asked the claimant not to be so aggressive towards him. The claimant left the meeting and attributed her behaviour to her mental health condition and her upset with regard to her friend. She stated that she left the meeting also because she did not want to do anything which could lead to her being dismissed. Arrangements were made for the claimant to see a mental health first aider following the meeting which helped to alleviate her anxieties and she chose to remain at work until 6.30pm so as not to lose any more flexi time the possibility of which caused her concern.

- 8.20 The claimant appealed against her final written warning. The appeal was heard in January 2020 and the appeal was upheld. The final written warning was revoked. Jane McDonald, the appeal manager, assured the claimant that her employment prospects with DWP would not be affected. The appeal was upheld because it was found that all reasonable adjustments had been identified but had not been made at the time the final written warning was issued.
- 8.21 On 28<sup>th</sup> January 2020 the claimant raised a grievance specifically with regard to the events of 23<sup>rd</sup> December 2019, the inappropriate delivery of the final written warning letter into her drawer, the way in which the welcome back discussion was held, the actions of Gordon Thompson in interrupting the meeting and the alleged failure to recognise the degree of her stress. Deborah Watson heard the grievance at a meeting on 17<sup>th</sup> February 2020. There was a delay in an outcome being communicated for which Deborah Watson apologised. It was partly because of the Coronavirus pandemic from mid-March and the fact that everyone was working from home. The outcome was communicated on 25<sup>th</sup> June 2020. The grievance was partially upheld in that it was found that it was not appropriate to put the HAIM outcome letter in the claimant’s drawer bearing in mind her mental health. The claimant should have been given advance warning of the outcome letter. However, the conclusion also was that both Gordon Thompson and Judith Norman had acted responsibly on 23<sup>rd</sup> December and had been supportive and had taken reasonable care to ensure the claimant’s safety. Therefore, her grievance about the other matters was not upheld and it was found that there was no failure under the duty of care or that the DWP breached its obligations under the Health and Safety at Work Act.
- 8.22 In advance of being notified of that outcome, the claimant had raised a second grievance on 2<sup>nd</sup> March. This related to a request to change her DETP trigger point up from fifteen days on the basis that it was inadequate, a request that she be awarded two days special leave retrospectively from December on compassionate grounds relating to her friend and that her attendance using the flexi scheme should be remedied by her flexi deficit being written off so that she was no longer disadvantaged by this. The grievance was set out in a very detailed twelve-page document with appendices. The meeting did not take place regarding that grievance until 11<sup>th</sup> August and the outcome was given on 18<sup>th</sup> August 2020. The grievance



was not upheld. The decision maker was Kelly Nash. It was found that the DETP level was reasonable and the claimant had not requested it be reviewed based on her absences within twelve months prior to her grievance. As to her claim for 'absence' on 23<sup>rd</sup> December, as the claimant had in fact worked for three and a half hours that day special leave could not be awarded for time already worked. As to the flexi deficit there had been no informal or formal meetings between the claimant and her line manager and therefore no firm decision had been made. The claimant was told that she could appeal.

8.23 On 24<sup>th</sup> August the claimant raised a further grievance. The headings in her grievance were:

- Car accident
- Final written warning
- Appeal
- Decision to grant final written warning
- Accusations about my conduct
- Issues around EPT move and training

The grievance was referred to Mr Edmund Cybulski based in the DWP in Falkirk, Scotland as a service centre support lead. John Harley, HR Business Partner, informed Mr Cybulski that his name had been put forward as grievance officer as it was preferable for someone outside of Newcastle to conduct the investigation. Mr Cybulski had no prior knowledge of the claimant. He interviewed the claimant on 24<sup>th</sup> August 2020. She was accompanied by Mr Le Marquand and notes were taken. He noted that the claimant's grievance was against Gordon Thompson, a senior colleague in the claimant's line management and related to e-mail correspondence between Mr Thompson and Alan Carr, her immediate line manager. The claimant confirmed that, within her complaints, she was alleging bullying and harassment. Mr Cybulski shared the grievance complaint with Gordon Thompson and asked for his response. Mr Thompson inserted his responses in detail on the document which was produced at pages 907 to 934 of the bundle. Mr Cybulski then met with Gordon Thompson on 9<sup>th</sup> September 2020 to discuss the grievance in full. This was a Skype meeting. Notes were taken. Mr Cybulski decided that it was not necessary to interview any other people. It was noted that Mr Cybulski was an investigation manager and was not to be the decision maker. His conclusion was that he did not find evidence to uphold the claimant's grievance against Gordon Thompson. He provided a detailed report setting out his reasons. This included the fact that he did not agree the claimant's view or her interpretation of the e-mails from Gordon Thompson and did not agree that Mr Thompson was showing hostility or prejudice. He also did not find any basis of discrimination. Mr Cybulski felt that the claimant had been very well supported by her line management and the DWP with reasonable adjustments and accommodations. It was noted that there was a degree of frustration in Gordon Thompson's e-mails which was more directed towards the significant amount of support which Mr Thompson was having to give to Alan Carr, the claimant's line manager rather than to do with the claimant

herself. Mr Cybulski also felt it was appropriate for Gordon Thompson to share the e-mails with Angela Marsh-Davies, his own line manager. He did not find that the actions of Mr Thompson amounted to bullying or harassment or that he had discriminated although he did find that Mr Thompson's language was "casual and inappropriate in places".

- 8.24 On 1<sup>st</sup> September 2020 the claimant lodged an appeal against the outcome of her second grievance concerning the DETP sick pay and flexi leave.
- 8.25 On 22<sup>nd</sup> September 2020 the above appeal was heard. On 20<sup>th</sup> October the appeal against that second grievance was not upheld.
- 8.26 On 21<sup>st</sup> October the claimant had been informed of the result of the grievance investigation by Mr Cybulski and the findings.
- 8.27 The claimant was invited to an appeal meeting against the refusal of her third grievance and this was heard on 17<sup>th</sup> March 2021 by Mr Phil O'Meara-Shields of the DWP Economic Crime Group. He noted that the investigation findings made by Edmund Cybulski had been endorsed by Liz Williams although she had not met with the claimant in accordance with the usual process. Her decision had been to uphold the findings in Mr Cybulski's decision. The claimant specified the grounds of her appeal in a further detailed document sent to Mr O'Meara-Shields and she was critical of Mr Cybulski's investigation and conclusions and repeated her allegations with regard to Mr Thompson. However the essence was in relation to the findings of Mr Cybulski with which she disagreed. Mr O'Meara-Shields met with the claimant and took into account a further statement she had provided. He provided a detailed decision dealing point by point with the various incidents raised by the claimant:-
- The car accident, leave and hostility from Gordon Thompson
  - The move to EPT and related training
  - Final written warning
  - E-mails from Gordon Thompson to Alan Carr and Angela Marsh-Davies and the accusations made by Gordon Thompson
  - E-mails between Gordon Thompson and Angela Marsh-Davies
- 8.28 Mr O'Meara-Shields was sympathetic to the distress suffered by the claimant and expressed sympathy for her. He found that there had been procedural errors and was critical of the investigation by Mr Cybulski. He recommended that Mr Thompson would benefit from some mental health awareness training and that there should be a greater willingness to seek guidance. He found that the language and behaviour fell below the standards expected of an HEO employed by the DWP. However, his conclusion as to the issues was that the initial decisions were reasonably reached and therefore the actual complaints were not upheld. Essentially the original decisions taken by the DWP were upheld.
- 8.29 By the time of the above later events the claimant had, of course, already issued her claim form in the tribunal on 13<sup>th</sup> March 2021. She had also

received in January 2021 copies of further e-mails particularly involving Gordon Thompson even though these related to events in many cases very much earlier in the chronology.

## The Law

### **Equality Act 2010**

#### **Section 13 Direct Discrimination**

- (1) 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.

#### **Section 15 Discrimination arising from disability**

- (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.

#### **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.

## 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 or offensive environment for B
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if--
- (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 123 Time limits**

- (1) [Subject to section 140A] Proceedings on a complaint within 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.
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of--
  - (a) the period of 6 months starting with the date of the act to which the proceedings relate, 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 the 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.

### **Authorities**

A detailed list of authorities was provided by Mr Moretto including seventeen case reports. In particular we noted the following:

**Nagarajan v LRT [1999] IRLR 572**

**Madarassy v Nomura 2007**

**Griffiths v DWP [2016] IRLR 216**

**Pnaiser v NHS England [2016] IRLR 170**

**Sridhar v Kingston Hospital NHS Foundation Trust UKEAT 21 July 2020**

**Robertson v Bexley Community Centre 2003 [2010] IRLR 434**

**Adedeji v University Hospitals Birmingham NHS Trust 2021 EWCA CIV 231**

**Kendricks v The Commissioner of Police for the Metropolis 2003 ICR 530**

**Betsi Cadwaladr University Health Board v Hughes UKEAT/0179/13/JOJ**

### **Submissions**

9. For the respondent Mr Moretto provided detailed closing submissions setting out the relevant law and referring to the cases set out in his list of authorities. He submitted that the allegation of direct discrimination was not substantiated and there was no different treatment in relation to the claimant. He argued that the failure to make reasonable adjustments was also not made out as the evidence showed that there had been significant efforts by the respondent to put in place all reasonable adjustments over a lengthy period of time and in accordance with detailed policies operated by the respondent. He went through each of the elements of alleged disability related to discrimination arguing that there was no unfavourable treatment as far as the claimant was concerned. He submitted to the tribunal that there was no harassment and pointed to the judicial interpretation of the statutory definition of harassment. As to victimisation he maintained that this appeared to relate only to what Mr Thompson has said into the investigation interview with Mr Cybulski and that that claim was not made out. On the time point he argued forcibly that this was a claim in which the allegations were very significantly out of time. He argued that all matters before 5<sup>th</sup> October 2020 were out of time and this applied particularly to the events of 23<sup>rd</sup> December of 2019 and the content of the e-mails. He argued that there was nothing which could be

described as discriminatory appearing after December 2019. The claimant had not properly explained her failure to bring the claim for fifteen months. She had had significant assistance and advice from her union representatives and had demonstrated as early as 23<sup>rd</sup> December 2019 that she knew the appropriate step would be to go to ACAS and the early conciliation procedure. He argued that there was no basis for finding that it would be just and equitable to extend time.

10. The claimant also submitted a detailed document dealing point by point with the list of issues and referring at length to the evidence and to many of the documents contained in the bundle. She argued that the last act of discrimination was 22<sup>nd</sup> October 2020 when she received the investigation outcome and associated paperwork. Her case was that all of the acts were linked by the treatment she received from the respondent and, particularly, from Mr Gordon Thompson and that there was a continuing state of affairs from mid-2019 at least. She therefore maintained that her claims were all in time. Insofar as delay was concerned she pointed out her serious mental health problems, the anxiety which the whole situation gave to her which was accentuated by uncertainty with issues about which she was unfamiliar and also the impact of the pandemic which meant that she was at home for a lengthy period of time and this also had an impact upon her ability to deal with matters such as a potential claim to a tribunal. The prospect of doing so caused her further mental health concerns.

## Findings

11. We deal with these in relation to the agreed list of issues.

### **1. Jurisdiction – Time**

It is noted that the claim was presented on 13<sup>th</sup> March 2021 and the ACAS conciliation period was from 4<sup>th</sup> January 2021 to 15<sup>th</sup> January 2021.

- 1.1 **Are the claimant's claims or any of them out of time in accordance with Section 123 Equality Act 2010.** In accordance with these dates any matters which took place before 5<sup>th</sup> October 2020 are out of time. Significantly the issues which occurred on 23<sup>rd</sup> December 2019 are very significantly out of time. However, the claimant relies upon content of e-mails which she received as a result of a subject access request made on 21<sup>st</sup> January 2020. The claimant states that the last act of discrimination was 22<sup>nd</sup> October 2020 when she received the investigation outcome carried out by Mr Cybulski with the associated paperwork and, in particular, comments made by Gordon Thompson which were part of her claim as to the discriminatory treatment which she received and evidence of it. These are relevant if the tribunal finds that there was a continuing state of affairs from at least mid-2019.

Although Miss Appleby was moved from Mr Carr's team on 5<sup>th</sup> October 2020, she maintains that the events which affected her which she claims amount to discrimination, were continuing because of the investigation outcome and the fact that she was not able to read the material which was part of her case until well beyond 5<sup>th</sup> October 2020.

If the last discrimination was taken to be when she received the allegedly offensive material on 22<sup>nd</sup> October 2020 then it should be from that time that the tribunal considers whether the claim issued on 13<sup>th</sup> March 2021 is out of time and the extent of this and if so whether time should be extended, if it is found to be just and equitable to do so.

Against the claimant with regard to time is that fact that she had mentioned the question of going to ACAS on earlier occasions including during her exchange with Mr Thompson during the meeting on 23<sup>rd</sup> December 2019. She also acknowledged in evidence that she was aware that there are time limits to take claims to the tribunal and in addition to this she had the benefit throughout of support and advice from her union representatives whether on a formal or informal basis, namely Mr Le Marquand and Mrs Russell. Were it a matter of whether it was reasonably practicable for a claim to have been issued earlier then we would find that certainly it was but that of course is not the statutory test in relation to discrimination proceedings but is the test with regard to unfair dismissal claims which of course this case is not.

With regard to delay in issuing the proceedings and the question of whether it is just and equitable to give further time, we also note that the claimant is an extremely intelligent and articulate lady and that during the period extending from December 2019 throughout 2020 the claimant was dealing with a number of grievances which she put together (albeit with some assistance) in a very detailed and articulate manner supported by complex documentation. We consider that from the point of view of ability to put together what would by comparison be a relatively straightforward document such as claim form to the tribunal, this would have been possible for her.

However, against this we take into account the significant mental health problems experienced by the claimant because of her various conditions. She outlined these and the effects are demonstrated throughout the documents with the claimant seeking assistance from her union and reporting in detail to her brother for support on many occasions. Added to this there is the fact that the pandemic affected the whole working environment from early 2020 and the impact upon the claimant, we accept, would have been significant having taken into account the details of BPD and PTSD as set out in the NHS documents provided.

Our conclusion with regard to the question of whether there was a continuing state of affairs is reached making allowance for the claimant suffering from significant mental health issues. The matters which the claimant was raising over the last two years of her employment and before are linked in nature and the complaints which she was making of the treatment she received bear sufficient similarities so as to amount to a continuing state of affairs. Accordingly, we do find that the last in the series of events which links everything was when she read the detailed comments from Mr Thompson in the e-mails provided to her



on 20<sup>th</sup> October 2020. We find that it is just and equitable to extend time to make the presentation of her claim form valid and therefore give the tribunal jurisdiction to hear her claims of discrimination. We take into account what is said in Robertson v Bexley Community Centre [2003] IRLR 434 and consider this as an appropriate case to exercise our discretion acknowledging that to do so should be taken to the exception rather than the rule. We find that the claimant has discharged the burden of persuading us that it is appropriate to exercise our discretion in her favour in this case. We have done so in assessing all of the factors set out in Keeble v British Coal 1997 IRL

- 1.2 **Was there a continuing state of affairs from mid-2019?** As stated above we find that there was such a state of affairs.
- 1.3 **Insofar as any of the claims are out of time is it just and equitable for the tribunal to extend time in order that there is jurisdiction to deal with such claims.** As stated above we do so find and we have extended time in order that there is jurisdiction to deal with the claims.

## 2. Direct discrimination

- 2.1 **In relation to the claimant's claim of direct discrimination, who is the claimant's comparator (actual or hypothetical) and are they an appropriate comparator?** No actual comparator is given By the claimant. She suggests that the hypothetical comparator would be a person in the same position as the claimant namely with the same abilities, the same absences, raising the same issues that the claimant was raising and to which Gordon Thompson was responding and that such a person would have been treated more favourably. The respondent submits that there is no evidential basis for suggesting that any such person would have been treated differently from the claimant. It is also submitted by the respondent that it was not put to Mr Thompson in cross examination that he would have behaved towards any other person in a different manner, for example, when dealing with absence issues or matters such as the replacement chair.

The claimant maintains that she was treated less favourably than a person with similarly high attendance absence, and with no other material difference in circumstances than her disability would have been treated had they existed. The claimant maintains that the direct discrimination was with respect to language used by Mr Thompson, the treatment of her third-party claim, arrangements for training, the problem with the replacement chair, the events of 23<sup>rd</sup> December 2019, the various interviews, the comments made by Mr Thompson to Mr Cybulski as to the claimant's conduct history.

- 2.2 **Has the claimant been subject to less favourable treatment (than an actual comparator or hypothetical comparator) as identified in paragraphs 28, 34, 40, 77 and 121 of her ET1?**

In particular, the treatment the claimant contends amounted to less favourable treatment than an actual or hypothetical comparator is:

- 2.2.1 At paragraph 28 of the claim form: the correspondence from Mr Thompson to Mr Carr in July 2019 (425, 444-445 in the bundle). The tribunal does not find that anything in the language used in these e-mails amounts to treatment which would be different from that which would have been used in relation to such a hypothetical comparator. The comments are straightforward comments, in relation to the issues being considered such as training.
- 2.2.2 At paragraph 34 of the claim form: the e-mail correspondence between Mr Thompson and Mr Carr regarding the claimant's increased trigger point in August 2019. With regard to this correspondence, it is clear that the claimant's trigger point at 15 was more than double the earlier figure and evidence was to the effect that there was no other employee who had a DETP at that level. The claimant was seeking a temporary increase to eighteen days. The tribunal finds that similar comments would be made with regard to any hypothetical comparator who was seeking such an extension.
- 2.2.3 At paragraph 40 of the claim form: the e-mail correspondence from Mr Thompson to Mr Carr in November/December 2019 relating to the specialist chair – documents 533, 549,555 and 562. The delay with regard to the replacement chair appeared to arise from a communication problem between Posturite and Mr Alan Carr. Whilst the language by Mr Thompson, when commenting upon the issues when referred to him could have been more temperate, the comments were in relation to the lack of clarity and what appeared to be mixed messages coming from Posturite. The comments indicate a frustration that the implementation of a reasonable adjustment for the claimant, namely the provision of the specialist chair, was being delayed, and the comments were an attempt to try to expedite the adjustment. The tribunal does not find that there was anything in those comments which amounted to less favourable treatment as far as the claimant was concerned.
- 2.2.4 At paragraph 77 of the claim form: Mr Thompson's e-mail correspondence in November/December 2019 this appears to be a duplication of 2.2.3 above. Paragraph 40 and paragraph 77 of the claim form referred to e-mail correspondence but the same page numbers in the bundle are given under both these paragraphs.
- 2.2.5 At paragraph 121 of the claim form: allegations made in Mr Thompson's investigation interview on 9 September 2020 and commentary by Mr Cybulski in his investigation report sent to

the claimant on 21 October (946 – 950 and 988 – 994). The claimant maintained that she received adverse treatment by virtue of Mr Thompson including a list of alleged conduct on the part of the claimant and having put this in terms which would distress the claimant and in terms that were incorrect and/or exaggerated. The tribunal considered this evidence on several occasions within the hearing. Mr Thompson, who was under investigation with regard to a complaint, was specifically asked for details of issues which had occurred with regard to the claimant's conduct in the past. He included in this a conflict which occurred between the claimant and another employee, the claimant asking for permission to leave early because of a problem with her period, the claimant's difficulties with other members of the team. Mr Thompson was relying upon information which had been given to him by Alan Carr, the claimant's team manager. The tribunal felt that it was necessary and reasonable for Mr Thompson to give the information when requested by Mr Cybulski and the tribunal does not find any evidence to support the suggestion that he did so in terms that were an inaccurate repetition of what he had been told or that he endeavoured in any way to portray a picture other than the factual accounts which he said he had received from Mr Carr. We find that Mr Thompson would have adopted the same approach when responsibly dealing with any enquiries in any investigations where he was being requested to give detailed information.

**2.3 If so, was such less favourable treatment because of the claimant's disability?** We do not find that there was any less favourable treatment with regard to the above issues. We find that the claimant was treated as the hypothetical comparator would have been.

### **3. Failure to make reasonable adjustments**

**3.1 Has the respondent failed to make reasonable adjustments as outlined in paragraphs 27, 33, 58, 59, 102 and 110?**

3.1.1 Paragraph 27: Failing to make alternative arrangements for training in July 2019.

Following the matters having been raised by the claimant and representations made, the respondent did make reasonable adjustments so that part-time employees such as the claimant could receive training or the potential move to change of circumstances. There was no failure on the part of the respondent. In the event the claimant did not proceed with that potential move and did not take up the training which was made available.

- 3.1.2 At paragraph 33: Failing to increase her sickness absence trigger point in August 2019.

The claimant's DETP was already at fifteen which was higher than the normal maximum of seven and higher than was afforded to any other employee. No reasonable grounds were given for increasing this further and therefore the failure to respond to the request was not unreasonable. The tribunal found it useful to consider the comments made by Lord Justice Elias in *Griffiths v Secretary of State for Work and Pensions 2015 EWCA CIV 1265*. That case also considered the question of making adjustments in provisions such as a DETP to cover the potential of possible absences in order to give accommodation to the additional stress and anxiety caused to a particular disabled employee.

*"If the worry and stress of being at risk of dismissal is to be eliminated altogether, then all disability-related illness must be excluded. But if that step is not taken – and no-one was suggesting that it should be – then in a case like this when lengthy periods of absence are anticipated, the period by which the consideration point should be extended becomes arbitrary. As the majority point out in paragraph 49 when drawing an analogy with the O'Hanlon case, insofar as the alleged disadvantage is with the stress and anxiety caused to a particular disabled employee, it would be invidious to assess the appropriate extension by such subjective criteria."*

Therefore, we accept that it would not have been a reasonable adjustment in any event to extend a consideration point simply to reduce the stress and anxiety which might be caused by an employee otherwise reaching it. We find there was no failure by the respondent to make reasonable adjustments with regard to the sickness absence trigger point which was regularly reviewed and, in the case of the claimant, was generously applied.

- 3.1.3 At paragraph 58 and 59: The way in which the written warning was issued to the claimant in or around 23 December 2019 ie by leaving in her desk drawer. The motivation for Mr Carr was to try to allay the anxiety which the claimant was experiencing in the outcome of her absence meeting as was conveyed to Mr Carr by the e-mail from Mr Le Marquand late on the Friday evening. In order to try to deal with this Mr Carr placed a copy of the letter directly in the desk drawer even though he was not expecting that the claimant would be in work the following Monday. The corollary to this is the claimant suggesting that for her to find the letter in her desk drawer, bearing in mind her mental health issues, would cause her particular distress. However, it has to be borne in mind that what was causing the

claimant anxiety according to Mr Le Marquand was awaiting the outcome rather than what was conveyed in the letter. Although events transpired as they did and the claimant saw the letter in her drawer before she received the hard copy in the post, this did not demonstrate, in our view, any failure to make reasonable adjustments for the claimant. Any suggested adjustments would have involved further delay in the claimant receiving the outcome of the absence review and getting the warning.

3.1.4 At paragraph 102: Failing to grant special leave with pay and/or increase her sickness absence trigger point on or around 18 August 2020. From the evidence it appeared that the respondent was following established DWP policies with regard to the correct designation of periods of leave. Our findings with regard to the sickness absence trigger point are as stated above. On this occasion as before there was no evidence to the effect that the decision not to increase the trigger point was unreasonable.

3.1.5 At paragraph 110: Failing to increase her trigger point, grant special leave, or write off her flex-deficit on or around 20 October 2020. The tribunal finds that the respondent took into account the claimant's circumstances and made decisions which were justified by those circumstances and in accordance with the established DWP policies. It appeared that the decisions made were objective and based on evidence and in compliance with policies. There was no basis for the finding that the decisions on this case amounted to a failure to make a reasonable adjustment.

**3.2 Were the adjustments requested by the claimant?** We note as a matter of law that the claimant need not have requested the adjustments. However, whether the claimant requested the adjustment is a matter which may go to whether the respondent was aware any PCP would have the relevant effect, whether it did in fact so and whether it was reasonable to make the adjustment.

Save as to the communication of the written warning, the claimant did indeed make requests for adjustments which were considered in detail by proper process.

**3.3 What is the provision , criteria or practice (PCP) relied upon by the claimant? Was it a PCP?**

As to 3.1.1 there was a PCP with regard to training and this was adjusted for the claimant.

As to 3.1.2 there was a PCP namely the policy and this was properly considered in detail for the claimant and had already been extended to meet her needs.

As to 3.1.3 in relation to the communication of the warning there was no PCP.

As to 3.1.4 there was a PCP set out in the detailed policies and these were properly applied.

As to 3.1.5 there was a trigger point in relation to the increases the claimant was seeking but, again, the policies were properly applied.

**3.4 Did the PCP place the claimant at a substantial disadvantage?** The tribunal finds that the claimant was not placed at a substantial disadvantage. The policies were applied to meet the circumstances of these in circumstances similar to those of the claimant.

**3.5 Did the respondent know or should it reasonably have been expected to know that the claimant was likely to be placed at that disadvantage?** This does not apply in view of our above findings.

**3.6 Would the adjustment have alleviated that disadvantage?** This does not apply in view of our above findings.

**3.7 Was the adjustment requested reasonable?** It was reasonable for the claimant to ask that adjustments be considered but, as found above, there was no failure to provide reasonable adjustments. We would add a further point with regard to the circumstances of delivering of the written warning by placing it in the claimant's drawer that this arose out of communications between Mr Carr, Mr Turnbull and others but prompting from Mr Le Marquand and the emphasis was to seek to alleviate the claimant's concerns and anxiety.

#### **4. Discrimination arising from disability**

**4.1 In relation to the claimant's claim of discrimination arising from her disability, has the claimant been treated unfavourably by the respondent in relation to the matter set out at paragraphs 30, 36, 39, 43, 49, 60, 62, 78, 115 and 116 of her ET1?** In particular the treatment the claimant contends amounted to unfavourable treatment arising in consequence of her disability is:

4.1.1 At paragraph 30 of the claim form: Failing to make alternative arrangements for training in July 2019. The tribunal finds that there was no failure to make alternative arrangements. Training for part-time staff was arranged and the claimant accepted in cross examination that such training for part-time staff was offered. In any event the claimant was reassured that she would be transferred to a place where her adjustments could be accommodated and this reassurance was given repeatedly. She was transferred to RAR from 5<sup>th</sup> October 2020 which was a place where she said she was happy to work.

- 4.1.2 At paragraph 36 of the claim form: Failing to increase her sickness absence trigger point in August 2019. We have already indicated above our findings as to this. In any event we do not find there was any unfavourable treatment as the claimant was indeed being treated more favourably than other staff by virtue of her increased trigger point.
- 4.1.3 At paragraph 39 and 43 of the claim form: The e-mail correspondence between Mr Thompson, Mr Carr and third-parties in November/December 2019 relating to the specialist chair.

We do not find that there was any unfavourable treatment. Mr Carr, who was described in favourable terms by the claimant and others, was seeking to assist the claimant because she could not work due to her chair and she said that not being at home was harming her mental health. Mr Carr was seeking to clarify the matter with Christine Meaney from Posturite, the ergonomic chair advisors, and was trying to speed up delivery of the chair. When Ms Meaney suggested that temporarily the claimant could use her existing chair, Mr Carr was trying to resolve this. Accordingly, we do not find that there was any treatment arising in consequence of the claimant's disability which could be described as unfavourable treatment. It could be argued in any event that the proportionate means of achieving a legitimate aim applied namely the attempt to get the claimant back to work and seeking to give her appropriate reassurance.

- 4.1.4 At paragraph 49 of the claim form: Breaching her confidentiality by informing colleagues about her friend and making flippant remarks.

The tribunal finds that there was no unfavourable treatment because of something arising in consequence of disability. The claimant conceded in cross examination that she did not tell Mr Carr that the information about her friend was confidential. The off-hand comment made about Andrew Turnbull does not amount to unfavourable treatment of the claimant in all the circumstances.

- 4.1.5 At paragraph 60/62 of the claim form: Mr Thompson interrupting the meeting of 23<sup>rd</sup> December 2019 and his behaviour at that meeting.

The tribunal concludes from all of the evidence given in relation to the events on 23<sup>rd</sup> December 2019 that Mr Thompson was not behaving in any manner which was inappropriate by entering the meeting. His entering the meeting did not amount

to unfavourable treatment. Indeed, it amounted to an attempt to provide appropriate and favourable treatment for the claimant bearing in mind it had been communicated to Mr Thompson by his line manager that the claimant was at work and was having her return to work interview and she should be given appropriate support. Mr Thompson responded promptly to this by attending himself and entering the meeting and we find no evidence to the effect that he did so in a manner which, in itself, was inappropriate. The evidence given is to the effect that the claimant was confrontational towards Mr Thompson and was aggressive, making threats to the effect that she would commence legal action by contacting ACAS and accusing Mr Thompson in the sense that he would have difficulty if he tried to “bullshit” his way out of the situation. The evidence suggested that the claimant raised her voice and Mr Thompson was seeking to calm down the situation. It is also appropriate to consider that Mr Thompson’s actions were, indeed, a proportionate means of achieving a legitimate aim which was to give the claimant support with regard to her difficulties. We find that his entering the meeting and the way in which he dealt with the situation was proportionate in all the circumstances.

- 4.1.6 At paragraph 78 of the claim form: E-mail correspondence of November/December relating to the specialist chair. This appears to be a repetition of what is at 4.1.3 above.
- 4.1.7 At paragraph 115 of the claim form: The outcome and content of the investigation report sent to the claimant on 21<sup>st</sup> October 2020 (988 – 994).

We find no basis for the suggestion that there was anything in the report which can amount to unfavourable treatment. Mr Cybulski had undertaken a thorough investigation and concluded this by a very detailed explanatory report, his conclusions and the reasons for them. Mr Cybulski’s conduct was entirely justified amounting to a proportionate means of achieving a legitimate aim, namely resolution of the claimant’s grievance. There was nothing to suggest Mr Cybulski acted other than in good faith in his attempts to resolve the grievance by his investigation.

- 4.1.8 At paragraph 116 of the claim form: Treating the claimant’s absence from 23 to 29 October 2020 as sickness absence.

The tribunal finds that this was not unfavourable treatment because of something arising in consequence of the claimant’s disability. For the period mentioned the claimant was indeed sick and it was therefore reasonable for the respondent to treat this as sick leave. She was paid for her sickness absence. The fact that her sickness absence at that time was low meant that



the designation of the relevant period made no difference to her sickness record.

The recording of this as sickness was a proportionate means of achieving a legitimate aim, namely the accurate recording of absences by referring to the reason given for the absence.

**4.2 If so, did such less favourable treatment arise from the claimant's disability?** As indicated the tribunal does not find that she was subjected to less favourable treatment.

**4.3 If so, was any unfavourable treatment justified?** We refer to what is stated above. Although we have not found that there was less favourable treatment, we have explained that the treatment about which the claimant complains was, where stated, justified by adopting a proportionate means to achieve legitimate aims.

## 5. Harassment

**5.1 In relation to the claimant's claim of harassment, was the claimant subject to the treatment referred to at paragraphs 29, 35, 41, 60, 61, 76 and 122 of her ET1?** In particular, the treatment the claimant contends amounted to harassment is:

5.1.1 At paragraph 29 of the claim form: The correspondence from Mr Thompson to Mr Carr in July 2019 (425, 444- 445). In considering this section as well as other references to the language used by Mr Thompson we were referred to *Land Registry v Grant* [2011] IRLR 748 per Elias LJ:-

*"Tribunals must not cheapen the significance of the words (in Section 26 (1) of the Equality Act 2010) they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment. In my view to describe this incident as the tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute".*

We also took note of what is stated in the case of *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 at paragraph 22:

*"While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred) it is also important not to encourage a culture of*

*hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase”.*

We find in respect of the comments made in the correspondence referred to grounds for concern as to whether Mr Thompson used the most tactful of expressions. The fact that he would not have known that the e-mails would subsequently be seen by the claimant (which they were because of her SAR) means that he should bear this in mind and the possibility that someone such as the claimant could be affected by reading what he said. However, having considered the e-mails in question the tribunal does not find any content which justifies the description of harassment under the statutory definition. It is possible to find that there were unfortunate phrases. However, taking into account that the legislation refers to violating an employee’s dignity or creating an “intimidating, hostile, degrading, humiliating or offensive environment”, we do not find any basis for finding that these e-mails constitute harassment.

- 5.1.2 At paragraph 35 of the claim form: The e-mail correspondence between Mr Thompson and Mr Carr regarding her increased trigger point and to her about that in August 2019.

We repeat our findings above in the previous paragraph and find that there was no harassment arising out of the correspondence.

- 5.1.3 At paragraph 41 of the claim form: The content of discussions between her and Mr Carr, e-mail correspondence between them and from Mr Carr or others in November/December 2019 relating to the specialist chair.

Whilst we accept that the claimant may have taken exception to the way in which Mr Thompson expressed himself in this e-mail, for example references to the writing on the wall or circumstances being surreal, we repeat our finding with regard to the earlier sections by applying the statutory definition. Again we do not find that some tactless phrases such as are referred to here amounted to material which justifies the description of harassment within the statutory definition.

- 5.1.4 At paragraph 60 and 61 of the claim form: Mr Thompson interrupting the meeting of 23<sup>rd</sup> December 2019 and his behaviour in that meeting.

We refer again to our findings above with regard to Mr Thompson’s behaviour in entering the meeting on 23<sup>rd</sup> December 2019. Contrary to him creating a hostile, intimidating, degrading, humiliating or offensive environment for the claimant

or violating her dignity we find on the evidence that the opposite was the case. He was seeking to give support and to give reassurance and help to the claimant in a stressful situation. We find no basis for any suggestion that his conduct on 23<sup>rd</sup> December 2019 amounted to harassment.

- 5.1.5 At paragraph 76 of the claim form: E-mails from Mr Thompson to Mr Carr from January 2019 to December 2019.

These relate to issues already covered namely third-party leave, training, the replacement chair, categorisation of leave, flexi allowance and the granting of additional leave. On the basis of our findings with regard to these issues and the e-mails we do not find any cogent basis for suggesting that any of these e-mails amounted to harassment of the claimant.

- 5.1.6 At paragraph 122 of the claim form: Allegations made by Mr Thompson in his investigation interview of 9<sup>th</sup> September 2020 (946 – 950).

We have made findings with regard to the allegations made by Mr Thompson which were his response to Mr Cybulski with respect to the investigation. We have accepted that the material recited by Mr Thompson was relaying what he had been informed by Mr Carr. Mr Thompson considered that what Mr Carr had told him was credible and he repeated it in the terms it had been described to him. Whilst the claimant may have been distressed to see the references made to these issues the tribunal does not consider that this amounts to harassment and to so find could be regarded as encouraging the culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase as described in the Richmond case.

- 5.2 **If so, did this conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading or offensive environment for her?** As stated above we did not find in any of the instances described by the claimant that the claimant's dignity was violated or that the environment created was of the type set out in the legislation.

- 5.3 **Was the conduct related to the claimant's disability?** We have not found that the conduct is within Section 26 of the Equality Act. We do not find that the conduct complained of related to the claimant's disability but related to dealing with management issues as would be required with any employee.

## 6. Victimisation

- 6.1 In relation to the claimant's claim of victimisation, did the claimant do a protected act?** We do not find the claimant's claim of victimisation clear. She maintains that the protected act was her complaint about the allegations against Mr Thompson to the effect that she suggested he had discriminated against her. We have considered the victimisation claim on the basis that this is indeed the protected act referred to.
- 6.2 If so, did the respondent subject the claimant to a detriment referred to at paragraph 120 of her ET1 as a result of her doing (because she had done) a protected act?**

6.2.1 Namely: Allegations made by Mr Thompson in his investigation interview of 9<sup>th</sup> September 2020.

We conclude that the claimant is suggesting that in some way because Mr Thompson was being complained about by the claimant, he invented, exaggerated or expressed in an appropriate manner the list of conduct. The claimant suggests that the information which Mr Thompson received from Mr Carr was hear-say and that Mr Thompson chose to express the circumstances in "lurid terms" particularly the reason with regard to the claimant seeking leave because of menstrual problems. The tribunal finds that the response from Mr Thompson in the investigatory interview and at the request of Mr Cybulski was appropriate and we find no basis for the suggestion that Mr Thompson was retaliating or subjecting the claimant to a detriment because she raised a complaint against him. Although at times Mr Thompson language which appears to be abrupt or at times sarcastic, we do not find that he victimised the claimant by subjecting her to a detriment because she had raised the complaint about him. In making this finding we took into account the evidence of Mr Thompson on these matters which we found to be straightforward and credible.

## Conclusion

12. Accordingly, and for the reasons stated, we unanimously find that the claims of disability discrimination are not made out whether direct discrimination, failure to make reasonable adjustments, disability related discrimination, harassment and victimisation are not made out and all of the claims are therefore dismissed. The conclusion we reached in this case is that the respondent, by its policies and its management of the claimant, sought to accommodate the claimant's disabilities, make adjustments for her and respond appropriately to issues raised, complaints made and grievances communicated. We reached our conclusions taking into account the details of the claimant's disabilities and the impact upon her of events as described as well as the external impact upon her of tragic events involving her close friend and the effect of the pandemic.

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EMPLOYMENT JUDGE SPEKER OBE DL

JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON  
26 April 2022

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