EMPLOYMENT TRIBUNALS

Claimant:	**Ms M. Gromek**
Respondent:	**Moto Hospitality Limited**
Heard at:	**East London Hearing Centre**
On:	**26-28 May 2021, 18 January 2022; and 19 January 2022 (in chambers)**
Before:	**Employment Judge Massarella** **Mr D. Ross** **Mr J. Webb**

Representation

Claimant:	In person
Respondent:	Mr D. Northall (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the claims of direct disability discrimination, discrimination because of something arising in consequence of disability and harassment related to disability in relation to Issues 2(a) to (f) were presented out of time; it is not just and equitable to extend time; the Tribunal lacks jurisdiction in relation to these claims and they are dismissed;**

2. **had the Tribunal accepted jurisdiction in relation to those claims, it would have concluded that they were not well-founded;**

3. **the claims of disability discrimination in relation to issues 2(g) to (i) are not well-founded and are dismissed;**

4. **the Claimant was not constructively dismissed.**

REASONS

This has been a remote hearing (CVP), which has not been objected to by the parties. A face-to-face hearing was not held because of the Covid-19 pandemic.

The hearing

1. We had a main bundle of 373 pages and a supplementary bundle of 52 pages. We told the parties at the beginning of the hearing that we would not consider documents which we were not taken to in cross-examination or closing submissions.

2. A timetable was agreed at the outset; remedy would be dealt with separately, if the Claimant succeeded her claims. It had been suggested in correspondence that the Claimant might seek an order for anonymisation of the judgment but, in view of the assurances given to her by the Respondent that it would not be inviting unnecessary observers to attend the hearing, she did not pursue the application. The Tribunal spent some time at the beginning of the hearing explaining to the Claimant how the hearing would be conducted. She confirmed that she had prepared questions for the Respondent's witnesses and had a list of page references.

3. The list of issues was clarified, particularly the dates on which the alleged acts of discrimination were said to have occurred (although the Claimant was unable to provide dates for some of them); the Respondent clarified its legitimate aims in the discrimination arising from disability claims.

4. The Tribunal read for most of the morning of the first day. Unfortunately, at the end of the morning the Tribunal discovered that, because of a listing clash, it could not sit on the third day. We indicated that we would continue with the hearing, achieve what we could on the first and second days, and relist a third day as soon as possible. Both parties agreed with the approach, and the Claimant began her evidence in the afternoon. Her evidence was not completed by the end of the day.

5. On the morning of the second day, the Tribunal received an email from the Claimant, applying to postpone the hearing; the Respondent objected to a postponement. The Claimant's ground for the application was that it would be better to adjourn to dates on which all the evidence could be heard on consecutive days.

6. The Tribunal asked the Claimant if she wished to pursue that application at the hearing, and she said that she did. We heard some brief additional submissions from her and from Mr Northall (Counsel for the Respondent). The application was refused for the following reasons.

7. Firstly, the Claimant was in the middle of her evidence and it would be inappropriate to stop at that point; she would not be able to speak to anybody about her case until the case resumed. We disagreed that the questioning of the Claimant up to that point had not been directed at the list of issues. We were satisfied that Mr Northall's cross-examination had been relevant. He told us that

he thought he would need a further two hours, which we considered reasonable; he intended to be brief with the Claimant's supporting witness.

8. Secondly, the Claimant had told the Tribunal the day before that she had prepared questions for the Respondent's witnesses, and we had spent some time clarifying the process with her. There was no indication then that she was concerned about any disadvantage. We thought we could make good progress with the Respondent's evidence that afternoon.

9. Thirdly, this was a case which was issued in 2019. It was originally listed to be heard in 2020 but had to be postponed because of the pandemic. If it were postponed and relisted for three days, there would be a substantial delay before it could come back into the list. We considered it would not be fair to the Respondent's witnesses, and in particular Mr Argent who was no longer employed by the Respondent and who had taken time off work to attend the hearing, to have to take further time out from their other commitments.

10. Finally, a postponement would lead to a waste of Tribunal resources at a time when they are particularly scarce: the second day would be wasted altogether, along with the cost of the interpreter who was present at the Claimant's request.

11. We decided that the hearing would continue and would resume on 28 June 2021.

12. A further difficulty arose later in the afternoon, when it was discovered that the Claimant's supporting witness, Ms Anika Rapusta, was proposing to give evidence by video link from Poland. No enquiries had been made as to whether permission was required from the Polish authorities. We interposed the first of the Respondent's witnesses (Mr Matthew Argent, Department Manager until 2019), to make best use of time.

13. Enquiries were made by the Tribunal administration as to the process required in the case of a witness giving evidence from Poland, which turned out to be complex. It had not been completed by 28 June 2021, and so what would have been the resumed final hearing was converted into a telephone preliminary hearing to update the parties. The resumed hearing was relisted to 9 September 2021. By 9 September 2021, the Claimant had still not received permission, despite having gone through all the steps required, and the hearing date was again vacated.

14. A further telephone preliminary hearing was listed to review the position. There were considerable difficulties in terms of the Tribunal's and the parties' availability: the Claimant was now in Poland, where she had travelled because of a family emergency; she would not be returning until 12 December 2021. The earliest the Tribunal could list the resumed hearing was on 18 January 2022.

15. The Claimant told the Judge that, if permission for Ms Rapusta to give evidence from Poland had not been secured in time for the hearing, she would prefer to proceed with the hearing in her absence. The Judge explained that this did not necessarily mean that the Tribunal would not be able to have regard to Ms Rapusta's evidence because we had a written statement from her and, while a Tribunal would normally give considerably less weight to the evidence of witness who did not attend to be cross-examined, the position may be different when there was a good reason for non-attendance.

16. In the event, permission had not been secured by 18 January 2022, and the Claimant confirmed that she wanted the hearing to proceed in Ms Rapusta's absence. We heard evidence from Mr Angus Swan (Area General Manager), and Ms Michelle McKenna (HR Regional Adviser).

17. We also heard closing submissions: both the Claimant and Mr Northall had prepared documents, which they supplemented orally; we took both sets of submissions into account. We apologise the parties for the delay in promulgating this judgment, which was caused by pressure on judicial resources and the competing demands of other cases.

Findings of fact

The Claimant's disability

18. The Claimant has an underlying medical condition: she suffers from deep-vein thrombosis (DVT) in one of her legs; she has experienced blood clots in the past; from time to time she experiences painful swelling in the leg, which require her to take a day or two off work; she takes warfarin to thin her blood.

19. The Respondent conceded that this amounted to a disability for the purposes of these proceedings.

The Respondent

20. The Respondent operates motorway service areas throughout the UK. The Claimant's employment commenced on 24 September 2017. She was employed as a supervisor in the Costa Coffee branch in the Respondent's Thurrock services.

21. Mr Argent was employed by the Respondent as department manager of Costa Coffee at the Thurrock services. He managed a team of around thirteen people, who were either customer service assistants or supervisors.

Recruitment of the Claimant

22. The Claimant and Mr Argent had worked together before at McDonald's in around 2015. Mr Argent had a high opinion of her and tried several times to recruit her, with the agreement of Mr Swan.

23. The Claimant initially declined, because she had just started another job, but in September 2017 Mr Argent interviewed her for a supervisor role at Costa. Mr Argent knew about the Claimant's underlying health condition and was not concerned that it would prevent her from performing the role. He offered the Claimant a job as a supervisor in his team at Costa in Thurrock. She commenced employment on 24 September 2017. She was specifically recruited with a view to her being trained up into the assistant department manager (ADM) role.

Medical information provided by the Claimant

24. As part of an induction process, the Claimant completed a health questionnaire with Mr Argent. The document contained a warning that, if wrong information was given, disciplinary action may be taken. The Claimant filled the form out herself and signed and dated it 24 September 2017. She confirmed in evidence

that she understood the significance of the form. It asked about a number of conditions, which the Claimant indicated she did not have. The only positive indication she gave was in relation to medication: she wrote that she took warfarin.

25. The Claimant alleged that Mr Argent told her to omit information about her DTV condition. We reject that evidence. It is inconsistent with the information inserted into the additional comments box at the bottom of the form by Mr Argent in which he wrote:

> 'Follow up medical history questionnaire has been completed, and all Customer Service Managers briefed about the condition, what to do in the event of Marta experiencing a cut and where her yellow book will be kept during shifts.'[1]

26. At the bottom of the form Mr Argent ticked the box to indicate that a follow-up medical questionnaire was required. Mr Argent filled that form out. The Claimant then signed and dated it, 24 September 2017. The form contains a similar declaration, warning of the consequences of giving wrong information. It disclosed that she had previously suffered from blood clots: that the condition was 'clear'; that she last suffered from it five years previously; that she last saw her GP about it three years previously; that she took medication to prevent a recurrence; that it did not affect her say-to-day activities; and that she did not require any adjustments.

27. We found Mr Argent to be a credible witness. We are satisfied that he filled the form out on the basis of the information provided to him by the Claimant. We reject any suggestion that he omitted information which she supplied to him or otherwise misrepresented the information.

The Claimant's role

28. The Claimant's core role was as described in her application to the AIM programme (for which, see below):

> 'In my current position as a Supervisor/Barista Maestro I produce orders to a consistently high standard and understand that quality of control is vital. I provide customers with a quick, professional and accurate service. Maintain safe and health work environment by following organizational standards and sanitation regulations. I'm running and supervising shifts. Motivate team members, supporting the team performance. Ensuring that brand standards are followed at all the times. Upselling and keeping track of KPI.'

29. The evidence as to when the Claimant started doing the on-the-job training for the ADM role was somewhat confused. Doing the best we can, we think it likely that the process began around December 2017 and continued over the following months. At a certain point, on Mr Argent's own admission, the Claimant was able to cover 80% to 90% of the role, if required. However, on the Claimant's own admission, there was no plan for a formal promotion to take place before November 2018.

[1] All quotations from documents are transcribed without amendment for spelling/grammar

Health difficulties from September 2018

30. Before the events in September 2018, the Claimant and Mr Argent had an excellent working relationship and a good friendship. They kept in touch through WhatsApp. On 18 December 2017, the Claimant messaged Mr Argent:

> 'Good morning Matt.
>
> I am so sorry but I think I may not be able to come to work today [*sad face emoji*]. My leg is killing me and it's swollen. Can't sleep because of the pain. I can't make a step without pain if I'm not going to get better before 2am, I will call duty manager. I will also text Anwar and Surjan if they can start early because I suppose to do opening with you. I am very sorry for the inconvenience but I don't think I can come today [*sad face emoji*].'

31. The Claimant acknowledged that she had already started the ADM training by the time she sent this message. Notwithstanding the fact that she had these ongoing health concerns, there was nothing to suggest that Mr Argent did anything to curtail the training. The Claimant continued to experience symptoms from time to time.

32. The Claimant messaged Mr Argent again on 24 March 2018:

> 'Matt, I'm sorry I feel like I'm constantly disappointing you. maybe we should rethink everything, because I don't want to let you down so much. Unfortunately I feel like shit with that. I'm sorry [*sad face emoji*].'

33. We find that by 'rethink everything', the Claimant meant rethink the ADM training. Although she was initially reluctant to accept this, she did eventually do so.

34. Mr Argent responded sympathetically:

> 'Take the rest you need to recover. You are your own worst enemy, know your limits and don't exceed them, I will support you with that. Plans will not charge for you as it is right for you, we will talk next time.'

The Claimant replied:

> 'I'm sorry for trouble. And thank you.'

35. The Claimant accepted in cross-examination that when he said 'plans will not change' Mr Argent was referring to her ADM training. She accepted that he was saying that he would support her in continuing that training.

36. Mr Argent also supported the Claimant's application to take part in the AIM ('Aspire In Moto') programme, a company-wide programme to increase employees' management knowledge and skills. The Claimant completed her application form for the AIM programme in June 2018.

37. We agree with Mr Northall's observation in his closing submission that it is striking that it was the Claimant who was expressing reservations about her ability to progress to the ADM role, while Mr Argent was encouraging her to be positive.

The Claimant's visit to Poland in July/August 2018

38. In July 2018 the Claimant took some pre-booked annual leave to go to Poland. She messaged Mr Argent from Poland to say that she would be having a pre-planned operation during her leave. This was an elective procedure, which was to have been conducted on an outpatient basis. She asked Mr Argent if she could be rostered so as to take her rostered off-days immediately on her return. Mr Argent replied, telling her not to worry about work, and that they would catch up when she returned.

39. In the event, while in Poland the Claimant experienced a sudden, and life-threatening, health incident: a blood clot had migrated to her lungs, which caused her to collapse. She was rushed to hospital and had an emergency operation.

40. We note that the Claimant gave almost no information about this operation, and the serious nature of it, in her witness statement, other than to say (para 41): 'Emergency operation in Swinoujscie Poland'.

<u>The events of 18 August 2018 (Issue 2(a))</u>

41. The Claimant returned to the UK on 18 August 2018 and went into work to speak to Mr Argent the same day and to tell him what had happened, even though she was exhausted and was not rostered to work that day.

42. There was such a stark difference between the parties' accounts as to what happened on 18 August 2018 that we concluded that one of those accounts must simply be untrue.

43. The Claimant's evidence in her witness statement was that she had 'just come to tell [Mr Argent] about everything and ask for a few days off' - and no more than that.

44. She stated that Mr Argent suggested that they have a discussion with Mr Swan, the area general manager, who was the most senior person on site at the time. Mr Argent went to see Mr Swan, on his own initially, and asked if they could meet with the Claimant. Mr Swan agreed. The Claimant was reluctant, as she was feeling tired and upset, but the meeting went ahead.

45. The Claimant alleged that Mr Argent told her to lie if asked by Mr Swan whether he (Mr Argent) was aware of the Claimant's health condition.

46. Again, the Claimant's evidence was that she merely asked Mr Swan for an additional week's recovery time, as she had only just had the operation and still had stitches, at which point Mr Swan told her that there was nothing he could do to help her and that she would have to leave. She described this in her closing submissions as a 'shock meeting'.

47. Mr Argent's account of the events of the day is quite different. The Claimant told him that, because of the life-threatening incident in Poland, she had been advised by her doctors that she needed a sedentary, office-type job and could no longer do the kind of work she was doing for the Respondent; she would have to leave. In the meantime, she asked for a few extra days off, but in the context of the fact that she intended to leave at the end of the month.

48. The Claimant accepted in cross-examination that she wanted to speak to Mr Argent urgently that day, because she had something important to tell him. She accepted that she was extremely upset during the discussion with Mr Argent. She accepted that Mr Argent was very sympathetic, and that he gave no indication to her that her employment would have to end, nor did he suggest to her that she would have to stop being a supervisor, or stop training for the ADM role.

49. Mr Argent agrees that he arranged a meeting with Mr Swan, despite the Claimant's reluctance. She accepted in cross-examination that Mr Argent said that 'Mr Swan would know what to do, we can find a solution'.

50. Mr Swan and Mr Argent's evidence was that the Claimant repeated to Mr Swan that she had decided to leave because she had been advised that she could not continue to do work of this sort given her underlying health condition. She said that she would need to take a job in which she could sit down more. Mr Swan asked her what she meant; she said that her previous job was in an office and she thought that would be a sensible place for her to work. The Claimant said that she was planning to leave at the end of the month. Mr Swan suggested that she might be able to do an alternative role at the Thurrock services, for example working in Marks & Spencer, but the Claimant said that she needed to leave and would do so at the end of the month. Mr Swan said words to the effect of: 'if she needs to leave, then she needs to leave'.

51. The Claimant and Mr Argent then had a conversation on their own. It was put to the Claimant that she told Mr Argent that she needed to find a less physical job. The Claimant said that she could not recall using the term less physical. However, in her later grievance interview she said exactly that:

> 'Yes – then we had a private convo – where I said need to find a job, less physical he was (concerned) worried…'

52. The Tribunal accepts Mr Swan's and Mr Argent's account of the events of that day. We found the Claimant's account implausible in almost every respect. The starting-point is that she went to the trouble of going into the office that day to have a conversation with Mr Argent, even though she was not rostered to work, had only just got back from Poland and, on her own account, was exhausted. It makes no sense that she would do so just to ask for a little more time off, rather than phoning or messaging, as she had previously done when making similar requests. She must have had something more momentous to communicate.

53. Equally, if it were right that she was merely asking for a little more time off, it is implausible that Mr Argent would suggest a meeting with Mr Swan; that was something he could easily have dealt with himself. Nor would it have made any sense for him to say that Mr Swan 'would know what to do' and would help them 'find a solution'. Similarly, there was no logical reason why Mr Swan would have reacted as vehemently as the Claimant says he did to such a minor request. We find that, by his final comment ('if she needs to leave, then she needs to leave'), Mr Swan simply meant that the Claimant's wishes must be respected.

54. The Claimant accepted that there was no documentary evidence in which she indicated at the time that she felt that she was being forced out of her job. On the contrary, such contemporaneous documents as we did have (referred to

below) were inconsistent with that. They suggest only that she was intent on finding another job, took a casual and supportive interest in whether Mr Argent was having any luck finding a replacement for her, and reported optimistically on her plan to return to her old employer. Mr Argent expressed consistent regret that she had decided to leave.

55. For the avoidance of doubt, we reject the Claimant's evidence that Mr Argent told her to lie to Mr Swan about his knowledge of her health condition. It is inconsistent with the fact that he had been party to the Claimant's disclosure of her health condition at the beginning of her employment, which was a matter of record. We also reject the Claimant's theory that, even at this point, Mr Argent was planning to replace her with another colleague, Mr Rahman. There was no evidence to support that.

56. We considered whether Ms Rapusta's evidence threw any light on the matter. She was not present on the day but was entirely reliant on what the Claimant told her. Further, we had significant concerns as to the reliability of her account, in part because it mirrored the Claimant's evidence so very closely, even down to the detail that Mr Argent offered the Claimant a mint before they went into Mr Swan's office. We found it unlikely that Ms Rapusta's own recollection of an indirect account would have included such minutiae.

57. After the meetings with Mr Argent and Mr Swan the Claimant sent four voice messages to Ms Rapusta. Her evidence was that she was later unable to retrieve them; nor could Ms Rapusta produce the messages. Those messages may well have provided important evidence as to what was said on the day. We found the explanations as to why neither witness could produce them unsatisfactory. For these reasons we considered that we could give little weight to Ms Rapusta's evidence.

58. The Tribunal has concluded that the Claimant's account of the events of that day was untrue, and that it was tailored to support her case in these proceedings. That conclusion led us to approach her evidence on other issues with some caution, particularly when there was no corroboration in contemporaneous documents.

<u>The Claimant's work after 18 August 2018 (Issue 2(c))</u>

59. After 28 August 2021 the Claimant reduced her hours to her contracted hours of 28 per week. Although in her witness statement (paragraph 47), she appeared to suggest that the decision to reduce her hours was Mr Swan's, in the course of oral evidence she accepted that it was by agreement: she felt that 28 hours would be better as she was still recovering.

60. The Claimant asked not to work weekends, which was also agreed. She wanted to have weekends free in order to do some babysitting for a friend and to earn some extra money. In the event she worked a single weekend to help Mr Argent. We note the friendly and cooperative tone of their exchange about this:

> 'MA: I have put you to work on Sunday 2nd September only because I am desperate and no more weekends from there on. I hope that's ok.
>
> Hope you are feeling well Marta.

> MG: Of course it's ok I tell Agata so she will not book any students on that day. No worries [*smiley face emoji*]'

61. In a message at some point between 18 August 2021 and 6 September 2021, the Claimant wrote to Mr Swan:

> 'I'm starting to look for other job. My ex-boss called me, he is opening company and offered me a job. I also find something awesome… On the computer at home for airlines. So fingers crossed [*thumbs up emoji*].'

62. The Claimant said in the course of cross-examination that the potential job with her former employer was 'maybe office management/recruitment'. That is consistent with the fact that she had told Mr Argent and Mr Swan that she was looking for sedentary work. The fact that she was looking for work 'on the computer at home' and that this was 'awesome' also supports the Respondent's case that she had told them that she could no longer do a job which involved being on her feet.

63. In a further message, Mr Argent complained about how difficult work had been recently, to which the Claimant responded:

> 'oh dear… I'm sorry to leave you like this. I really am [*sad face emoji*].'

64. We find that this text is consistent with the Claimant expressing a sense of regret, or even guilt, that she had made a decision to leave. We have no doubt that it was her decision.

<u>Recruitment into the ADM role (Issue 2(c))</u>

65. Mr Argent advertised the ADM role advertised online by 20 August 2018. The Claimant maintained that she did not know that the role had been advertised. We find that she did. In a message to Mr Argent dated 28 August 2018, she wrote:

> 'do you have a new candidate for assistant?'

to which Mr Argent replied:

> 'no, no one has applied. But I am planning to speak to Anwar, no one knows this. I'll have a long chat with him and see if it's feasible'

The Claimant replied:

> 'I know you talked to him [*smiling emoji*]. I saw him before his holiday.'

66. There is not a hint in this exchange that the Claimant was unhappy with the situation. Mr Argent did indeed approach Mr Rahman to ask whether he would be interested in training for the ADM role. He said that he would be interested. Mr Argent did not take the advertisement down at that point; he simply forgot.

67. In a later text exchange with the Claimant, Mr Argent wrote:

> 'You are amazing. I will really miss you when you eventually leave. Thank you Marta.'

68. The Claimant agreed that this was very complimentary and indicated that he was very upset about her leaving. We find that this too was inconsistent with the Claimant being forced out of her job.

The letter of 6 September 2018 (Issue 2(d))

69. On 6 September 2018 the Claimant hand-delivered a letter Mr Argent, asking to be reconsidered for the ADM role.

> 'Due to my recent change of circumstances, I would like to apply for reconsidering me as a candidate for Costa Assistant Manager position.
>
> Last two weeks I spend on doing health checks by doctor Abdullah and Grand from Anticoagulant Katherine Monk Ward in Basildon Hospital. They also contacted doctors from Poland to gather all information's about my operation and schedule appointment with a Vascular surgeon. My visit with surgeon conformed, that I am already convalescence and allowed by doctors to work up to 40 hours per week. I was informed by a doctor, that as long I am taking my medication, using cream when I feel discomfort and wear pressure sock, so my leg doesn't swell up, there are no contraindications to do my job.
>
> I have also requested for you a formal letter from my doctor about my health condition and conformation, that I am able to do my job with required number of hours.
>
> Please consider my application of reconsideration positively. I am highly motivated and hard working. Already trained for the position, with a true commitment to my future in this company. My work has become very important part of my life and I want to continue my career in Moto. I cannot imagine working in a different place. Work has become my passion, thanks to the people with whom I work and those I work for. I am positive I will not disappoint you.'

70. The Claimant maintained that, at the same time, she provided Mr Argent with supporting medical evidence. We find that she did not. It is inconsistent with the fact that the letter itself indicates that she had 'requested' a letter from her doctor, which suggests that she did not already have one. Moreover, her evidence in cross-examination on this issue was unsatisfactory: asked why she had not disclosed that medical evidence in the course of the Tribunal proceedings, the Claimant initially said that she no longer had it because she had 'used it for other purposes'; she then said that she had given it to Mr Argent and had not retained a copy; she later changed her evidence to say that he had given it back to her and she had thrown it away.

71. The company later offered to pay for a copy of a medical letter to be provided; it never materialised. The only medical evidence in the bundle was a letter dated 26 November 2018 from a Dr Malik, who wrote that:

> 'I can confirm that Marta has history of recurring DVTs for which she takes regular warfarin and undergo regular blood monitoring. She has no current or recent DVT and therefore should not be restricted physically due to this and able to perform her full work commitments.'

72. It is difficult to reconcile that letter with the fact that the Claimant had had a recent, and very serious, DVT some three months earlier.

73. Mr Argent told the Claimant that, unfortunately, he had already spoken to Mr Rahman about undertaking the ADM training, and that it would be unfair on him to go back on his word. He was pleased that the Claimant had changed her mind about leaving the company, but that she would continue in her substantive role of supervisor. Mr Argent's evidence was that when he told her this the Claimant became very angry and stormed out of the room. The Claimant accepted in cross-examination that at first she was upset, and then became angry when he said that he would not go back on his word to Mr Rahman. From this point onwards the relationship between the Claimant and Mr Argent deteriorated. A few weeks later Ms Rapusta asked to be considered for the ADM training, but Mr Argent explained to her, as he had to the Claimant, that he had already made a commitment to Mr Rahman.

The Claimant's applications for other roles within the Respondent (Issue 2(e)

74. The Claimant applied for ADM positions at other sites within the Respondent. On 11 September 2018, she messaged Mr Argent informing him that she was applying to other sites and asking if she could count on his good feedback/reference if needed.

75. On 16 September 2018, the Claimant wrote to Mr Swan:

> 'Due to my recent change of circumstances and denial of my formal application of reconsideration as a Costa Assistant Manager Position Candidate on 06.09.18, I recently applied to few Costas in Moto Services for that position. I am very series about my carrier in Moto and would like to continue it. I am sure I could be valuable asset to any Moto Costas and be committed as I am in ours.
>
> As I stated in my previous letter, on that week, it was fully conformed that I am already convalescence and allowed by doctors to work up to 40 hours per week as a Barista. I was informed by a doctor, that as long as I taking my medication, using cream when I feel discomfort and wear pressure sock, so my leg doesn't swell up, there are no contraindications to do my job.
>
> I have also requested a formal letter from my doctor about my health condition and conformation, that I am able to do my job with the required number of hours.
>
> I would appreciate your positive feedback and reference letter.
>
> I am a highly motivated and hard working. Already trained for the position, with a true commitment to my future in this company. My work has become very important of my life, and I want to continue my career n Moto. I cannot imagine working in a different place. Work had become my passion, thanks to the people with whom I work and those I work for. I am positive, I will not disappoint at my new position in another Costa.'

76. Again we note that in this letter the Claimant says that she had has 'requested' a letter from her doctor, not that she has secured one and provided it to the Respondent, contrary to her evidence in Tribunal.

77. Mr Swan replied that the company's policy was only to give a neutral, factual reference. The Claimant agreed this was 'mentioned – but not exactly about any policy'. She also accepted that when Mr Swan was contacted verbally by the other sites, he spoke positively about her. In her own witness statement (paragraph 81), she reported that a General Manager had told her that Mr Swan had been praising her and her work. Mr Swan's evidence that he was contacted by three colleagues to enquire about the Claimant and that he spoke highly of her to all of them. We accept that evidence.

78. In the event, the Claimant withdrew her applications and cancelled an interview she had been offered. She said that this was because she was upset.

<u>The relationship with Mr Argent after 11 September 2018 (Issue 2(b) and 2(f))</u>

79. By this stage, it is clear that the relationship between Mr Argent and the Claimant had deteriorated. We were taken to a text exchange on 17 September 2018:

> 'MG: As stated my last weekend working day was 2nd September. As I inform you, I have arrangements for weekends and you agree to that.
>
> MA: Yeah and you agree for 22nd to help me out of this month. Also our agreement with no weekends was based on the fact you had the really bad leg issue which limited you to 28 hours maximum and to help you out financially and you took on looking your friends children at weekends (which is why I agree to no weekends) but now you said you have fully recovered from the issue and can do 40 hours a week. You also said you were leaving at the end of the month? I'm very confused so can you explain clearly the situation so I can understand what you are saying.
>
> MA: Can you answer the above please.'

80. The Claimant replied:

> 'Just to clarify I didn't give you my notice yet. So until I give you, I'm still working here. In my contract states that I need to give one week notice. If you wanted to cancel your promise about weekends, you should let me know beforehand so I would rearrange my plans. My contract is 28h per week. I didn't state in my letter that I'll work 40h. Don't refer to it because it was simply declined. You didn't even accept it and give me back.
>
> I was thinking about calling sick for tomorrow… not because I really, really need it, just to make my point… but you know what, I'm better than this. I promised to you that I'll do that Saturday and help you out. I would only make a bad, hard day to others. You can talk bullshit about me to this gossip moron as much as you want. I don't care anymore.'

81. We note that, in this response, the Claimant did not take issue with Mr Argent's summary of what he understood the position to be: that the Claimant would be leaving because of her health.

82. We reject the Claimant's evidence that Mr Argent asked her on a daily basis when she was going to leave or treated her in a hostile manner on a daily basis. We think that is an exaggeration; the allegations lacked particulars.

83. On the balance of probabilities, we think that the Claimant became angry when Mr Argent would not comply with her request to allow her to resume the ADM training and, in the following days, became uncooperative and disrespectful towards him. This is evidenced in the texts quoted above. Although it is clear that Mr Argent was also becoming frustrated by the Claimant's attitude, his language remained professional; hers did not.

84. Towards the end of September, Mr Swan was reviewing the situation and reflecting on the fact that it was a shame to lose the Claimant, either to another Moto branch or altogether from the company. He considered a reorganisation, whereby the Claimant might be appointed to the ADM position, while Mr Rahman continued to train, and that Mr Argent might be promoted to a role in Burger King. He took this proposition to Mr Argent, who said that he thought it was no longer appropriate because of the Claimant's behaviour and attitude at work in recent weeks. In his view, she was no longer suitable for promotion. Mr Swan took the proposal no further.

85. Curiously, the Claimant positively relies on these events in her closing submissions as showing that 'Mr Swan appreciated my work and commitment'; it is difficult to reconcile this with the Claimant's evidence that, on 18 August 2018, he reacted to the news of her health difficulties with hostility and insisted that she must leave the company.

<u>The Claimant's last day at work</u>

86. The Claimant accepts that on the last day at work she behaved rudely to colleagues, and walked out before the end of her shift; she acknowledged that her behaviour 'was not good'. She explained that she was feeling very upset that day and that this behaviour was out of character. She said that she objected to being asked to clean the washroom, when she regarded that as the responsibility of others. Mr Argent explained that he did not ask her to do it personally, he merely asked her to ensure that it was done. We accept his evidence.

87. On 1 October 2018 the Claimant went on sick leave.

<u>The grievance (Issue 2(g))</u>

88. On 24 October 2018, the Claimant lodged a grievance.

89. Ms McKenna appointed Mr Matthew Stringfellow (General Manager at the Respondent's Trowell site) to investigate the grievance. The Claimant was interviewed on 14 November 2018. Ms McKenna attended as notetaker.

90. We accept Ms McKenna's evidence that the grievance had a level of complexity to it, in part because of the number of people that the Claimant referenced and the number of documents that she provided, all of which had to be followed up. There were investigatory meetings with nine individuals between 14 November and 19 December 2018.

91. There was then further delay because, in the middle of the process, the Claimant made an additional allegation about Mr Argent's allegedly saying to a customer that the Claimant would not be returning to work. That too required investigation. The Claimant was kept informed as to the progress of the investigation by letters on 19 and 24 December 2018. The outcome letter, dated 28 December 2018, was detailed and thoughtful in its analysis.

92. We are satisfied that the grievance was investigated in a thorough and timely manner and there was no improper delay.

The resignation (Issue 2(i))

93. The Claimant resigned on 2 January 2019. The letter did not state that she was resigning in response to adverse treatment by the Respondent.

The grievance appeal (Issue 2(h))

94. The Claimant appealed the grievance outcome by way of an email dated 2 January 2019. The letter is very brief and states:

> 'ahead of any appeal I would ask that you forward me typed or readable notes from all of the investigations that have been carried out in relation to my case in order that I can put a thorough, point by point case forward …'

95. The Respondent provided further documents by letter dated 1 February 2019. The Claimant did not submit any detailed grounds of appeal, despite being chased by the Respondent on 11 February 2019. By letter dated 20 February 2019, the Claimant was invited to an appeal hearing on 27 February 2019; she was unavailable. She was asked to suggest alternative dates, but did not do so. We note that, in her written closing submissions, the Claimant stated that her representative advised her not to do so, but to proceed with ACAS early conciliation.

96. The Respondent chased three times in March and April 2019, and warned the Claimant that the appeal might be treated as withdrawn. She did not reply and the appeal was closed down.

The law

Time limits

97. S.123(1)(a) Equality Act 2020 ('EqA') provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.

98. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated and ending with the day of the early conciliation certificate does not count (s.140B(3) EqA). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (s.140B(4) EqA).

99. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it

considers it just and equitable to do so. That is a broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances. They will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

100. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. There are statutory time limits, which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 *per* Sedley LJ at [31-32]).

101. The fact that the Claimant was pursuing internal resolution by way of a grievance is a factor which may be taken into account, although it is not determinative (*Apelogun-Gabriels v London Borough of Lambeth* [2002] IRLR 116 at [16]).

102. In the context of discrimination cases, the importance of recalling not only what is done but the thought processes involved make it all the more likely that memory fade will have an impact on the cogency of the evidence (*Redhead v London Borough of Hounslow* UKEAT/0086/13/LA *per* Simler J at [70]).

<u>The burden of proof in discrimination cases</u>

103. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(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.**

104. The effect of these provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[2] He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance**

[2] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> **of probabilities, the Respondent had committed an unlawful act of discrimination.**
>
> **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

105. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court confirmed that a Claimant is still required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an act of unlawful discrimination. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense.

106. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at [2, 9, 11] held that the Tribunal should avoid adopting a 'fragmentary approach' and should consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

107. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

<u>Direct discrimination</u>

108. S.13(1) EqA 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.**

109. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

110. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].

111. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan v London Regional Transport* [1999] ICR 877 at 886).

112. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at [36], the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic.

113. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment' (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [35]). An unjustified sense of grievance does not fall into that category.

Discrimination because of something arising in consequence of disability: s.15 EqA

114. S.15 EqA provides as follows:

> **(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.**

115. The correct approach to a claim of this sort was considered by the Court of Appeal in *City of York Council v Grosset* [2018] IRLR 746 *per* Sales LJ (at [36] onwards):

> **'36. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability.**
>
> **37. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something" ...**
>
> **38. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something" ….'**

116. In *Pnaiser v NHS England* [2016] IRLR 170, Simler J accepted that:

> **'just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a S.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.'**

117. The Code of Practice offers the following explanation of what is meant by 'something arising in consequence of disability' for the purposes of s.15 EqA:

> **[5.9] The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to**

> **use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.**

118. The meaning of 'unfavourable treatment' was considered by the Supreme Court in *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2019] ICR 230 (at para 27):

> **'… in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.'**

119. It is then necessary to look to the employer's defence of justification. S.15(1)(b) EqA provides that the unfavourable treatment may be justified, if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question must be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (*Allonby v Accrington & Rossendale College & Others* [2001] ICR 1189 CA).

120. Justification requires the Tribunal to conduct an objective balancing exercise between the discriminatory effect and the reasonable needs of the employer (*Ojutiku v Manpower Services Commission* [1982] ICR 661 CA per Stephenson LJ at 674B-C, and *Land Registry v Houghton & Others* UKEAT/0149/14 at [8-9]). It will be relevant for the Tribunal to consider whether any lesser measure might have achieved the employer's legitimate aim (*Naeem v Secretary of State for Justice* [2014] ICR 472).

121. The time at which justification needs to be established is the point when the unfavourable treatment occurs (*Trustees of Swansea University Pension and Assurance Scheme v Williams* [2015] ICR 1197 EAT at [42]). When the putative discriminator has not considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification, although the test remains an objective one (*Ministry of Justice v O'Brien* [2013] UKSC 6 at [47-48]).

<u>Harassment related to disability</u>

122. Harassment related to disability is defined by s.26 EqA, which provides, so far as relevant:

> **(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 other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—**
> **…**
> **disability**
> **…**

123. The use of the wording 'unwanted conduct *related to* a relevant protected characteristic' was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. It is a broader test than that which applies in a claim of direct discrimination (*Unite the Union v Nailard* [2018] IRLR 730).

124. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 (at [47]) held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

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

125. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ (at [12]), referring to the above, stated:

> **'We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**

Discriminatory constructive dismissal

126. Where the dismissal relied on is a constructive dismissal, the employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that he was entitled to regard himself as discharged from his obligations under the contract.

127. An employee may rely on a breach of the implied term of trust and confidence. The applicable principles were reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 (at [14] onwards):

> **'The following basic propositions of law can be derived from the authorities:**
>
> **1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.**
>
> **2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".**
>
> **3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v* WM *Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the**

> **breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).**
>
> **4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).**
>
> **[…]**

128. The Court of Appeal gave further guidance in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 (at [55]):

> **'(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **(2) Has he or she affirmed the contract since that act?**
>
> **(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**
>
> **(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)**
>
> **(5) Did the employee resign in response (or partly in response) to that breach?'**

129. In determining whether there has been a breach of the implied term, the question is not whether the employee has subjectively lost confidence in the employer but whether, viewed objectively, the employer's conduct was likely to destroy, or seriously damage, the trust and confidence which an employee is entitled to have in his employer: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 (at [29]).

130. It is important to apply both limbs of the test. Conduct which is likely to destroy/seriously damage trust and confidence is not in breach of contract if there is 'reasonable and proper cause' for it: *Hilton v Shiner Ltd Builders Merchants* [2001] IRLR 727 (at [22- 23]).

131. In *De Lacey v Wechseln Ltd (t/a The Andrew Hill Salon)* [2021] IRLR 547, the EAT confirmed that a 'last straw' constructive dismissal may form the basis for a claim of unlawful discrimination even if the last straw itself is not discriminatory. It may amount to unlawful discrimination if some of the matters relied upon, though not the last straw itself, are acts of discrimination. Where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. Since it is clear that, in a discriminatory constructive dismissal, time runs for the claim from the date of the acceptance of the repudiatory breach, not from the date or dates of the discriminatory events, it follows that a discrimination claim arising out of a constructive dismissal may be in time even

if the discriminatory events that render the dismissal discriminatory are themselves out of time.

Conclusions

132. The effect of the guidance in *De Lacey* is that, where a discriminatory constructive dismissal is alleged to have occurred, the Tribunal must assess the merits of each discrimination claim, irrespective of when it occurred, decide whether there was discrimination and, if so, whether it formed part of a breach of the implied term, in response to which the Claimant resigned. Consequently, we will postpone dealing with time limits until later in the judgment.

Issue 2(a): direct discrimination and disability-arising discrimination - 'On 18 August 2018, Matthew Argent and Angus Swan not promoting the Claimant to Assistant Manager and/or not confirming her in that role and/or not providing her with a promised contract in the position of Assistant manager'

133. Dealing first with the s.15 EqA claim, in our judgement, it is not unfavourable treatment not to promote an employee, in circumstances where they are no longer asking for promotion but stating that they intend to leave the company.

134. Furthermore the 'something arising in consequence of disability' relied on by the Claimant was that she had 'experienced a further DVT, had an operation and required one week's further sick leave'. That is not why the Respondent did not progress the Claimant's promotion on 18 August 2018. They did not do so because she told them that she had been advised to leave the Respondent's employment, and that she intended to follow that advice, not that she required a further week's further sick leave. The claim fails on its facts.

135. I asked Mr Northall whether, if the Tribunal found that they did not progress the promotion because the Claimant had told them that she was leaving (which was something which arose in consequence of her disability), it could go on to consider the remaining elements of the cause of action. He submitted that it could not. Not only was it not the Claimant's case, she positively denied that she had said she would be leaving. In Mr Northall's submission, a tribunal may not uphold a claim which has not been advanced by a Claimant. We think that must be right. In any event, even if the Claimant had advanced a claim based on the 'something arising' being her decision to leave, we would have concluded that it was proportionate for the Respondent not to progress her promotion and the claim would fail at that stage as well: it would plainly be disproportionate for an employer to go to the lengths of promoting an employee, if that employee had already informed it that they would not be remaining in its employment. The legitimate aim would be 'ensuring opportunities are offered to employees who are ready, willing and able to undertake and benefit from the opportunity'; not promoting the Claimant would be reasonably necessary to meet that aim, when she herself said she did not meet those criteria; in those circumstances there would be no discriminatory impact on her.

136. For these reasons, the s.15 EqA claim fails.

137. The claim of direct discrimination also fails in the light of our conclusion above as to the reason why the Respondent acted as it did. We are certain that the Respondent would not have promoted a person without the Claimant's

disability, had s/he informed it that s/he would be leaving the organisation shortly.

Issue 2(c): direct discrimination and disability-arising discrimination - 'On or after 18 August 2018, Matthew Argent and Angus Swan preventing her from carrying out the Assistant Manager duties that she had been carrying out before her visit to Poland'

138. It is clear that after the meeting on 18 August 2018 the Claimant and Mr Argent agreed that she would work only her contracted hours and no weekends, in order to reduce the amount of physical work that she was doing. The Claimant also wanted to have weekends free in order to do some babysitting for a friend and to earn some extra money.

139. The Respondent did not 'prevent' the Claimant from doing her ADM duties; it accommodated her wishes, which included shorter hours and no weekends. For that reason, this claim fails on its facts. There is no evidence that the Claimant asked, or wished, to preform different duties. There was no suggestion in any of the contemporaneous documents that the Claimant was unhappy about the shifts that were allocated to her, or the duties she was/was not performing - until, that is, she changed her mind about leaving. Accordingly, there was no unfavourable treatment.

140. If that is wrong, the something arising which the Claimant relied on did not occur as described, and so the claim fails factually for that reason as well.

141. We are also satisfied that, if it were right that she had been prevented from doing the ADM duties, there is no evidence that the Respondent would have treated someone without her disability any differently, in circumstances where they were saying that they no longer had the capacity to do the role and needed to leave the company for that reason. As with the disability-arising claim, again there was no detriment in circumstances where the arrangement was consensual.

Issue 2(d): direct discrimination and disability-arising discrimination - 'On 6 September 2018, Matthew Argent and Angus Swan not changing their decision described within paragraph 2(a) after the Claimant quickly informed it that her doctors confirmed she could do the duties of Assistant Manager but appointing Mr Rahman a poor performer'

142. We are satisfied that the sole reason why, on 6 September 2018, Mr Argent and Mr Swan declined to change their decision about progressing the Claimant's promotion was because by that point the opportunity had already been offered to Mr Rahman, and they considered that it would be unfair to retract that offer. It had nothing whatsoever to do with the Claimant's disability, nor was it because of the 'something arising' which the Claimant relied on. Nor was there any evidence that Mr Rahman was a poor performer, or that Mr Argent offered him the opportunity because of their friendship.

Issue 2(b): direct discrimination, disability-arising discrimination and harassment related to disability - 'Matthew Argent asking the Claimant why she was still at work on an almost daily basis after 11 September 2018'

Issue 2(f): direct discrimination, disability-arising discrimination and harassment related to disability - 'Mr Argent, her manager, becoming unpleasant and hostile towards the

Claimant and ignoring her: not saying hello; making spiteful comments; and asking the Claimant why she was still there, almost daily after 11 September 2019'

143. We note that these allegations were barely particularised; they were nothing more than broad assertions. We are not satisfied that this conduct occurred as alleged. There was no reliable evidence that Mr Argent treated the Claimant in the unpleasant and hostile manner described in the allegation. The claims fail on their facts.

144. We have already found that there was a cooling in the relationship between the Claimant and Mr Argent, and that the Claimant was largely responsible for this: she responded petulantly when Mr Argent refused to revoke his offer to Mr Rahman, and later behaved in an unprofessional manner towards him (see para 80). We are satisfied that any change on Mr Argent's part was in no sense whatsoever because of, or related to, the Claimant's disability or something arising in consequence of it. It was solely because of the Claimant's behaviour which had nothing to do with her disability.

145. It is right that we were taken to a single text (para 76), in which Mr Argent asked for clarification about when the Claimant would be leaving. We are satisfied that the sole reason he did so was because he needed to know what the position was, in order to be able to plan. It is inherently unsatisfactory if an employee has announced a decision to leave but then appears to prevaricate. We are satisfied that Mr Argent would have asked the same question of any employee who had announced their departure, but then acted inconsistently with leaving.

146. If we are wrong about that, in relation to any coolness which Mr Argent showed towards her, we considered whether the purpose or effect of his conduct was to violate the Claimant's dignity, or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant ('the proscribed environment'). There was no evidence whatsoever that this was his purpose. Further, we are not satisfied that the Claimant subjectively perceived that her dignity had been violated or that she was experiencing the proscribed environment. Her principal feeling appears to have been anger and resentment towards Mr Argent for not complying with her wishes. In our judgement, those feelings did not meet the high threshold such as to amount to harassment related to disability.

Issue 2(e): direct discrimination and disability-arising discrimination - 'On or after 16 September 2018, Angus Swan refusing to provide the Claimant with a reference in order that she look for other assistant manager roles within the Respondent'

147. The Claimant confirmed at the end of her cross-examination of Mr Swan that she was no longer pursuing this allegation. We have already found that Mr Swan did not refuse to provide the Claimant with a reference.

Issue 2(g): direct discrimination and disability-arising discrimination - 'Delaying deciding the Claimant's grievance'

Issue 2(h): direct discrimination and disability-arising discrimination - 'Delaying responding to the Claimant's grievance appeal'

148. We have already found that there was no improper delay in dealing with the initial grievance or with the grievance appeal.

149. Moreover, we noted that, in cross-examining Ms McKenna, the Claimant did not put to her that process was discriminatory or related to her disability. The Judge asked her if she was still claiming that it was. She replied that she could not say that the actions were discriminatory but were 'maybe a little bit mean'.

150. Although we did not treat that as a formal withdrawal, it clearly undermined the basis of the claims. Insofar as there was any delay in the initial grievance, we have concluded that the sole reason for it was the extent of the investigation required; it was in no sense whatsoever because of, or because of something arising from, the Claimant disability. The fact that the appeal process was never completed was entirely because the Claimant did not lodge detailed grounds of appeal, despite being asked to do so, and then failed to offer dates on which she would be available to attend a hearing. The claims are not well-founded and are dismissed.

Issue 2(i): direct discrimination and disability-arising discrimination - 'Constructively dismissing the Claimant: the Claimant resigned in response to the above treatment'

151. Because we have found there was no discriminatory conduct, it follows that there cannot have been a discriminatory constructive dismissal and the claim is dismissed.

Jurisidiction

152. The claim was presented on 8 April 2019; the Claimant notified ACAS on 8 March 2019; any act or omission before 8 December 2018 is out of time.

153. The Claimant's last day at work was 1 October 2018. Because the claims relating to the grievance/grievance appeal, and the claim of constructive dismissal (the only acts in time) all failed, the earlier individual acts of discrimination cannot form 'conduct extending over a period', linked to an in-time act, because there is no such ac. They are out of time and the Claimant requires an extension.

154. Because the Claimant led no evidence in her witness statement to support an extension of time, without objection from the Respondent, the Judge asked the Claimant a number of open questions, to elicit any relevant evidence, before she was cross-examined. She explained that, for the point at which she lodged her grievance, she had assistance from a friend who was an HR manager at another company.

155. We considered whether it would be just and equitable to extend time in relation to the earlier claims and concluded that it would not. The Claimant was receiving advice from a person who, while not a lawyer, must have been familiar with time limits, given his role in HR. We think it likely that that the Claimant always knew of her right to bring a discrimination claim in Tribunal and must have learnt of the relevant time limits at the latest when she spoke to her friend in mid-October 2018. Yet she did not contact ACAS for a further five months. The delay is substantial; the Claimant has not advanced any good reason for it. Given that she was able to present a grievance, there was no impediment to her presenting a claim form. Although the fact that the Claimant was pursuing an internal grievance may be a factor in some cases, the Claimant stopped actively pursuing the process at the beginning of February 2019, yet still did not contact ACAS until over a month later. As for the balance of prejudice, given our

conclusion as to the underlying merits of the claims, the prejudice to the Claimant of time not being extended is less that it would otherwise have been; whereas the prejudice to the Respondent, given the passing of time and the effect on memories, remains significant. In all the circumstances, we do not exercise our discretion to extend time. Consequently, the Tribunal lacks jurisdiction in relation to issues 2(a) to (f).

Employment Judge Massarella

Date: 25 April 2022

APPENDIX: AGREED LIST OF ISSUES

1. The issues for determination are as follows.

EQA, section 13: direct disability discrimination

2. Has the Respondent subjected the Claimant to the following treatment:

   a. on 18 August 2018, Matthew Argent and Angus Swan not promoting the Claimant to Assistant Manager and/or not confirming her in that role and/or not providing her with a promised contract in the position of Assistant manager;
   b. Matthew Argent asking the Claimant why she was still at work [date TBC];
   c. on or after 18 August 2018, Matthew Argent and Angus Swan preventing her from carrying out the Assistant Manager duties that she had been carrying out before her visit to Poland;
   d. on 6 September 2018, Matthew Argent and Angus Swan not changing their decision described within paragraph 2(a) after the Claimant quickly informed it that her doctors confirmed she could do the duties of Assistant Manager but appointing Mr Rahman a poor performer;
   e. on or after 16 September 2018, Angus Swan refusing to provide the Claimant with a reference in order that she look for other assistant manager roles within the Respondent;
   f. Mr Argent, her manager, becoming unpleasant and hostile towards the Claimant and ignoring her: not saying hello; making spiteful comments; and asking the Claimant why she was still there [dates TBC];
   g. delaying deciding the Claimant's grievance;
   h. delaying responding to the Claimant's grievance appeal;
   i. constructively dismissing the Claimant: the Claimant resigned in response to the above treatment.

3. Was that treatment "less favourable treatment', i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others (comparators") in not materially different circumstances? The Claimant relies on the following comparators Mr Rahman and/or hypothetical comparators.

4. If so, was this because of the Claimant's disability and/or because of the protected characteristic of disability more generally? The Respondent will deny this and

contends that it did not appoint her as Assistant Manager because the Claimant had informed it she planned to leave.

EQA, section 15: discrimination arising from disability

5. Did the following thing(s) arise in consequence of the Claimant's disability: that in the summer of 2018 the Claimant experienced a further DVT and had an operation and required 1 week's further sick leave.

6. Did the Respondent treat the Claimant unfavourably as above at paragraph 1?

7. Did the Respondent treat the Claimant unfavourably in any of those ways because of any of those things i.e. that the Claimant experienced a further DVT and had an operation and required one week's further sick leave?

8. If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following aims:

    - Ensuring the fair exercise of managerial discretion
    - Preserving trust and confidence in R's relationship with its employees
        - Which includes:
            - Respecting an employee's wishes
            - Honouring agreements made with employees
            - Alternatively, not reneging on promises made
    - Protecting the health and safety of employees
    - Maintaining a stable workforce
    - Ensuring the fair allocation of opportunities for promotion
        - Which includes:
            - Ensuring opportunities are offered to:
                - employees who are ready, willing and able to undertake and benefit from the opportunity
                - employees who are likely to provide effective service in the role
    - Ensuring employee grievances are investigated and resolved comprehensively and effectively.

EQA, section 26: harassment related to disability

9. Did the Respondent engage in conduct as set out at paragraph 2(b) and 2(f).

10. If so was that conduct unwanted?

11. If so, did it relate to the protected characteristic of disability?

12. Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an

intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Time limits / limitation issues

13. Were all of the Claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010?

14. Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; and whether time should be extended on a "just and equitable" basis.

15. Given the date the claim form was presented and the dates of early conciliation, the Respondent will argue that any complaint about something that happened before 8 January 2019 is potentially out of time.

Remedy

16. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded, including the issue of whether the Claimant's employment would have ended in any event for lawful reasons. A further specific remedy issue that may arise includes: did the Respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992?