

EMPLOYMENT TRIBUNALS

Claimant: Miss G Raja

Respondents: (1) Starling Bank Limited
(2) Mr M Newman

Heard at: London Central
(by Cloud Video Platform)

On: 6,7,8, and 12 July 2022

Before: Employment Judge Joffe
Mr M Simon
Mr D Clay

Appearances

For the claimant: In person

For the respondents: Ms R Tuck, Queen's Counsel

JUDGMENT

1. The claimant's claim that she was unfavourably treated by the respondents because of something arising from disability in being dismissed, contrary to Section 15 Equality Act 2010, is upheld.
2. The claimant's claim that she was unfavourably treated by the respondents because of something arising from disability in the respondents not investigating her allegations of discrimination, contrary to section 15 Equality Act 2010, is not upheld and is dismissed.
3. The claimant's claim that she was unfairly dismissed contrary to section 100(1)(e) Employment Rights Act 1996 is not upheld and is dismissed.
4. The claimant's claim that she was subjected to a detriment contrary to section 44(1)(e) of the Employment Rights Act 1996 in the respondents not holding a meeting to discuss her health and safety concerns and instantly dismissing her on 9 March 2020 is upheld.

5. The claimant's claim that she was victimised contrary to section 27 Equality Act 2010 is not upheld and is dismissed.

REASONS

Claims and Issues

1. The issues had been agreed at a case management hearing before Employment Judge Davidson on 19 November 2020. The claimant wished to make some changes to the List of Issues. These did not go outside the ambit of her claim form and Ms Tuck did not suggest the respondent was unable to deal with the issues as amended or prejudiced by them. In those circumstances, we allowed the list of issues to be amended and it was as follows:

The claimant's disability (asthma) and the respondent's knowledge of that disability were not in issue.

1. Discrimination arising from disability (s 15 EqA)

a. Was the claimant treated unfavourably – i.e. dismissed – because of something arising from her disability?

b. The claimant says the 'something' being: (para 5.1.1 at page 50): "the claimant's past and turbulent health condition, disability related sickness absence, likely future time off work, her likely need for workplace adjustments such as working from home, social distancing, her likely need to self-isolate; and her propensity to cough over colleagues at work" which arose in consequence of her disability.

c. The claimant says the 'something' being: (para 3.2 at page 49, A3(b) claim form at page 15) asking for a discussion with the line manager, the second respondent, about her medical condition in response to the first respondent's email of 06 March 2020, which arose in consequence of her disability.

d. The claimant says the 'something' being: (A4, A6, B1 and B2(j) claim form at page 15 and 16) her ignored grievance and appeal letter dated 11 March 2020 and 23 March 2020 respectively, sent to the respondent which alleges the protected act, disability discrimination, which arose in consequence of her disability. The unfavourable treatment being the respondent's failure to act and investigate the allegation of discrimination following dismissal, despite providing appeal rights.

2. Automatically unfair dismissal for taking an appropriate step in a health and safety case (s100(1)(e) ERA 1996)

a. Was the reason or principal reason for dismissal that, in circumstances of danger which the claimant reasonably believed to be serious and imminent, she took appropriate steps to protect herself?

b. The “step” relied upon (para 7.1, page 51) is “asking for a discussion with the line manager, the second respondent, about her medical condition which she was very concerned about.”

3. Detriment for taking an appropriate step in a health and safety case, (s 44(1)(e) ERA (now s 44 (1A) (b) ERA))

a. Was the claimant subjected to a detriment on the ground that, in circumstances of danger which the claimant reasonably believed to be serious and imminent, she took appropriate steps to protect herself?

b. The “step” relied upon (para 7.1, page 51) is “asking for a discussion with the line manager, the second respondent, about her medical condition which she was very concerned about.”

c. The detriment (at para 7.4.1 and 7.4.2, page 51) is alleged to be the respondents “retaliated against the claimant....by subjecting her to instant dismissal” and “deliberately failed to have a separate meeting with the claimant to specifically discuss her health and safety concerns.”

4. Victimisation (s.27(1)(a) and s.27(2)(d)) EqA

a. Was the claimant victimised by the respondents by subjecting the claimant to a detriment because the claimant did a protected act by making an allegation that the respondents have contravened the Equality Act?

b. The claimant says the protected act being (at 9.1.1, page 53 and A4, A6, B1 and B2(j) claim form at page 15 and 16): “making an allegation the respondents were in breach of the Equality Act 2010 within her grievance and appeal letter dated 11 and 23 March 2020,” namely disability discrimination.

c. The claimant says the detriment being failure to act and investigate the allegation of discrimination following dismissal, despite providing appeal rights, and subjecting her to further unfavourable discriminatory treatment.

Findings of fact

The hearing

2. We had an electronic hearing bundle of some 1368 pages. Many of these documents were not referred to by the parties as they concerned mitigation. We read the documents we were directed to by the parties.

3. The claimant produced a witness statement and gave evidence on her own behalf. For the respondents we heard from:
 - a) Mr M Newman, chief administrative officer, general counsel and company secretary;
 - b) Ms S Yallop, chief people officer.
4. We also had a witness statement from Ms H Swain, senior people partner, for the respondents. Ms Swain was abroad and unable to give live evidence, as permission from the country she was in could not be obtained in time for the hearing.
5. We agreed a timetable with the parties and they were able to work to that timetable. There were some technical issues but not such as to prevent the hearing being conducted fairly.

The parties

6. The first respondent is a bank which has been rapidly growing. At the time of the claimant's employment, it had about 1000 employees; it now has now nearly 2000. In 2017, it only had 70 people. The second respondent said that the first respondent had not historically had a 'regimented' structure because it had grown so rapidly.
7. The second respondent is chief administrative officer, general counsel and company secretary for the first respondent. He is a qualified solicitor and is responsible for all the legal affairs of the first respondent. He has been general counsel since 2015, working closely with Ms A Boden, the CEO. He leads a function which now has about 40 staff.
8. The claimant is a qualified solicitor, having qualified in 2010. Prior to her employment by the first respondent, she most recently worked as deputy company secretary at a building society and had previous posts at banks as a regulatory lawyer. At the time of her appointment, she was studying for ICSA fast track exams to qualify as a company secretary.

Policies and procedures

9. We were provided with the first respondent's company handbook, which included an equal opportunities policy with the following section:

DISABILITIES

If you are disabled or become disabled, we encourage you to tell us about your condition so that we can consider what reasonable adjustments or support may be appropriate.

10. There was an ill health reporting procedure and a long term absence procedure. Otherwise the performance management process was part of the disciplinary procedure; it appeared from this that performance management would be dealt with in much the same way as misconduct, by a system of warnings.
11. The first respondent also used a system called Small Improvements: this seemed to be for continuous monitoring of performance in relation to staff at a lower level than the claimant. The second respondent did not use this system.
12. There was no bank-wide policy or process for salary increases at material times.
13. We saw no written probation policy. We were told there had been a standard six month probation period. During the claimant's employment, the period had been reduced to three months. We were told that it had since been increased to six months again.

The first respondent's HR function

14. This was headed by Ms Yallop, who reported to the second respondent. There were dedicated senior people partners for different areas. Ms Swain was the partner for the second respondent's area of the business. There were a total of about ten HR employees.

Policy of recording / file notes:

15. Ms Yallop's evidence was that file notes were sometimes kept by HR but it was not clear in what circumstances this happened. None were kept by Ms Yallop or Ms Swain of any discussion they had with the second respondent about the claimant's performance.

Evidence about disabled employees

16. The second respondent told the Tribunal that he had made reasonable adjustments for a dyslexic employee and adjustments for an employee with diabetes

Chronology

17. In the spring of 2019, the second respondent discussed with Ms Boden and Ms Yallop the need to recruit a deputy company secretary to assist with the company secretarial element of his role. The first respondent was also recruiting for a corporate lawyer at the same time. The second respondent said that the intention was to recruit someone with the potential to take over the company secretary role in full. It was important that candidates had the potential to grow.
18. There were 49 applicants for the role, of whom the respondents interviewed five, including the claimant.
19. On 17 May 2019, the claimant was interviewed by the second respondent. There was a short written exercise and a discussion about the role and the answers to the test.
20. There was an issue between the parties as to whether the second respondent said during the interview that the claimant would have to hire a secretariat assistant.
21. The claimant says that the second respondent informed her that he was planning to grow the company secretariat function and the role would require hiring a secretariat assistant, due to business expansion plans. He asked her if she would be comfortable with hiring an assistant to support with minute taking for executive committees and general secretariat duties. She said that she said she would be happy to support with hiring and training an assistant.
22. The respondents' case was that the claimant at a later date herself suggested hiring an assistant and they acceded to the request in order to support the claimant's performance. We return to this issue later but in brief we preferred the claimant's account which was consistent with the timeline.
23. The claimant said that the second respondent also asked if she would be comfortable supporting behind the scenes rather than being the company secretary as this was his role. She said that he said he was hiring a corporate lawyer to handle corporate transactions and employee share schemes. We accepted that evidence.
24. The second respondent said that he emphasised that he wanted an appointee to 'grab the role' and 'make it their own'. The claimant accepted in cross examination that he had indicated he wanted someone proactive, but said that was true of any such role. We concluded that the second respondent had said something about the appointee grabbing the role and making it their own.

25. The claimant told the Tribunal that the second respondent took detailed notes of her responses. No notes of the interview appeared to have been retained. One of a number of issues the claimant raised about disclosure is the lack of interview notes.
26. There was an internal email dated 3 April 2020 in which Ms Swain told another member of staff, in relation to the claimant's later Data Subject Access Request:

'I have reviewed our systems and we have no data on Gulnaz at all other than CV and interview notes which I can provide?'
27. The respondents said that 'interview notes' were simply notes on the Workable recruitment system, which we understood to be a type of software the first respondent used.
28. On 30 May 2019, the second respondent sent an email to Ms Boden asking for written approval for the claimant and a corporate lawyer to commence employment.
29. On 31 May 2019, the claimant was offered the role on a salary of £75,000 per annum. Much was made by the respondents of the claimant being highly paid. We note that the salary is not an especially high salary in the banking sector.
30. On 1 July 2019, the claimant commenced employment as deputy company secretary. The second respondent was her line manager and she had a range of duties including minuting a number of executive and board meetings and other secretariat and governance functions.
31. We could see from documents that in August 2019, the recruitment process for an assistant for the claimant commenced. The claimant contacted the first respondent's recruitment team and interviewed candidates. She decided to appoint Ms M Fox by September 2019. Ms Fox had a three month notice period to work out in her existing role and did not start until December 2019. It was clear to us that the second respondent's account that the claimant had asked for an assistant later in the autumn and he had agreed to provide her with one to help her out was incorrect. We accepted the claimant's evidence that there had always been a proposal to recruit an assistant for her and this was discussed during her interview.
32. On 6 August 2019, the claimant passed her corporate secretarial practice exam.
33. On 8 October 2019, the claimant passed her probation. There was no discussion or assessment. She received an email with a letter attached. The email from the second respondent read:

Gulnaz

See below and attached - well done!

Matt

34. The letter read:

As you are aware, your employment with Starling Bank is subject to a probationary period. I am pleased to confirm that you have successfully completed your probationary period.

...

I would like to take this opportunity to congratulate you on your hard work to date and look forward to continuing to work with you in future.

35. The second respondent's evidence was that at this point he felt the claimant's performance was satisfactory but that she never extended herself; the example he gave was that board meetings started at 8:30 am. He would be in at 7:45 am checking that the room, communications systems and refreshments were ready. He said that he appreciated not everyone can turn up that early but also said there was a 'lack of ownership' by the claimant. He said she would turn up at 8:25 am.
36. The claimant accepted she did not turn up until shortly after 8 am unless there were issues with the underground, in which case she might be a bit later; she said that it was said not possible for her to turn up earlier than that. She said that she would have made sure everything was ready in advance and had total faith in the utilities team. There was no suggestion in evidence that the claimant had been asked to arrive earlier or that she was not working her contracted hours.
37. The second respondent said that the claimant's performance was acceptable but not dynamic. He said that around this time he began to have doubts about her suitability for the role. She was 'a very nice lady and seemed positive about her role with the Bank, she did not perform to the level I expected of her and certainly did not seem to be grabbing hold of the role and making it her own.' He said that he assumed that she was still settling in to a new workplace.
38. There was no probation discussion and no one-to-one meetings. The second respondent said there would be lots of feedback on specific matters and regular discussions but at the time he was not having regular one-to-ones with staff. Nothing was said by the second respondent to the claimant about any concerns about her performance. It was difficult for the Tribunal to accept that there were any significant concerns about the claimant's performance up to and including the date she passed her probation given the contemporaneous documents and the fact that no issues were raised with the claimant.
39. In November 2019, the second respondent said that he began to really question her suitability for the role and the work involved. He says he was probably quite

demanding of his team in terms of the quality of work they turn out and that detail is really important to him.

40. The second respondent accepted there were examples of positive feedback on the claimant's work, some of which were in writing and in the bundle, but said that these were not for the most complex aspects of the role. He said generally that he was still doing all the strategic work and was disappointed the claimant showed no interest and aptitude for this. He did not however give any clear specifics to the Tribunal about what it was the claimant was failing to do.
41. The claimant said that the second respondent was demanding about people being present and on time and that it was a long hours culture; the second respondent denied that.
42. In his own witness statement the second respondent suggested that it was about this time the claimant asked for an assistant and he authorised her to recruit one to support her, although he did not feel the role was justified.
43. As we have said, we rejected that evidence, which was inconsistent with the contemporaneous documentation.
44. The second respondent gave very positive evidence about Ms Fox. She worked really hard and showed signs of development. He said that the claimant left on time or before almost every evening but Ms Fox worked late every evening and had a great attitude.
45. The claimant said she was not able to stay in the office beyond her contracted hours but would log on and work later in the evening. She gave a couple of examples of very late evenings she worked.
46. It appeared to us from this evidence that employees working long hours in the office was important to the second respondent. There was no good evidence that the claimant was not completing her tasks. It may be that the second respondent was hoping the claimant would build the role in a way which did not happen but in the absence of documented meetings between the claimant and the second respondent, it is difficult for the Tribunal to have a sense of whether the second respondent was conveying to the claimant what his expectations were. It appeared from the claimant's evidence he was not doing so, and in the absence of any documentary evidence to suggest any substantial feedback, we concluded that he was not.
47. Ms Fox commenced on 9 December 2019. We saw notes of the one-to-ones the claimant carried out with Ms Fox.
48. On 30 December 2019, the claimant received a letter from Ms Boden about her salary increase:

I would like to advise that in recognition of your outstanding contribution to Starling, your salary will increase to £76,000 with effect from the 1st of January 2020.

Please be aware that all decisions affecting salary are made at the Company's discretion; this is not to be seen as setting a precedent and no future obligation should be understood from this.

Please also be advised that matters relating to salary are confidential in nature and should not be discussed with other employees.

Thank you for your hard work to date.

49. The second respondent said that he gave all of his team a pay rise that year and had decided to review all salaries at the same time of year irrespective of when the person joined. He said that the claimant's increase was the lowest in team (apart from one person set a specific target which that person then met) and significantly less than a pro rated 5%. He said that the reference to 'outstanding contribution' was because it was a standard letter used for all employees receiving a salary increase.
50. We did not see any letters for other employees which confirmed that the letter was a standard template. We could not understand why, if the claimant's performance had genuinely led to her receiving a reduced salary increase, the respondents took no care to convey that in the letter and or to convey to the claimant that there were issues with her performance. Ultimately, we were not able to accept that there were any significant performance concerns by December 2019. For convenience, we set out in a single section later in this Judgment, the chronology of performance concerns asserted by the respondents.
51. In January 2020, the claimant said that Ms Boden told her in conversation 'you are doing such a good job'. We were given no context for this remark and did not know what it referred to specifically but it seemed to us unlikely the remark would have been made in any context if the claimant's performance had been felt to be seriously of concern.
52. In late January 2020, Ms Fox had an absence for norovirus. It was suggested to the claimant that the second respondent would have been aware that Ms Fox was off sick because they all worked in an open plan office. It was clear that it was the claimant who was managing the absence and it was not clear to us whether the second respondent would have been aware of Ms Fox's absence.
53. In February 2020, the claimant passed the ICSA chartered governance qualifying programme and on 24 February 2020, the claimant was admitted as a graduate of the chartered governance institute.

54. In late February – March 2020, the pandemic was developing and government guidance began to be issued. The claimant referred us in particular to guidance that those who were more vulnerable to severe symptoms of Covid because of underlying health conditions should try to work from home.
55. On 6 March 2020, Ms Fox left the employment of the first respondent. She spoke with Ms Swain. Ms Swain told the second respondent that Ms Fox made reference to her relationship with the claimant. The second respondent said that he asked Ms Fox why she was leaving and she said ‘manager problems’ He asked her “manager me? Or manager Gulnaz?” She replied “Manager Gulnaz.”
56. The second respondent also commented that he felt that the claimant was only concerned with replacing Ms Fox and not about why she left or whether she could be retained. He did not initiate any discussion with the claimant about those matters.
57. The claimant recorded on the Slack system about Ms Fox:
Gulnaz Raja [2020-03-03T09:37:46Z[UTC]] Mon 2 March - MF informed she would like to provide notice to leave. MF felt the organisation was not a fit and she had tried to give this time. She felt the culture had been a bit of a shock for her and difficult to adjust. She also stated matters with the wider legal team were unsustainable and didn't feel comfortable with them. She also stated OJ was negative and sometimes aggressive and never acknowledged. I mentioned it was important to feel happy when coming to work and sometimes an organisation may not be a fit. She felt a larger organisation would be a better fit and had accepted a position with Deloitte
Gulnaz Raja [2020-03-03T13:56:01Z[UTC]] people are busy all the time, its boring and dull, no one makes any effort to get dressed up
58. The claimant said that she had had one-to-ones with Ms Fox (and we saw documentary evidence of these) and encouraged her development. Slack messages between the two suggested the relationship was cordial.
59. In Ms Swain’s witness statement, Ms Swain said that Ms Fox told her that her primary reason for leaving was that she found the claimant difficult to work for. Ms Swain conducted an exit interview which was informal and no notes were taken.
60. We concluded that Ms Fox very likely told the claimant that she was leaving for the reasons the claimant recorded. She may well have told the second respondent and Ms Swain that she was unhappy about her relationship with the claimant. In the absence of any recording of concerns or investigation or discussion with the claimant, we were unable to conclude that any problem with the claimant’s relationship with Ms Fox could fairly have been considered by the respondents to be the claimant’s fault.

61. On 6 March 2020, Ms Yallop wrote to staff:

All

I'm sure no-one has avoided the increased media attention about UK cases of COVID-19 in recent days. We are continuing to follow the updated guidance from the Department of Health and Social Care and consider how we carefully manage this situation at Starling.

In addition to the travel guidance below, any travel and or close contact with anyone who has recently travelled to any region of Italy is now included in the government advice. Therefore please let your manager / People Partner know if you have travelled or have plans to travel to Italy or if you are in close contact with anyone who is.

...

Finally, if you have any underlying medical conditions which gives you any cause for concern, (for example which affect your respiratory system; your immune system etc), then again please speak to your manager or People Partner for additional guidance.

If you have any questions please contact your People Partner or local People team member:

...

Our Employee Assistance Programme via perkbox <https://starlingbank.perkbox.com/perks/info/health-assured> is also available

Claimant's health

62. It is relevant at this point to interpose the evidence we had about the claimant's health condition and what the respondents knew about it.
63. The claimant has asthma which is exacerbated by environmental conditions and by respiratory infections. The claimant said that she developed a persistent cough in October 2019 due to the air conditioning in the office being very cold. She raised concerns about the air conditioning with the first respondent's facilities department on 2 July 2019, 12 July 2019 and 5 September 2019 but, although her concerns were acknowledged, there was no change. On 30 September 2019, the claimant wrote to the second respondent on Slack asking if she could have his old desk to get away from the air conditioning vent. There was no response from the second respondent.
64. The second respondent said that the claimant did not mention asthma; he thought the request for a move was simply to get to a warmer area away from

the vent. He thought she took the desk anyway, although he did not reply to the message.

65. In about October 2019, the claimant said that she discussed the air conditioning with the second respondent and he said, 'Are you trying to say that this is my problem as I'm responsible for facilities'. She said she said, 'No, it's because it has an impact on my asthma, that's why I'm coughing.'
66. In cross examination, the second respondent said: 'Had this conversation occurred, then I am pretty certain that I would have done something about that. I don't recall that conversation at all'.
67. It made sense to the Tribunal that the claimant would have escalated the matter to the second respondent at this point since she had raised it with facilities a number of times and had no real response. We concluded she had explicitly referred to her asthma given the email which she sent on 7 November 2019 described below. Given the fact that the second respondent had managed to forget most of what the claimant had said about her health by the time the respondents submitted their response to the proceedings, including overt references in written materials to the claimant's asthma, we did not put much weight on the fact that he could not recall this discussion.
68. On 7 November 2019, the claimant made an appointment with her GP due to her persistent cough and emailed the second respondent:
I will need to wfh tomorrow please. I have a chest infection so will need to see my GP to change my inhalers.
69. We note that the reference to inhalers makes best sense in the context of a previous reference by the claimant to having asthma.
70. There was no response from the second respondent. It seemed unusual to the Tribunal that a manager would not at least acknowledge that an employee was unwell and express concern.
71. The claimant said that at this time she used cough sweets and inhalers in meetings. She would apologise about coughing and explain she had asthma. She might use an inhaler two or three times in a meeting. The respondents' witnesses said they had no recollection of those behaviours and the coughing.
72. Between 16 and 20 December 2019, the claimant was on sick leave. She sent various emails to the second respondent. On 16 December 2019, she wrote:
Hi, I'm unable to attend work today due to suffering with flu.
73. There was no response from the second respondent.

74. On 17 December:2019 in the morning, the claimant wrote:
Still unwell today with flu and unable to attend.
In the afternoon she wrote: *I'm unlikely to be back tomorrow - very unwell with fever and troublesome cough. I'll keep you updated.*
75. There was no response to that email.
76. The claimant said that she did update the second respondent but that email was not provided on disclosure. She said that she would have said at that point that her problems were to do with asthma. The claimant said that she offered to dial in to the board meeting on 20 December 2019 and that she did dial in and was not acknowledged by the second respondent. We accepted that the claimant had dialled in to the meeting.
77. The second respondent that said if there was no email, there had been no update. No update might have been necessary as it was very close to Christmas.
78. We did not think that the respondent would have repressed a single email and concluded that there was no such email. It was quite likely that the claimant had updated the second respondent in some other way, possibly by way of a Slack message which had not been retrieved.
79. The second respondent was cross examined about not responding to these emails and not making further enquiries. He said that he trusted people to get on with the job, and if they were off ill to keep him updated and let him know when they were back. He would not pry about medical issues which are sensitive, especially when there was a gender difference. It did not indicate a lack of care on his part. He said that the claimant was quite private. He did not conduct return to work interviews and trusted employees to return to work when ready. That was the culture. He ordinarily would ask how someone was when they came back to work. When the claimant returned to work he assumed that she was OK.
80. We were not satisfied with this as a full explanation of why the second respondent failed to respond to communications from the claimant about her health. It seemed to us that it is a usual part of managerial responsibilities to at least express concern and extend an offer of support to an employee who reports being unwell. Human beings regularly express concern or make general enquiries about one another's health without needing to pry into sensitive details or being seen as doing so.
81. On 23 December 2019, the claimant returned to the office but had not made a full recovery. The second respondent made no enquiry about her health on her return.

82. On 24 December 2019, the claimant attended work. She said that she also worked from home on Christmas and Boxing Day and attended the office on 27 December 2019. She attended the office on 30 and 31 December 2019 and also attended a GP appointment on 30 December.
83. On 3 January 2020, the claimant emailed the second respondent:
- I have two medical appointments next week (Tuesday and Thursday) in relation to asthma so will need to wfh due to the timing. Sorry, I couldn't rearrange these to be on the same day.*
84. There was no response from the second respondent.
85. The claimant told the Tribunal that the lack of response felt punishing and that the second respondent was indicating that he was not happy. She said that he was not responsive about health matters but was responsive in relation to work.
86. The claimant said that the respondents should have made the connection between her earlier complaints and asthma at this point as she had had a persistent cough for four months and used inhalers openly in meetings.
87. The claimant said that in early January she asked the second respondent if she could work from home to complete some urgent work as her persistent cough was making her feel unwell and she was suffering from fatigue. She said he refused her request.
88. The second respondent's evidence was that he did turn down a working from home request from the claimant on one occasion but she did not give a reason for her request. The first respondent's policy was generally to work in office. It was an office culture, a team culture, he said.
89. We accepted the claimant's evidence that she would have given a reason for wanting to work from home. She had been sick and she had been open about being sick and having medical appointments.
90. On 13 January 2020, the claimant had a further medical appointment.
91. On 24 January 2020, there were Slack messages between the claimant and the second respondent:
Claimant: : I'll send the email I hear back from passageways which should be Monday. Also I have a hospital appointment on Monday so will need to wfh pls.
Second respondent: *ok*

92. The claimant cross examined the respondent on whether he thought he should have enquired about her third hospital appointment in a month, or referred the matter to Ms Yallop or Ms Swain; he said could not remember what he thought at the time.
93. On 27 January 2020, the claimant had a medical appointment including a chest Xray.

Performance concerns to January 2020

94. We heard evidence from both parties about what the respondents said were the concerns about the claimant's performance. Up until January 2020, these were as below.

November 2019

95. The second respondent said that an email exchange which we were shown indicated a failure by the claimant to know and understand the identity of director. He said that there was a fundamental lack of knowledge or understanding of vital information; he said 'if I am honest I would say that from this point onwards I began to question whether she should stay with the bank'. He did not investigate the matter with her or raise his concern. The claimant said in evidence that she knew who the directors were as she included them in every set of board meeting minutes. Looking at the email exchange it appeared to us that the second respondent had misread a short email by the claimant which was a bit sloppily expressed but that she did know who the directors were and this would have been apparent if the second respondent had raised the matter with her.
96. We saw a redacted document produced by the respondents which looked like this:

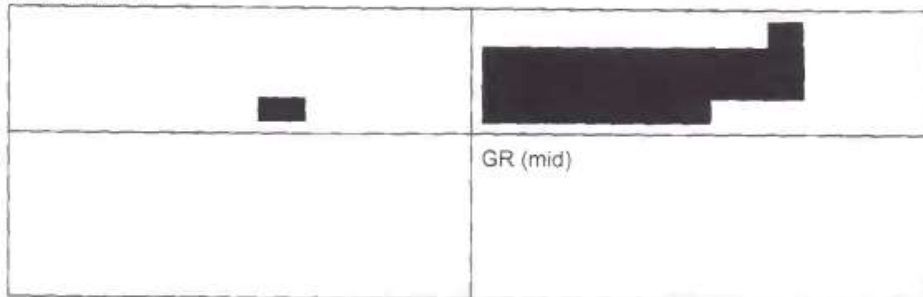
Matt Newman



Gulnaz Raja

- Hiring more junior person to support her so she can focus on more technical areas

↑Performance



← Behaviour/Attitude →

97. Ms Yallop’s evidence was that this document was created in late 2019, as part of a discussion about succession planning with Ms Boden and the second respondent. The second respondent did not recognise the document. It is a graph of employees’ performance and attitude. It was said by the respondents to show that the claimant (‘GR’) was below average in relation to performance. We were not persuaded that was the case because the ‘mid’ in brackets seemed to suggest she was in the middle. Ultimately we did not feel we could derive very much from the this document, given how little we were told about how it was formulated and what information had fed into it.

December 2019 board minutes and feedback

98. The second respondent gave evidence that key policies for approval were not included in the minutes, timings did not add up and attendees were wrong. He said that he discussed these issues with the claimant, it appeared in early January. The claimant said that she did not recollect a discussion to that effect. We were shown a handwritten note made by the second respondent which records the issues. It was not part of the claimant's HR file. In evidence the second respondent said that he wrote the issues on a piece of paper and then must have put the piece of paper in a drawer.
99. We accepted that the second respondent had some concerns about the minutes but we had no clear evidence as to whether those concerns were justified.

Reporting work in December 2019

100. The claimant had been assigned work on something called a close controllers report. The second respondent said that she did not progress the report and did not come back to him as her line manager to say either she did not understand the request or have capacity to complete it; she just did not do it or discuss it.
101. The claimant's evidence was that this report was not due until 31 March 2020. It was not a large piece of work and would not need to have been started by 9 March 2020. The second respondent did not raise the matter with her but she approached him about it in January and February 2020. She was told to concentrate on other matters. The work was 'on her radar' and in her calendar and would not have been forgotten.
102. We accepted the claimant's account. It was clear that the issue was not raised with the claimant at the time and it seemed improbable to the Tribunal that the second respondent would not have mentioned to the claimant an important piece of work which he genuinely felt was being neglected.

Errors in January 2020 board pack

103. There was a change to the name of the file references for some board papers made on the day of the board meeting which the second respondent said would reflect poorly on him as company secretary if they were not correct. He wrote to the claimant:
You just changed all the refs on my docs in the board pack? Change them back URGENTLY
- 104 .The claimant wrote back:

*Sorry was going by your board approvals table
I'll change now*

105. The claimant's evidence was that she was trying to support with the board pack process by naming the electronic files so they aligned with references in the board approvals table. She did not change the documents themselves.
106. It appeared to the Tribunal that the claimant had attempted to take a proactive step which the second respondent felt was a wrong step. It was clearly something which irritated the second respondent at the time but it was not a large issue.

End January 2020 power of attorney document

107. The second respondent said that this should have been a very straightforward task but what the claimant produced was very poor; there were drafting errors and careless mistakes. He said that he took a significant amount of time to go through the document with her to explain what was wrong.
108. The claimant told the Tribunal that the issues were with the existing template and the second respondent did not raise concerns with her.
109. Again, in the absence of documentary evidence, we concluded that the second respondent had been dissatisfied with the document but had not explicitly raised his concerns with the claimant and there was insufficient evidence before us to determine whether the concerns were significant.
110. Two other general performance matters were raised by the respondents. It was suggested that the claimant had failed to work on a company secretary handbook and failed to work on employee share schemes. There was such a paucity of evidence from the respondents on these matters, both of any deficiency and that any issue was raised with the claimant, that we were unable to conclude that there were any genuine significant performance concerns about these matters.

Resumed chronology of events

111. The second respondent said that his frustration with the claimant's performance was growing by January 2020. Because of the nature of the errors and apparent lack of care, he had little confidence she could improve. He discussed his concerns with Ms Boden and Ms Yallop. These discussions were not documented by anyone. The second respondent said that they discussed whether to let the claimant go. He said he still wanted to give her the opportunity to improve.

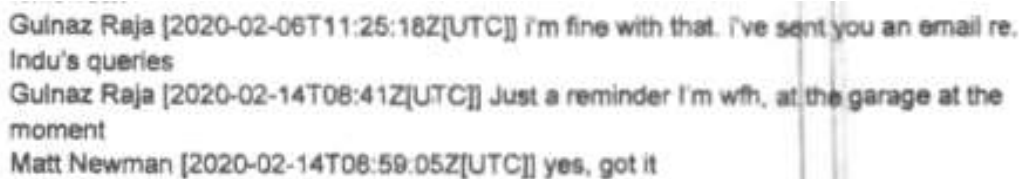
112. On 6 February 2020, the claimant emailed the second respondent, in the context of a Tube strike:

I've been waiting nearly an hour now and jubilee, metropolitan, even Thameslink - not running. I'll be wfh instead.

113. She received no response and she worked from home that day.

114. 11 February 2020, the claimant emailed the second respondent: *I have an MOT booked in for Friday and will need to wfh for handover and collection please.*

115. There followed some Slack messages:

A screenshot of a Slack conversation. The messages are as follows:
Guinaz Raja [2020-02-06T11:25:18Z[UTC]] i'm fine with that. i've sent you an email re. Indu's queries
Guinaz Raja [2020-02-14T08:41Z[UTC]] Just a reminder I'm wfh, at the garage at the moment
Matt Newman [2020-02-14T08:59:05Z[UTC]] yes, got it

February 2020 ongoing performance criticisms

116. On 4 February 2020, at 17:35 (or just after the end of the claimant's usual / contracted working day, the second respondent sent her an email arising from some correspondence he had been engaged in with someone else about a document: *Pls check this.*

117. The second respondent said that the claimant did not check the document and just left the office.

118. The claimant said that she had not been included in the previous email correspondence and was not told there was a task which needed to be done urgently before she left for the day. She left at 17:30 and saw emails when she got home; she had not been copied in to earlier chains and was working through these but saw that at 20:58, the second respondent messaged the person the document was from:

Thanks for this – this is fine. No further questions

The need to do the work had gone.

119. We concluded that the second respondent's irritation arose from the claimant leaving the office at 17:30.

120. In early February 2020, the claimant was asked to work on a non disclosure agreement. The second respondent said that these were short documents which should have taken an hour but took the claimant several hours. When she did produce the NDA, there was no explanation or rationale for changes made to a template so the document was of little help. He said that in respect

of a further NDA, she spent an entire day drafting one from scratch; he said that this showed a lack of awareness that they had precedents which meant an NDA could be prepared in around 15 minutes.

121. We heard evidence from the claimant disputing what the second respondent said in some detail. There were no documented concerns raised and ultimately all we could conclude on this issue was that the second respondent had had some concerns about the NDAs which were not raised and explored with the claimant but we could reach no conclusion that these were justified.

122. On 14 February 2020, the claimant emailed the second respondent about a stock transfer form:

We will need to arrange for JTC as transferor to sign this (page 1 and 2) Shall I get this done by Marcus on Wednesday? (Craig asked for the share certificate to be signed by Marcus on Wednesday rather than posting).

Also, is the consideration for less than £1000? If more, it will need to be filed at HMRC too.

123. The second respondent said that the claimant was wrong to say that a stock transfer form had to be filed with HMRC. She asked if the consideration was less than £1000 when he says she should have known this information. The second respondent described this as a fundamental lack of knowledge which he would not have expected from a junior assistant company secretary and which demonstrated to him that the claimant was not capable of progressing in a company secretary role. She was not relieving him of work but creating work

124. The claimant said that the transfer form needed to be sent to HMRC as there was a requirement to pay stamp duty if the transaction was over £1000. She said that she had asked the second respondent about his thoughts on the process previously after receiving the stock transfer form and it was important to ask the question.

125. Again, the respondent did not satisfy us that there was an error by the claimant. Had the matter been discussed with the claimant, it may be that she would have addressed his concerns; but there was no discussion.

126. The second respondent said that the claimant failed to maintain the first respondent's structure chart. It was her job to maintain it. He said that she would often ask colleagues in the legal team about it, which showed a lack of understanding of it and she then failed to update and maintain it following a transaction which had been completed and had an impact on the structure chart.

127. There was a disagreement in evidence between the claimant and the second respondent as to whether there were aspects of the structure chart which were

in fact the responsibility of an external law firm. Once again, in the absence of any discussion with the claimant at the time or documented concerns, we were unable to conclude that the respondent had a significant and justified concern about this aspect of the claimant's work.

128. Also on 14 February 2020, the second respondent said that Ms Boden was frustrated as the claimant had not put all documents for the board in one pdf. She emailed the claimant about this and the claimant said that she had advised Larry Potter to do this in future. Ms Boden wrote back to say that this was the claimant's job.
129. The correspondence demonstrated that Ms Boden had asked the claimant to do something which was the claimant's responsibility. There was nothing in the correspondence which suggested that the issue was perceived as significant.
130. The second respondent was critical of the time taken by the claimant to draft board meeting minutes. He said that the claimant said it took three days when he expected it to take four to six hours.
131. The claimant was given responsibility for the February 2020 board minutes and the second respondent said that given issues which arose in December and January and discussions they had had about the importance of accuracy, he felt this was a critical moment and that if she did not produce minutes to the highest standard it would show she did not have the capability for the role and he would have to let her go.
132. The second respondent said that the papers for the February 2020 board meeting failed to include relevant policies which therefore had to be held over to the March 2020 meeting. He said that the claimant was working to the wrong deadline in an email which she sent which read:

Hi

Please find attached the draft Board Report for completion of your relevant section - https://docs.google.com/document/d/1brM-oWgUcmiWJL79trjWX_

bvAjY7UnhmrV-2lqad6_M/edit

I have left the content from the January report for your section as reference only - please update accordingly.

Please note the closing date for completion is Wednesday 12 February at 1PM.

133. The second respondent said that he replied to the claimant, copied to Ms Yallop in a short and abrupt way, which demonstrated his level of frustration

with the claimant. In fact he only wrote to Ms Yallop according to the email provided to the Tribunal:

It's not due Weds, it's due Monday at noon.

134. The claimant and second respondent disagreed in evidence as to how the deadlines for board papers worked. Ultimately we were able to conclude that on this occasion the second respondent considered that the claimant had got the deadline wrong.
135. So far as the policies were concerned, we were satisfied that the second respondent considered that the policies should have been included with the papers.
136. The second respondent said that these repeated errors were hugely embarrassing for him and created operational problems. He said that he discussed the problems with Ms Boden and Ms Yallop and they agreed the claimant should leave as she did not show the potential or desire to develop.
137. Ms Yallop in evidence agreed that there were discussions about the claimant's performance. She said that nothing was said about health or attendance. There are no file notes of any discussion. Ms Yallop said that reflected the collegiate and fast moving nature of the first respondent. They spoke a lot in meetings which did not formally minute; they would make decisions and act on them.
138. The second respondent did not know exactly when the discussions occurred but told the Tribunal that a decision would have been made by 16 February 2020.
139. Ms Swain said in her witness statement that a decision to terminate the claimant's employment was made by mid February 2020. Ms Yallop also gave evidence that she believed the decision had been made it by mid February. At some point Ms Yallop gave the second respondent advice about the termination. It was a commercial decision given the claimant's length of service. The risk to the business was considered minimal. This advice was not documented.
140. The second respondent said that that, following the February board meeting, he had questions about the claimant's quality of work, work ethic and ownership of her role. He said that she failed to correctly note all the action points arising from the board meeting in an email of 20 February 2020 and he was dissatisfied that the claimant did not complete writing up the minutes before she took annual leave in the last week of February 2020.

141. The claimant's evidence was that the second respondent had misunderstood the email she sent which was not intended to relay all of the action points. No one had raised concerns previously about the time she spent writing up the minutes, which she felt was the amount of time required to do them properly in a regulated environment.
142. The second respondent said that he then discussed with Ms Swain the plan for terminating the claimant's employment and their Slack messages on 28 February 2020 refer to those discussions. Ms Swain in her statement said that she had heard from Ms Yallop that the second respondent might have actioned the claimant's termination.
143. Slack messages between Ms Swain and the second respondent that day read:
- Ms Swain: Morning – Susanna mentioned you may have had the conversation we had planned for next week? Just let me know if there is anything you need me to do.
- Second respondent: Are you in today?
- Ms Swain: Yes
- Second respondent: I have a slightly new plan. Catch me when you're down here.
- Ms Swain: OK will head down soon
144. The second respondent's evidence was that the new plan was about the timing of the termination. He said that his reasons for not having had the discussion earlier were:
- It was a difficult conversation and he was not looking forward to it;
 - Both he and the claimant were intermittently in the office at this point due to leave. He was on holiday 17, 20 and 21 February and the claimant was on holiday 21 February to 2 March 2020. He was on holiday much of the week of 2 March;
 - He needed the claimant to complete the February 2020 board minutes before she left.
145. We accepted the respondents' evidence that there had been discussions between the second respondent and Ms Yallop and Ms Boden about terminating the claimant's employment by mid-February 2020 and that the second respondent had raised performance concerns.
146. The claimant said that on 4 March 2020, due to fluctuations in temperature in the office, she had a severe cough and had to leave the office at about 16:45. She said that she asked the second respondent if she could leave early as she had a persistent cough. She said that he said nothing and continued working at his PC. She that her relationship with the second respondent was very corporate and formal and he had an aversion to discussing health matters.

147. The second respondent in evidence said that he did not remember this incident. He said that he had a large team and received hundreds of emails and Slack messages; people came to see him in person. This incident might have happened but he did not recall it. We accepted the incident had occurred.
148. On 5 March 2020, the claimant send the second respondent a slack message *Still feeling unwell from yesterday but will wfh*. That was consistent with the discussion she said that they had had the day before.
149. In terms of what the second respondent told us he knew about the claimant's health, he said that he had not remembered her referring to her asthma in an email; it had not 'registered' with him. He did not recall the reference to asthma after she presented her claim and only remembered the reference after the email was disclosed. He was aware that asthma may range in severity and had no idea the claimant had a disability. He said that he was aware she had 'a couple of days' sickness but considered that overall her attendance was OK.
150. The second respondent did not recollect the claimant's persistent cough nor the claimant apologising for it; he said that other people he had spoken to since the proceedings started did not recall it either.
151. The second respondent said that the air conditioning was controlled by the building owner and the temperature of the second floor where he and the claimant worked was an issue for a lot of people; a lot of people said it felt too cold. He said that he and the claimant had no discussions about her health or attendance.
152. On 9 March 2020, the claimant drafted an email in the 'notes' function in her phone. She was planning to ask the second respondent for a discussion about Ms Yallop's email of 6 March 2020 but drafted this email to send in case he was not in. She told the Tribunal that she was very nervous about being exposed to the Covid virus on her way to work or at the office. She said that she was fearful for her own safety and that of her parents.

The draft says:

Hi

I wanted to discuss this in person but I'm not sure when you are back in the office. This is in relation to the below advice form HR to speak to your manager about any medical concerns in relation to Coronavirus.

As you are aware I am an asthma sufferer. This makes me more prone and at risk of contracting flu / viruses attacking the immune system resulting in breathlessness and persistent coughing. This is due to inflammation of the

respiratory tract and full recovery can take a number of months as experienced during my recent illness in December and January (although previously recovery has taken much longer). I am also susceptible to recurrence following an illness.

In view of the above and given the symptoms of the virus, I would like to minimise any impact on my respiratory / immune system. Please can you provide further guidance and support on this matter?

153. After she arrived at work, the claimant spoke with the second respondent about wanting to have a discussion. She said that this was at 9:20. She said she asked when he would be free for a discussion about the Yallop email. She said that she wanted to discuss her pre-existing medical condition which she was very concerned about. Given the note the claimant had prepared, we accepted that the claimant had been explicit with the second respondent about what she wanted to talk about.
154. The claimant said that the second respondent invited her into a meeting room at 9:45. She thought it was to discuss the medical issue. She was blindsided when he said that she was not a Starling person and would be provided with one month's notice to leave the bank. She said that she asked for clarity as to why she was not a Starling person. She asked if it was because of her ongoing illness, the fact that she had been off sick and now had raised concerns about coronavirus.
155. The claimant said that she explained that no formal or informal warnings had been given or prior meetings had taken place in relation to this decision. She had passed her probation and received a pay rise.
156. The second respondent's account of the events of that morning was somewhat different. He said that the claimant said that she had received the Yallop email and wanted to talk to him about it. He told the Tribunal that he said that was fine but that he did not pay that much attention to what the claimant had said; what was in his mind was that he was planning to terminate her employment that day. He said that there was no reference to concern about her health or anyone else's health.
157. The second respondent said that he expected people to speak to him about the Yallop email but he did not make a connection to a respiratory condition with the claimant; he was not aware of the claimant's condition. It did not cross his mind that the claimant wanted to discuss a medical condition. The Tribunal found that evidence unconvincing. The claimant had had to go home with a cough a few days before and worked from home for the same reason on the following day. The email invited a discussion about medical conditions. We find that the claimant mentioned her medical condition when asking for the

meeting. The second respondent we find was well aware that the claimant wanted a meeting to discuss her medical condition.

158. In further evidence about his thinking at this time, the second respondent told the Tribunal that it was a busy period. If he had had a person performing well who needed to work from home because of the pandemic, why would he dismiss that person, it did not make sense. He said that a diabetic employee in the team received time off work or worked from home if necessary. Since the pandemic started, there had been more home working.
159. The second respondent said that he did not discuss the Yallop email with the claimant because the meeting was a pre-planned dismissal meeting. They met between at some points between 9:30 and 10 am for about ten minutes.
160. The second respondent said that what was said at the meeting was as per his notes in the bundle, which were made several days later. He made no notes at the time. The second respondent's evidence, even when pressed by the Tribunal, was that these notes were 'nearly verbatim'. The notes are as follows:

Notes of meeting 9 March 2020 with Gulnaz Raja

1) MFN:

a) I don't think it's working out for you at Starling and I have lost confidence in having support so I am giving you a month's notice from today.

b) I doubt this is a surprise and I am sure you know the reasons but I'm happy to talk specifically about the reasons if you want.

2) GR: *This is a surprise. I am really surprised.*

3) MFN: *Well, that surprises me as there have been lots of things not working. As I explained at your interview, this was a role to be grabbed and taken and this just has not happened. I have lost confidence in things being done and I am not sure that there is the level of expertise that is required.*

4) GR: *Is it to do with Mollie leaving last week?*

5) MFN: *No, as I have said, it's to do with this role not having been grabbed and mistakes and me having no confidence in being supported. I was actually going to have this conversation two weeks ago but I went on holiday and then you were on holiday. Having said that I was not happy about Mollie going as I thought she was doing really well.*

6) GR: *So was it because I went on holiday?*

7) MFN: *No – as I said, people are entitled to go on holiday. I encourage people to take holiday. I have approved your holiday.*

8) GR: *I am really surprised. Can you give me examples?*

9) MFN: *Again, I am surprised you are surprised. As I said this was a role to take and make it your own. I have brought up a number of these. There has been no progress on organisation of the department, the records are not there. You have been asking me about the cap table, the structure chart is not right and you are asking me where it is. This was supposed to be for you to do. You were supposed to be doing the share schemes and you have not even got involved in them.*

10) GR: *I know that I said I wanted to get involved in the share schemes and I haven't done them but I feel that you have to be here from the start to understand them.*

11) MFN: *It's easier from the start but you were on the new one and we had agreed you would be taking them over but I got no support. I have had to end up doing stuff myself at a completely busy time when we are fund raising and you said you wanted to get involved in corporate work also and have not at all. The work that you have done has surprised me because a lot of it showed limited or no knowledge about company law – info sent to Shakespeare Martineau and the info given to Finance for the accounts.*

12) GR: *Is it because I was ill at Christmas?*

13) MFN: *No – as I said, it's because of performance issues. People get ill, Gulnaz, that is understood. As I said, this was a role for someone ambitious to take and make their own.*

14) GR: *I thought things were going ok.*

15) MFN: *But we went through a number of things that kept being wrong, like that specific Board meeting where I went through several things where they wrong. Every time on board meetings, I never felt confident that you were going to be here and I always had to come in early and set up the room.*

16) GR: *I would like to stay as I am really passionate about Starling.*

17) MFN: *But nothing that you have done has ever demonstrated that in any way.*

18) GR: *I was staying in the background. I was Deputy Company Secretary and I didn't want to try and be Company Secretary.*

19) MFN: *But that's what the role was supposed to be – to have someone who wanted to be Company Secretary. You said to me you didn't want to just being doing minutes and so we talked about share schemes and we got you an assistant to do minutes and nothing has moved on. You said to me Mollie wasn't working hard but I am surprised at that as I am here late and she was here a lot. I feel you're not a Starling person, there are people here who are really putting in the effort and you have not been. I asked for board minutes to get done before you went away and you said you couldn't do them; you didn't make the effort to get them done. Then you email me to say board mins take 3 days. You have been moving at a different speed to people in the rest of the*

team that really want to work for it. a number of times I asked for things to be done and they haven't been done, then I ask for CoSec to do the post and you question why and I feel guilty about it.

20) GR: Did other people have comments about me? I felt I built positive relationships with my colleagues.

21) MFN: There were no extremely negative comments but I speak to people and they speak to me and I have not had any positive ones.

22) GR: I would like another chance to try.

23) MFN: No. I don't think it would work. We have not moved on in 7 or 8 months or however long it has been. Please hand in your laptop and security pass.

161. The claimant was cross examined about the second respondent's account and these notes. She said that the hearing lasted less than a minute. As to the notes, she said:
- There was no question by her as to whether the dismissal was because of Ms Fox
 - She did not ask if it was because she went on holiday
 - There was no mention of the structure chart and share schemes
 - The second respondent did not say: 'people get ill that's understood'.
 - She asked about whether it was because of illness and being off sick and now because of Covid
 - She did ask if she could try and may have said she thought things were going OK
 - She did say that she was passionate about Starling
 - She did not say anything about staying in the background; that was not what she had been doing
 - There was no discussion about just doing the minutes
 - There was no discussion about how long board minutes took
 - She might have mentioned positive relationships with colleagues
162. Ms Yallop told the Tribunal that the second respondent spoke with her about the meeting and did not mention that the claimant said she wanted to speak with him about the email of 6 March 2020. He told her that the claimant had been surprised at the decision and had not accepted the reason for dismissal.
163. It is unsurprising that different people remember different aspects of meetings which have not been recorded at the time. The closest we have to contemporaneous accounts were the second respondent's notes and the claimant's account in her grievance letter,
164. We did not accept that the minutes the second respondent produced several days later were 'nearly verbatim'. The second respondent did not suggest that he had an exceptional or eidetic memory and it is not the experience of the

Tribunal that any individual can produce 'nearly verbatim' notes of a ten minute discussion several days after that discussion. What we find happened is that the claimant was shocked to be told she was being dismissed and asked for the reason. The second respondent said some of the things that he has subsequently included in his note. The claimant asked whether it was because of her illness and time off work – we think not limited to her time off at Christmas. What was on her mind was that she needed to ask about working from home due to the pandemic and we accepted her account of what she had raised about this at the meeting.

165. It is relevant to note the following:
- a. There is no HR file note or correspondence recording that the second respondent was going to dismiss the claimant on 9 March 2020;
 - b. The second respondent gave evidence he had made no preparations to cover the claimant's work. He had not made specific plans; he said that he had a growing legal department and new people joining. The CEO's executive assistant could help. He did not recruit to the claimant's role until around June 2021. After her departure, he got another person in a different team, to help with cosec work and help from a firm of solicitors;
 - c. No dismissal letter had been drafted or discussed with HR; there was no script or notes prepared in advance;
 - d. There was no HR presence at the meeting. Ms Yallop said she did not think she or Ms Twain were in that day. In many organisations, it would have been deemed sensible to have an HR representative to take a note and give advice;
 - e. There was no meeting invitation.
166. The claimant challenged the second respondent in cross examination about continuing to let her have access to confidential material in this period. He said that she was a solicitor and subject to confidentiality obligations. Her performance was not terrible in all respects so she could be trusted to do work such as board minutes. It was a very busy period and she was useful during this period.
167. On 11 March 2020, the claimant sent Ms Yallop her grievance letter:
- Dear Susanna*
- Re: Meeting with Matthew Newman dated 09 March 2020*
- I write with respect to events and discussions which took place on 09 March 2020.*
- 1. Following your email sent to the business on 06 March 2020 in relation to coronavirus. I followed your advice to discuss with my line manager any medical concerns with particular reference to the respiratory tract / immune system. Based on the fact I am an asthma sufferer and have a history of contracting flu*

viruses attacking the immune system, I felt it was important to raise this with Matt. Therefore, on 09 March at 9:20AM I approached him at his desk and asked him to let me know when he would be free for a discussion. I explained this was in relation to your coronavirus email and I wanted to discuss a pre-existing medical condition which I was very concerned about. He confirmed he would let me know when he would be free.

At 9:45AM, Matt asked me to join him in a meeting room near the Legal team. I was under the impression this was in relation to my request to discuss my medical condition, however there was no mention of this and I was blindsided into a discussion on my future at the Bank. He commented I was not a 'Starling person' and would be providing me with 1 month notice to leave the Bank.

I explained I was surprised by this decision and asked for clarity on why he felt I was not a 'Starling person'. Unfortunately, he was unable to coherently articulate any specific reasons of concern. I explained I felt passionate about the direction of the Bank and had built good working relationships with colleagues and the Board. I had taken ownership of the Board and Committee process and had recently passed my exams to qualify as a Chartered Company Secretary.

I also explained no warnings or meetings had taken place in relation to my performance and my probation had been passed. I also received a letter in January confirming a salary increase in relation to outstanding performance contribution.

It should be noted Matt was aware of my pre—existing medical condition of asthma. in the middle of December, I was struck with flu which impacted my immune system resulting in breathlessness and a persistent cough; Further, I attended several GP appointments as well as a hospital referral during January and February as the symptoms persisted. I have suffered with asthma as a young adult and on each occasion of contracting flu and the common cold, the symptoms of cough and breathlessness have been exacerbated resulting in medical treatment and hospital referral.

In view of the above and the recent outbreak of coronavirus, I was deeply concerned about the impact on my immune system. I was hoping Matt would be mindful of this and provide guidance based on HR procedures in rotation to coronavirus. However, his response was to terminate my contract with one month notice period and to leave the premises. It should be noted, given the current global health climate, I am unlikely to secure a new role for the foreseeable future. it should also be noted, I have pre-existing medical conditions which are likely to be further exacerbated in view of the length of time in securing a new role.

7. it is evident the above has amounted to automatically unfair dismissal on the following grounds:

a) Whistleblowing on a health and safety concern impacting my health, colleagues. the public and therefore in the public interest; and

b) Disability discrimination in breach of the Equality Act 2010. in response to requesting a meeting on coronavirus and pre-existing medical condition of asthma, I was automatically dismissed.

8. in view of the above, please can you provide the following:

a) With reference to one month notice period, please confirm my formal last date with the Bank;

b) A data subject access request to be actioned under the GDPR; and

c) Agreed written reference. which any third party may request the Bank in relation to my employment, to include my job title and dates of employment only.

I look forward to your response within 7 days. if you require any further information, please do let me know.

168. On 16 March 2020, the second respondent sent the claimant a dismissal letter:

Dismissal

I am writing to confirm that your employment with the company was terminated on the 9th of March 2020, due to underperformance in role.

As discussed, it is my view that you have failed to deliver against the expectations set out for the role of Deputy Company Secretary in the Legal team at Starling Bank.

You are entitled to one month's notice. As explained to you, you are not required to work your notice period and instead will be paid in lieu.

Therefore, you will receive your final salary payment on Tuesday the 31st of March 2020, which will be subject to normal deductions of tax and National Insurance contributions. We will forward your P45 in due course.

...

You have the right to appeal to my decision and should do so, in writing, within 7 days of receipt of this letter.

169. On 23 March 2020, the claimant sent Ms Yallop a letter appealing her dismissal:

I am appealing against the decision to dismiss me on 9 March 2020.

I have already set out the reasons I object to my dismissal in my letter addressed to you dated 11 March 2020. Section 8(a) of the said letter, prompted Matthew to confirm the reason for my dismissal and send written confirmation thereof which had not previously been communicated to me, in

particular at the time of dismissal. I note a response to section 8 (b) and 8 (c) is still awaited.

I strongly dispute that I was dismissed for “underperformance”. No concerns about my performance have been previously raised with me. I was not warned about my performance formally or informally. It was never brought to my attention that I required support to be able to improve any aspects of my performance. I passed my probation in October 2019 and was awarded a pay-rise for outstanding performance and contribution in January 2020. Further, in February 2020, I passed ICSA exams to qualify as a Chartered Company Secretary, demonstrating my capability to perform the role at the highest level. Matthew’s actions are now likely to have serious consequences for my chosen career path.

In addition, he failed to make reasonable adjustments to accommodate my disability, in particular he had not accommodated my physical condition of asthma, which he was made aware of in 2019 as well as requiring time off in December 2019 after contracting flu. Further, I am aware Matthew has overall responsibility for the People function and therefore note there was a failure to follow his department’s own disciplinary procedure as stipulated in

Schedule 10 of the Staff Handbook as follows:

a) Section 3 - no written notice of a hearing and sufficient information about the alleged underperformance and my right to be accompanied to the meeting.

b) Section 4 — failure to provide two written warnings; and

c) Section 5 — failure to inform me of my appeal rights as per section 5.1 (‘you may appeal in writing within one week of being told the decision’). I was not informed of my appeal rights on 09 March 2020.

6. It is evident from the above, no preliminary steps were taken prior to my dismissal in relation to any alleged ‘underperformance’. I believe that the real reason for my dismissal was disability discrimination and that he recognised that I would be likely to have to work from home during the coronavirus outbreak and/or take time off to self-isolate as sickness absence or alternatively because he thought I had coronavirus because of my ongoing cough and thought I would spread the virus at work. I note that I was dismissed less than half an hour after I raised my concerns about the coronavirus.

7. I believe that the decision to dismiss me was automatically unfair and discriminatory.

8. In addition, I made a protected disclosure on 09 March 2020, by informing him that I had an underlying health condition, namely asthma and respiratory tract / compromised immune system and therefore there was a health and safety concern in the public interest, in particular in relation to my colleagues and also members of the public I come into contact with whilst commuting. As a direct result of that disclosure I was subjected to a detriment, namely your

capability procedure and whistleblowing policy was not followed and I was unfairly dismissed.

9. I would like to be reinstated and to be paid compensation for the discriminatory treatment I have received and for appropriate measures taken to protect my health until the public health situation has improved.

170. On 25 March 2020, a barrister representing the claimant sent the respondent a without prejudice letter. That letter did not suggest that the claimant did not wish to pursue her appeal.

171. On 8 April 2020, the respondent's solicitors sent a without prejudice letter in reply. This raised the various performance concerns raised by the respondents in these proceedings.

172. On 14 April 2020, the claimant's barrister wrote again to the respondents.

As to the appeal, the letter said:

In fact no basic procedure was followed at all by your client. My client also raised this point in her appeal which has been completely ignored (letters dated 11 and 23 March reattached here as open letters). Further, despite providing my client with a late appeal right, your client even failed to follow through with any appeal procedures.

...

It is clear this dismissal was automatically unfair dismissal on the grounds of disability discrimination and protected disclosure of a health and safety matter. Your client's actions have placed my client's career at a severe disadvantage, she is unlikely to find another suitable role for at least 18 months and she has no option but to take this matter to the Employment Tribunal.

173. Ms Yallop's evidence about why she did not consider the claimant's appeal was that:

'Given the advancement of 'without prejudice' correspondence I did not address Gulnaz's appeal internally. She had not been given the right of appeal on termination in any event, and the nature of the correspondence from her representative indicated to me that Gulnaz was seeking to bring legal action rather than progress an internal appeal in any event.'

Medical evidence

174. We saw a letter from the claimant's GP dated 12 October 2020:

I am writing in the capacity of Miss. Raja's GP. This is to confirm that we have been reviewing Miss. Raja regularly at the surgery. More specifically this has been to manage her deteriorating asthma control due to a number of lower respiratory tract infections requiring a step up in her asthma management plan, steroids and antibiotics. This has spanned from November 2019 until June 2020 where she had a number of regular reviews to manage her asthma control and complications related to this.

In addition, Miss. Raja has also been suffering from reactive anxiety and depression due to her dismissal which took place in March 2020. We have tried to manage this with medication and psychological support which she has been attending on a monthly basis. This has required a number of reviews to optimise her medication and support her through this difficult time. To further complicate matters, due to her medical conditions and ethnicity she is at risk of developing significant complications due to COVID and is recommended to self-isolate for the foreseeable future.

Miss Raja also suffers with longstanding Asthma for which I have attached evidence for the last number of years.

175. A further report of 2 December 2020 had this section:

Patient has reported the impairment of asthma causes impact with day to day activities such walking, commuting, interacting in social activities, interacting with colleagues/others whilst coughing and fatigue at the end of the day due to breathing difficulties. The patient's condition is also impacted by environmental factors such as humidity, allergies, weather conditions such cold weather as well as pollen. The management of the condition can also cause stress and anxiety, which in itself can aggravate the symptoms of asthma.. Taken all of this together this amounts to a substantial adverse effect on ability to carry out normal day-to-day activities.

176. We also saw this summary of the claimant's medical records over the relevant period:

- 17 December 2019: reported coughing, fever, aches and pain and breathing difficulties. Problem - upper respiratory tract infection.
- 18 December 2019: experiencing problems with asthma.
- 30 December 2019: reported persistent cough, dry coughing for the last 2 months. Getting worse in cold weather and tickly. Reported more SOB (shortness of breath on exertion) at work and in cold weather. Patient explained had similar illness and symptoms previously. GP noted poor control of asthma and increased Symbicort dosage to 200/6.
- 07 January 2020: seasonal flu vaccination required due to asthma.
- 09 January 2020: patient explained she had a persistent cough and the increased medication had no response to asthma symptoms. Patient was keen to get an x-ray. Patient explained could benefit from working from home for a few days, felt very unwell and persistent cough.
- 13 January 2020: patient reported persistent cough during the day. Peak flow test undertaken and booked for x-ray and review with GP.
- 27 January 2020: x-ray at hospital reported as satisfactory on 29 January 2020
- 26 March 2020: Patient experiencing panic attacks and self-isolating due to asthma for last few weeks. Patient reported dismissed at work as raised health and safety issue surrounding Covid-19. Asthma reported as worse at night.
- 02 June 2020: Prescribed with Fobumix Easyhaler as part of step up in asthma management plan due to persistent cough from allergies and effects of environment
- 22 June 2020 – Prescribed with Sereflo inhaler 25/125 as part of step up in asthma management plan due to persistent cough from allergies and effects of environment
- 25 June 2020 – Prescribed Phenergan as part of step up in asthma management plan due to persistent cough from allergies and effects of environment.
- 20 November 2020 – Patient reported persistent cough and difficulty in breathing. Booked in for flu jab due to asthma.
- 26 November 2020 – Patient reported breathing difficulty when talking and requested to call back if any wheezing for course of steroids.

Law

Health and safety dismissals

177. An employee is automatically unfairly dismissed if the reason or principal reason for dismissal is one of the health and safety reasons set out in section 100 Employment Rights Act 1996.
177. Tribunals should take a two stage approach under section.100(1)(e). Firstly:
- Were there circumstances of danger that the employee reasonably believed to be serious or imminent?
 - Did he or she take or propose to take appropriate steps to protect him or herself or other persons from the danger?
- The second stage is to consider whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take appropriate steps. If so the dismissal would be automatically unfair: Oudahar v Esporta Group Ltd [2011] ICR 1406, EAT.
178. The 'circumstances of danger' are not limited to dangers in the workplace itself: Harvest Press Ltd v Mr T J McCaffrey [1999] IRLR 778, EAT.
179. Subsection 100(1)(e) is to be read with words inserted as follows: 'in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger or to communicate these circumstances by any appropriate means to the employer' in order to comply with EU Directive No.89/391: Balfour Kilpatrick Ltd v Acheson and ors [2003] IRLR 683.
180. Subsection 2 of section 100 provides: 'For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

Health and safety detriment

181. Under Section 44(1)(e) Employment Rights Act 1996, it is unlawful for an employer to subject an employee to detriment because in circumstances of danger which the employee reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

Victimisation

182. Under s 27 Equality Act 2010 a person victimises another person if they subject that person to a detriment because that person has done a protected act or the person doing the victimising believes that person has done or may do a protected act.
183. The definition of a protected act includes the making of an allegation that the person subsequently subjecting the claimant to a detriment (or another person) has contravened the Equality Act 2010 or done 'any other thing for the purpose or in connection with' the Equality Act.
184. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: EHRG Employment Code, paras 9.8 and 9.9.
185. The protected act need not be the only or even the primary cause of the detriment, provided it is a significant factor: Pathan v South London Islamic Centre EAT 0312/13.

Discrimination arising from disability

186. In a claim under section 15 Equality Act 2010, a tribunal must consider:
- Whether the claimant has been treated unfavourably;
 - Whether the unfavourable treatment is because of something arising in consequence of the employee's disability;
 - Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.
187. There are two aspects to causation:
- Considering what caused the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator;
 - o The 'something' need not be the main or sole reason for the treatment but must have a significant (or more than trivial) influence on the unfavourable treatment and so amount to an effective reason or cause of it;
 - o There may be more than one link in the chain between the something that causes unfavourable treatment and the disability;

- Determining whether that reason was something arising in consequence of the claimant's disability. That is an objective question and does not involve consideration of the mental processes of the alleged discriminator: Pnaiser v NHS England and anor 2016 IRLR 170, EAT.
- 188. The burden of proof provisions in section 136 Equality Act 2010 mean, in a section 15 case, that the claimant must establish facts from which the Tribunal could reasonably conclude that the unfavourable treatment was because of the something arising in consequence of disability. If such facts are established, the respondent will have to prove that the reason was not the 'something' arising.
- 189. The respondent need not know the something arises in consequence of the disability; the knowledge required is of the disability only: City of York Council v Grosset UKEAT/0015/16/BA.
- 190. The phrase 'something arising in consequence of the disability' should be given its ordinary and natural meaning; it is not limited to things which the employer has no control over or to the effects of the disability on the disabled person rather than the employer: T-Systems Ltd v Lewis EAT 0042/15.
- 191. An employer has a defence to a claim under section 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.
- 192. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment and the reasonable needs of the party responsible for the treatment: Hampson v Department of Education and Science [1989] ICR 179, CA.

Submissions

- 193. We received written and oral submission from both parties. After we had commenced our deliberations, we invited further submissions in writing from the parties with respect to the following issue:

During the course of deliberations, it seemed to the Tribunal that a possible analysis of the facts in this case, depending on the findings ultimately made, is that the claimant's request for a meeting to discuss the 6 March 2020 email brought forward in time a dismissal which had already been decided upon.

We did not hear submissions from the parties as to what the correct legal analysis of that situation is. Would or might those facts potentially fall within Section 100(1) ERA 1996 or would the bringing forward of a dismissal be properly regarded as a detriment under Section 44?
- 194. Both parties wrote to the Tribunal with their submissions on that issue. We have carefully taken into account all of the parties' submissions but refer to them below only insofar as is necessary to explain our conclusions.

Conclusions

Disclosure

195. Before considering the substantive issues, we considered whether the respondents' disclosure exercise had been unsatisfactory, as the claimant alleged, because that might have been a matter from which we drew relevant inferences.
196. The claimant said that some documents which were disclosed in the proceedings had not been disclosed in response to her DSAR. She raised the issue we have alluded to above about the reference to interview notes which were never provided. She said that there would have been further Slack messages but these were not provided.
197. The respondents said that Slack messages were on a platform hosted by a third party and the respondents had provided the messages they had been able to obtain. The 'interview notes' were in fact just notes on the Workable system, which had been disclosed. Some items did not get produced in response to the DSAR because they were not on the claimant's HR file but were found as a result of further searches during the disclosure process.
198. It seemed to us that the first respondent was not very good at documenting matters or keeping employee records. There was no good evidence before us that the respondents had not done a thorough and conscientious search for documents as part of the disclosure exercise and there was really nothing about that exercise which led us to conclude that documents had been suppressed or concocted.

Weight the Tribunal gave to Ms Swain's statement

199. Ms Swain in her statement said that she had discussions with the second respondent about the claimant's performance but gave no dates or specifics of those discussions. She also said that he did not discuss the claimant's health or attendance and that she was not aware of those matters.
200. In this respect, her evidence was very similar to that of Ms Yallop and similarly lacking in specificity. These discussions were not matters the claimant had knowledge of, so she had no conflicting evidence to give. We gave Ms Swain's statement as much weight as seemed to us to be sensible to give to a statement which lacked detail in circumstances where the witness was not available to provide that detail.

Discrimination arising from disability (s 15 EqA)

Issue: a. Was the claimant treated unfavourably – i.e. dismissed – because of something arising from her disability?

b. The claimant says the ‘something’ being: (para 5.1.1 at page 50): “the claimant’s past and turbulent health condition, disability related sickness absence, likely future time off work, her likely need for workplace adjustments such as working from home, social distancing, her likely need to self-isolate; and her propensity to cough over colleagues at work” which arose in consequence of her disability.

Causation of ‘somethings’

201. We had first to consider which, if any, of the ‘somethings’ arose from the claimant’s disability.
202. The ‘past and turbulent health condition’ seemed to be intended to be a description of the symptoms as described in the GP reports. The description and records suggested that the symptoms were exacerbated at different times by different factors and were at times significant. If ‘turbulent’ was an adjective intended to describe that essential volatility, it seemed to us that the claimant’s past and turbulent symptoms arose from her disability of asthma.
203. The claimant’s sickness absence over the relevant period, according to her GP’s records and reports also arose from her asthma.
204. The evidence of the GP reports suggested that the claimant was likely to require time off work in the future due to her asthma and, once the pandemic had started, the asthma also gave rise to a likely need for adjustments; the claimant’s vulnerability foreseeably would require some provision for home working in particular (which also seems to be what the claimant meant by ‘self-isolating’).
205. As to ‘propensity to cough over colleagues at work’, we accepted the claimant’s evidence that she had a propensity to cough when her asthma was exacerbated, including in the presence of colleagues in the workplace.

Causation of dismissal

206. It was relevant to consider which of these effects the respondents were aware of in order to understand which could possibly have acted on the mind of the second respondent in particular.
207. So far as the past and turbulent health condition was concerned, certainly the second respondent was aware that the claimant was having some time off work with symptoms and that she also had to attend medical appointments.

He would have known that she had some five days off with illness and a further four days where she had to work from home.

208. He would also, we considered, have been aware by early 2020 that future time off work was likely. The claimant had told him she had asthma, she had had a number of days off work, she had had to work from home to attend some medical appointments.
209. In the context of the pandemic and the guidance which was emerging by March 2020, it would also have been clear that the claimant was likely to require some adjustments.
210. The 'propensity to cough over colleagues' we were not convinced would have been an obvious feature. The second respondent said he had not noticed it. We bear in mind that these events unfurled over the autumn and winter period when many people suffer from colds. It did not seem to us improbable that the second respondent had not taken any particular note of the claimant coughing in the office.
211. Did the 'somethings' we found the respondents were aware of play a material role in the decision to dismiss the claimant some time in mid February 2020?
212. We looked carefully at factors which might shift the burden of proof:
- The second respondent's attitude to ill health and working from home. The claimant said that his failure to respond to messages showed he did not approve of and lacked sympathy for her health problems. We did not fully accept the second respondent's account that he trusted colleagues and was seeking not to pry into health issues. A total failure to respond to messages about ill health and the failure by a manager to express any concern or support to a subordinate on a significant number of occasions, seemed to us to be intended to discourage time off for ill health and working from home. The fact that he allowed working from home tacitly by not objecting to the occasions when the claimant worked from home to attend appointments did not change our impression that he was seeking to discourage the requests by not acknowledging them.
 - We considered that there was good evidence that the second respondent valued employees working long hours in the office. He was critical of the claimant for leaving work at the end of her contracted hours. That attitude seemed to us in these circumstances to align with an attitude of impatience with ill health absence.
 - The second respondent's credibility was to some extent impaired for us by his improbable assertions about his memory. We did not accept his evidence about his notes of the dismissal meeting being almost verbatim and we were troubled by his assertions that he did not remember the claimant's references to asthma and the occasion on 4 March 2020 when she said that she had to go home to

work due to her cough as compared with his apparently detailed recall of work issues.

- The lack of documentation at the time as to the reasons for deciding to dismiss the claimant and/or the discussions about her dismissal.
- The fact that the claimant passed her probation and was awarded a salary rise and the fact that the documents evidencing those events make no reference to any problem with her performance, but in fact suggest her performance is good. What happened in the chronology after that was that she began to have time off for ill health and began to request to work from home due to appointments.
- The total lack of any formal procedure in relation to the dismissal.

213. As to facts which might point the other way, we were not persuaded that the second respondent was aware that Ms Fox had some time off for sickness or that even if he had been aware, this would have told us much about his attitude to the claimant's sickness absence. The evidence as to the second respondent's treatment of other disabled employees arose during oral evidence and was lacking any particular detail.

214. We considered that there were facts from we could reasonably conclude that the claimant's ill health absences and need to work from home and her likely requirement for further time off in particular were a material reason for her dismissal. At this point in February 2020, some of the other somethings, such as a requirement for reasonable adjustments due to the pandemic, seemed to us not very likely to have played a material role.

215. We then had to look at the respondents' explanation and consider whether we were satisfied that the somethings played no material part in the dismissal. The respondents' explanation was that it was the claimant's performance which led to her dismissal. The lack of process related to the fact that the claimant had less than two years' service so there was felt to be no significant risk in dismissing her without a proper procedure.

216. We were not satisfied with the respondents' explanation, bearing in mind the contextual facts we have set out above. We accepted that the second respondent may well have had some concerns and criticisms of the claimant (which he did not raise properly or explore with her and as to the substance of which there is a paucity of evidence). We did not accept that they were of such significance that on their own they would have led to the claimant's dismissal at that point, particularly in view of the passing of probation and the salary rise. It appeared to us that the ill health absence and requests to work from home were part of a picture which included the claimant working her contractual hours and no more in the office and also a handful of work issues which together led the second respondent to decide that she was 'not a Starling person'.

217. We upheld this claim.

Issue: c. The claimant says the 'something' being: (para 3.2 at page 49, A3(b) claim form at page 15) asking for a discussion with the line manager, the second respondent, about her medical condition in response to the first respondent's email of 06 March 2020, which arose in consequence of her disability.

218. We also considered that the claimants' request for a meeting to discuss the Yallop email had itself brought forward the dismissal. We were not persuaded that the second respondent was going to dismiss on that day, with no meeting invitation, no script, no draft letter, no HR person present. It seemed to us that there were facts from which we could reasonably conclude that the second respondent brought forward the dismissal when he realised that the claimant was going to ask about adjustments in respect of her medical issues. Having such a meeting with the claimant might derail what was perceived to be a relatively low risk dismissal.

219. Essentially the second respondent's case as to why he had the meeting that day was that it was the first available date they were both in the office and after the claimant had completed some necessary pieces of work. That explanation did not persuade us that the claimant's request for a meeting about her medical condition did not play a material role in the fact that the second respondent decided to go ahead with the dismissal that day. Even allowing for the fact that the first respondent appeared to operate in a very document-light way in relation to HR matters and the apparent perception that this was a low risk dismissal, it seemed to us that the respondents would have been likely to have wished to reduce risk by, for example, including an HR adviser and note taker and/or having a prepared dismissal letter if the second respondent had not been seeking to pre-empt a discussion about the claimant's medical condition in the context of the Yallop email.

220. We upheld this claim to that extent.

Issue: d. The claimant says the 'something' being: (A4, A6, B1 and B2(j) claim form at page 15 and 16) her ignored grievance and appeal letter dated 11 March 2020 and 23 March 2020 respectively, sent to the respondent which alleges the protected act, disability discrimination, which arose in consequence of her disability. The unfavourable treatment being the respondent's failure to act and investigate the allegation of discrimination following dismissal, despite providing appeal rights.

221. This was essentially a claim of a type not infrequently brought by claimants under section 15 (which can be a difficult section even for legal advisers to interpret correctly) but which does not necessarily logically fit within the structure of the section. Essentially it is a claim that because the claimant

brought a grievance about disability discrimination, the respondents failed to consider her grievance.

222. We concluded that a grievance and an appeal against a dismissal which in itself arose because of disability could themselves be something arising from disability (having regard in particular to the authority of T-Systems Ltd v Lewis).
223. We did not consider, however, that there were facts from which we could reasonably conclude that the reason the respondent did not consider the grievance or the appeal against dismissal was the fact that she had brought such a grievance and an appeal. It seemed to us that in looking at causation, one had to consider what would have happened if no appeal and no grievance had been presented. In that situation the respondent would not have considered the grievance and the appeal because there would have been no grievance and appeal to consider.
224. In any event, we were satisfied by Ms Yallop's explanation, which seemed to us on this occasion to be entirely consistent with what the respondents' witnesses described as their 'agile' mode of doing business – they did not do things which they did not perceive they were obliged to do.
225. We did not uphold this claim.

2. Automatically unfair dismissal for taking an appropriate step in a health and safety case (s100(1)(e) ERA 1996)

Issue: a. Was the reason or principal reason for dismissal that, in circumstances of danger which the claimant reasonably believed to be serious and imminent, she took appropriate steps to protect herself?

b. The "step" relied upon (para 7.1, page 51) is "asking for a discussion with the line manager, the second respondent, about her medical condition which she was very concerned about."

226. The first question for the Tribunal was whether there were circumstances of danger. We considered that there undoubtedly were circumstances of danger in London in early March 2020. The situation was that the pandemic was rapidly developing and there were rapidly increasing numbers of people affected by the virus, in London in particular.
227. We also consider that the claimant reasonably believed the danger to be serious and imminent. The guidance she refers to as available at the time was pointing to particular risks to those with underlying conditions, including respiratory conditions, and to the desirability of those people working from

home. The claimant was concerned about travelling on public transport to work in an open plan office in central London.

228. The respondents sought to suggest that asking for a meeting to discuss the situation could not amount to the taking of an appropriate step. It seemed to us that it clearly did amount to a step and probably to the most obviously appropriate and reasonable step the claimant could have taken in the circumstances, giving her employer the opportunity to understand her concerns about the danger and to consider how best to minimise it.
229. It will be apparent from our findings above that we considered that the claimant's request for the meeting precipitated a dismissal which would have happened in the next days or weeks in any event.
230. We concluded, having invited further submissions from the parties on this point, that in the circumstances the reason or principal reason for dismissal was still the reason we have identified above – the perception that the claimant was 'not a Starling person' because of a combination of factors which included her absences and periods of working from home and also some perceived work issues
231. We did not uphold this complaint

3. Detriment for taking an appropriate step in a health and safety case, (s 44(1)(e) ERA (now s 44 (1A) (b) ERA))

Issue: a. Was the claimant subjected to a detriment on the ground that, in circumstances of danger which the claimant reasonably believed to be serious and imminent, she took appropriate steps to protect herself?

b. The "step" relied upon (para 7.1, page 51) is "asking for a discussion with the line manager, the second respondent, about her medical condition which she was very concerned about."

c. The detriment (at para 7.4.1 and 7.4.2, page 51) is alleged to be the respondents "retaliated against the claimant....by subjecting her to instant dismissal" and "deliberately failed to have a separate meeting with the claimant to specifically discuss her health and safety concerns."

232. We have already concluded that the claimant did take an appropriate step in circumstances of danger which she reasonably believed to be serious and imminent. And we have concluded that her dismissal was advanced in time because she took that steps. We are satisfied that being dismissed earlier than she otherwise would have been dismissed was a detriment to the claimant.

233. We upheld this claim.

4. *Victimisation (s.27(1)(a) and s.27(2)(d)) EqA*

a. *Was the claimant victimised by the respondents by subjecting the claimant to a detriment because the claimant did a protected act by making an allegation that the respondents have contravened the Equality Act?*

b. *The claimant says the protected act being (at 9.1.1, page 53 and A4, A6, B1 and B2(j) claim form at page 15 and 16): “making an allegation the respondents were in breach of the Equality Act 2010 within her grievance and appeal letter dated 11 and 23 March 2020,” namely disability discrimination.*

c. *The claimant says the detriment being failure to act and investigate the allegation of discrimination following dismissal, despite providing appeal rights, and subjecting her to further unfavourable discriminatory treatment.*

234. The claim of victimisation was limited to the failure to investigate the claimant's allegations of discrimination in her grievance and appeal.

235. The claimant's grievance and appeal letter included allegations of breaches of the Equality Act 2010 and was clearly a protected act.

236. Again, we essentially accepted Ms Yallop's account of why she did not take action on the grievance / appeal. It seemed to us that the respondent was not minded to do any work it did not feel to be necessary. There were no facts from which we could reasonably conclude that had the claimant presented a grievance / appeal with other types of allegation, but no discrimination allegations, and had she also instigated without prejudice discussions, the respondents would have dealt differently with her grievance / appeal.

237. We did not uphold this complaint.

Remedy hearing

238. The parties will receive a notice of hearing for a case management hearing to give directions for a remedy hearing.

05/09/2022- Employment Judge Joffe
London Central Region

Sent to the parties on:
05/09/2022

For the Tribunals Office