



# EMPLOYMENT TRIBUNALS

## RESERVED DECISION

**Claimant:** Mrs MG Harkins

**Respondent:** Marks & Spencer plc

**On:** 27, 28, 29 and 30 March 2023  
3, 4 and 5 April 2023  
12 April 2023 (reserved decision meeting)

**Before:** Employment Judge Ahmed

**Members:** Ms M Gola  
Ms L Woodward

**At:** Leicester

**Representation**

**Claimant:** Mr Rad Kohanzad of counsel

**Respondent:** Ms Grace Holden of counsel

## JUDGMENT

The unanimous decision of the Tribunal is that:

1. The complaints of discrimination arising from disability, failure to make reasonable adjustments, victimisation and harassment based on the protected characteristic of disability are all dismissed.
2. The Claimant was not unfairly dismissed.

## REASONS

1. By a Claim Form presented to the tribunal on 4 January 2022 the Claimant brings complaints of disability discrimination, unfair dismissal, victimisation and harassment. The complaints of disability discrimination are of discrimination arising from disability and a failure to make reasonable adjustments. The complaint of harassment is based on the protected characteristic of disability.

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2. In coming to our decision we have taken into consideration the oral evidence of the witnesses, the contents of their witness statements, the documents in the agreed bundle and the oral submissions made by counsel on both sides, to whom we are grateful. This decision represents the views of all three members of the tribunal.
3. The Claimant was employed by the Respondent from 22 October 1995 as a Visual Merchandising Team Manager until she was dismissed on 4 March 2022, the effective date of termination. Her role primarily involved working on the shop floor ensuring that the shop floor was in accordance with management directions and managing a small team of staff.
4. The Claimant has suffered from anxiety and depression for a number of years but found herself suffering from more acute symptoms around the beginning of January 2020.
5. The Claimant had a difficult relationship with some of the staff she managed. She says they constantly undermined her and at times was intimidated by them. She felt powerless to change things as one of them was in a personal relationship with her own line manager (SF) and so nothing was likely to be done. In particular she says that SF's relationship with her was blunt and often direct which had an adverse effect on her mental health. The Claimant does not appear to have identified the seriousness of the problem to her own managers.
6. In February 2020 the Claimant attended a telephone occupational health assessment. The reason for the reference was that the Claimant had been absent for a number of shifts. The absence had ostensibly been off work due to eye and back pain but in a wide-ranging discussion there was reference to the Claimant being signed off by her own GP for anxiety and that she was receiving medication for this. The report would have been seen by SF.
7. Following the Covid-19 pandemic in early 2020 the Claimant was furloughed from a point in April 2020 to 30 August 2020. She was furloughed longer than most of her colleagues as her husband was identified as a vulnerable person and was required to shield himself. When she returned to work she felt that she was made to feel guilty as other co-workers were not furloughed as long as her. The Claimant did not complain about returning to work - her view was that she preferred to be at work rather than at home. It was an integral part of her job to work on the shop floor and the Claimant did not ever ask to be removed completely from it.
8. In November 2020 the Claimant feared that she was going to catch Covid whilst at work. Her anxiety became severe to the extent that she was taken by the emergency services to a mental health crisis unit.
9. On 7 January 2021 the Claimant suffered a panic attack after worrying about her husband catching Covid. She was however able to return to work fairly soon. It was agreed that the Claimant would spend less time on the sales floor to minimise public interaction and thus reduce the risk both to herself and to her husband.
10. In January 2021 the Respondent organised counselling for the Claimant. Mrs Harkins was signed off work from 1 February to 27 February for anxiety and depression. She returned on 5 March on a phased return basis.

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11. On 9 March 2021 the Claimant was referred for a psychiatric assessment and was formally diagnosed with general anxiety disorder. The Claimant informed Ms Jessica Boniface, her then line manager, of the diagnosis. The Claimant also says that she mentioned self-harming and suicidal ideations to her manager. She says that she self-harmed on two occasions and the Respondent were aware of this. The Respondent denies that they were ever told of any actual self-harming but does accept that at one stage the Claimant had said she had thoughts of self-harm but did not believe she would ever act on them. We accept that the Respondent was never aware of the fact of actual self-harm.

12. On 19 April 2021 the Claimant attended an end of year review with her line manager Miss Sophie Green, the Deputy Store Manager. The Claimant says that prior to the meeting she met Miss Green in the car park and said that she had been self-harming and showed her the scars. Miss Green accepts that they met in the car park but there was no discussion of self-harming. We accept Miss Green's account. There have been a large number of Whatsapp and other messages exchanged between the Claimant and her managers. None of them show that the Respondent was ever made aware of self-harming.

13. It is however agreed that the Claimant was nervous at the start of the end of year review. Miss Green went through the usual yearly objectives and highlighted the Claimant's strengths. She then moved onto the colleague KPI's. There was a discussion about the Claimant's leadership presence and her ability to commit to 'M&S behaviours'. There was concern expressed as to the Claimant's leadership. The Claimant admitted that she was struggling to manage members of her team. Miss Green asked why this had not been mentioned before but the Claimant gave no clear answer. Miss Green said that overall the Claimant would be rated as 'missed' for the year. There was no reference to the Claimant's performance being 'poor' and there was no suggestion then or at any stage that a missed rating would lead to any performance capability or disciplinary measures. The discussion concluded with Miss Green asking the Claimant whether she enjoyed the leadership role and wanted to continue doing it or whether she preferred to concentrate purely on the visual aspect of the role. The Claimant said that she wished to continue in her present role as it was. It was left at that.

14. At a point in the discussions the Claimant became visibly upset. Miss Green suggested taking a break and left the room. Miss Green then went to make her own manager aware of the result of the review. The Claimant's condition worsened in the meantime. She telephoned her husband and he advised her to come home immediately. The Claimant said she was too upset to drive and she also had sedatives in her system. The Claimant called the PAM Assist team (employee assistance providers) who after a quick initial discussion said they would call her back. There was a delay in reverting to her. The Claimant also spoke to her daughter for support. After a discussion with PAM Assist the Claimant was advised to call the emergency services. A paramedic undertook a telephone assessment and the Claimant returned home. The Claimant had periodic absences from work until 3 June 2021.

15. On 19 May 2021 the Claimant had an absence meeting with Miss Boniface. It was agreed that it would be helpful if the Claimant could have additional support with IT in her role which had been identified as a weakness. Miss Boniface completed a

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well-being recovery action plan (WRAP) and a well-being adjustment plan (WAP) for the Claimant. These would be available for her managers to consult so that they were aware of the Claimant's condition and to provide necessary support. The Claimant says that occupational health had suggested an 8-week phased return but the Respondent only afforded a 4-week return followed by a review. She also alleges that Mr Andrew Frith, the Store Manager only reviewed the WRAP and WAP plans in late June which she says made her feel as though she was not a concern or a priority for him.

16. On or about 10 June 2021 the Claimant discovered that a former colleague had posted an image on Facebook which she believed was indirectly aimed at her. She believes it was posted by SF who by this point had left her role with the Respondent. She says that on the basis of this post SF appeared to know of her ill-health. The Claimant did not take a screen shot of the post and says that it was removed shortly afterwards. We have not therefore been able to view this for ourselves. The Claimant rang SF who said that Ms Boniface had said that the Claimant's ill-health had not been properly followed up in February 2020. The Claimant raised the posting with Mr Andrew Frith who said there was nothing he could do about it.

17. Mr Arron Sahota became the Claimant's line manager in early August 2021. On 23 August he met the Claimant. During an informal chat he touched upon various matters including the Claimant's communication skills which he said he had been made aware were negatively impacting other colleagues. During the discussion the Claimant asked if she could work a 4-day week instead of 5 as this would help her to care for her husband and also help her with her mental health. Mr Sahota said that this could be considered but if the Claimant was struggling to undertake her work over 5 days it might be difficult to do it in fewer days and that it might also exacerbate her stress levels. Mr Sahota asked her whether she had considered stepping down from her managerial role to enable her to care for her husband.

18. There was a further meeting/discussion between the Claimant and Mr Sahota on 25th August 2021 after a management briefing. The Claimant alleges that Mr Sahota asked the Claimant what her issues were because the Claimant had repeatedly mentioned issues about the management rota. The Claimant became emotional and asked whether Mr Sahota had read her WRAP and WAP forms. Mr Sahota said that he had flipped through them but not read them page by page. The Claimant says that her triggers had been hit but Mr Sahota was dismissive of her mental health.

19. On 6 September 2021 the Claimant submitted a formal grievance alleging that the Respondent had failed in their duty of care, subjected the Claimant to discrimination and disclosed confidential information. The grievance was investigated by Mrs Kate Johnson, a Store Manager in Kidderminster. The Claimant attended a meeting on 10 September to discuss her grievance. In a detailed letter dated 6 October 2021 Miss Johnson decided not to uphold any part of the grievance.

20. On 6 October 2021 the Claimant attended an ill-health meeting with Mr Sahota. The Claimant says that the meeting was excessively long at two and a half hours, that Mr Sahota failed to take into account her disability and that she was undermined. We see from the notes of the meeting that it began at 9.00am and

concluded at 10.35am. It did not therefore last 2 and half hours. We will deal with the remaining issues in our conclusions.

21. The Claimant appealed against the outcome of the grievance on 5th November 2021. The appeal was dealt with by Ms Ruby Burnton, a Store Manager in Loughborough. By a letter dated 20 November 2021, Ms Burnton dismissed the appeal.

22. Ms Lauren Robinson took over line management of the Claimant from 27 September 2021. By that stage the Claimant had already been on long term sickness absence. She also began ACAS early conciliation on 29 October 2021 with a view to bringing a Tribunal claim. Her first ET1 Claim Form, submitted as a litigant in person, was presented on 4 January 2022. It was later expanded upon through the provision of further and better particulars though no formal amendment was ever sought or obtained. At the commencement of this hearing we granted leave to amend subject to any time point being preserved.

23. The Claimant was invited by management to meetings to discuss her continued absence on 13 and 24 January 2022 neither of which she attended saying she was not well enough to do so.

24. On 28 January 2022 Ms Robinson wrote to the Claimant offering to proceed via an amended process by putting together a questionnaire of the matters to be discussed and for the Claimant to complete parts of it instead of a formal meeting. During that time Ms Robinson was also communicating with Claimant via MS Teams. Miss Robinson decided to put on hold the ill-health processes whilst ACAS early conciliation was proceeding.

25. On 7 February 2022 the Claimant was once again referred to occupational health. The occupational health report received on 17 February 2022 stated the following:

“Gemma was emotional and upset during most of the call. She was preoccupied with the outstanding work issues as it was at the forefront of her mind and in summary felt the mutual trust and respect has been damaged beyond repair between herself and the employer....

I have concluded that Gemma is unfit for work and there are no adjustments I could reasonably suggest at this stage to alter this. In summary there is no foreseeable return to work date.....”

26. An ill-health meeting took place with the Claimant and Miss Robinson on 23 February 2023. The Claimant confirmed that she agreed with the occupational health report that she was unfit to work and that there were no adjustments that could be made to facilitate a foreseeable return to work. Miss Robinson informed the Claimant that if there was no foreseeable return to work her employment may be terminated at a future meeting.

27. The Claimant was invited to ill-health meeting on 4 March 2022. During that meeting the possibility of ill-health early retirement was discussed but Ms Robinson discounted it on the grounds there was no evidence that the Claimant was unable to work again until the age of 65, which was 14 years away. Ms Robinson decided to dismiss the Claimant on the grounds of capability. Her reasons may be summarised as follows: that the Claimant had been absent for over six months with an 80% non-attendance rate for the financial year, that no reasonable adjustments were possible, that the Claimant was unable to suggest any reasonable adjustment that would

enable her to return to work and the most recent occupational health report did not believe there were any adjustments that would facilitate a return to work.

28. It is agreed that the effective date of termination was 4 March 2022. The Claimant presented her second ET1 Claim Form on 2 June 2022.

## **THE LAW**

29. The law in this case is not in dispute. Section 15 EA 2010, so far as is relevant, states:

“(1) A person (A) discriminates against a disabled person (B) if—

- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

30. Sections 20 EA 2010 deals with the duty to make adjustments and states (so far as is relevant):

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

(2) The duty comprises the following three requirements:

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

31. Section 26 of EA defines harassment as follows:

“(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of—

- (i) violating B's dignity, or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.”

32. Section 27 of EA deals with victimisation and states:

“(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.”

33. Section 123 EA 2010 concerns time limits and states:

“(1) Proceedings on a complaint within section 120 may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.”

34. Section 136 EA 2010 deals with the burden of proof and states:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

35. Section 98 of the Employment Rights Act 1996 (“ERA” 1996) contains the relevant statutory provisions on unfair dismissal and is as follows:

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and  
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

36. In **Pnaiser v NHS England** [2016] IRLR 170, the EAT set out guidance for the tribunal in determining complaints of discrimination arising from disability under section 15 EA 2010. The relevant guidance is as follows:

“(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required..... The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.”

37. In relation to failure to make reasonable adjustments, the EAT in **Environment Agency v Rowan** [2008] IRLR 20 said that:

“... an employment tribunal ... must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the Claimant.”

38. On the issue of unfair dismissal, and in applying section 98(4) ERA 1996, the Tribunal is required to bear in mind the guidance set out in **HSBC Bank plc v Madden** [2000] ICR 1283 where the Court of Appeal re-affirmed the principles originally set out in **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439 namely that:

“The starting point should always be the words of section [98(4) ERA 1996] themselves. In applying the above section the Tribunal must consider the reasonableness of the employer’s conduct, not simply whether the Tribunal would have done the same thing. The Tribunal must not substitute its decision as to what was the right course to adopt. In many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view another employer quite reasonably take another. The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band it is unfair.”

39. In long-term ill-health cases a key consideration is whether the employer can be expected to wait longer for the employee to return (see **Spencer v Paragon Wallpapers** [1977] ICR 301. A tribunal will usually be expected to consider whether the employee’s absenteeism has reached the level where ‘enough is enough’. A tribunal must also consider whether there have any procedural shortcomings in the process.

## **THE ISSUES**

40. The issues in this case are agreed as follows:

### **Unfair dismissal**

41. Did the Respondent dismiss the Claimant for a potentially fair reason? The Respondent relies upon ‘capability’ as the reason for dismissal? Having regard to the reason was and having regard to all of the circumstances was the dismissal fair within the meaning of section 98(4) ERA 1996?

### **Disability status & knowledge**

42. The Respondent accepts that Claimant suffers from depression and generalised anxiety disorder and that these conditions amount to a disability under section 6 EA 2010. It also concedes actual or constructive knowledge of the Claimant’s disability from March 2021. The Claimant alleges constructive knowledge from January 2020. The Respondent denies knowledge of any substantial disadvantage.

### **Discrimination arising in consequence of disability**

43. Was the Claimant dismissed because of “something arising” in consequence of her disability? The “somethings arising” relied upon by the Claimant are her absences from work and the Respondent’s alleged perception of her performance being poor.



44. The Claimant relies upon the following acts of unfavourable treatment:

44.1 That on 19 April 2021 the Respondent found that the Claimant 'missed' her annual objectives;

44.2 That the Claimant's 19 April 2021 PDR was graded as 'missed' or 'poor'

44.3 That between 19 May 2021 and 10 June 2021, Claimant's mental health had been discussed amongst members of staff;

44.4 That in June/July 2021 an ex-colleague wrote a post on social media which was indirectly aimed at the Claimant;

44.5 That at the end of August 2021 at a meeting with Mr Sahota when the Claimant explained that she was struggling owing to her mental health she wished to amend her working hours. The Claimant contends that Mr Sahota responded to the Claimant's request by suggesting that she step down from her current role;

44.6 That on 25 August 2021 at a meeting with Mr Sahota the Claimant alleges that he asked her whether she had any issues with him. The Claimant began to get upset. The Claimant avers that Mr Sahota responded by challenging the Claimant on her emotions. The Claimant asked Mr Sahota whether he had read her WRAP and WAP forms. Mr Sahota stated that he had briefly read through the forms. The Claimant stated that her triggers has been hit but he dismissed her comments;

44.7 That on 6 October 2021, the Claimant's line manager asked questions about her grievance for two and a half hours;

44.8 That on 6 October 2021, the Claimant was continually questioned and undermined during an ill health meeting by Mr Sahota; and

44.9 That on 4 March 2022, the Claimant was dismissed.

45. If the Claimant was treated unfavourably because of something arising in consequence of her disability, has the Respondent shown (where applicable) that the treatment was a proportionate means of achieving a legitimate aim by reason of the following;

45.1 The need to formalise the performance process, give employees a clear indication of their performance by providing structured feedback and promote a strong performing culture;

45.2 The need to ensure the health and wellbeing of colleagues through the communication of any adjustments or support they require;

45.3 The need to collaborate with colleagues to ensure the provision of excellent service and the meeting of operational, business and customer demands and to ensure the health and wellbeing of colleagues;

45.4 The need to ensure the health and wellbeing of colleagues and support them with any adjustments they require; and the need to manage long-term health conditions and absences associated with those conditions to ensure the smooth running of the store.

45.5 The need to ensure that the relevant Store is sufficiently manned and duties effectively managed in order to meet operational, business and customer demands and the need to appropriately allocate resources.

Reasonable adjustments

46. The Claimant relies on the following PCPs: attending work, requiring the Claimant to work on the shop floor and undertaking a year-end review.

47. In each case the issues are: is this a valid PCP for the purposes of section 20 EA 2010 and if so did the Respondent apply these PCPs to the Claimant?

48. If so, did the PCPs put the Claimant at a substantial disadvantage when compared to a non-disabled employee? The Claimant relies on the following substantial disadvantages:

48.1 It was harder for her to attend work than a non-disabled employee;

48.2 Her reviews were likely to be worse than a non-disabled employee;

48.3 Increased risk to further injury/exacerbate her current disabilities;

48.4 Increased risk of general health problems and

48.5 financial losses.

49. Did the Respondent know or could it have reasonably been expected to know, that the Claimant was likely to be placed at any such disadvantage?

50. If so, would it have been a reasonable adjustment to:

50.1 From 7 January 2021, not requiring the Claimant to work on the shop floor;

50.2 In April 2021, taking into account the Claimant's disability and its consequences when grading her performance;

50.3 Not grade the Claimant's performance as poor;

50.4 Put safeguarding measures in place;

50.5 In May/June 2021, giving the Claimant an eight, rather than four, week phased return to work; and

50.6 Not dismiss the Claimant.

51. Would these adjustments have alleviated the substantial disadvantages(s) referred to above?

### Victimisation

52. Did the Claimant do a protected act? The Claimant relies upon having raised a grievance on 6 September 2021.

53. Did the Respondent subject the Claimant to a detriment for raising a grievance? The Claimant relies upon the following detriments:

53.1 The Respondent not keeping in contact with the Claimant from October 2021;

53.2 Failing to carry out any welfare checks;

53.3 Failing to refer the Claimant to OH;

53.4 Failing to try and get the Claimant back to work; and

53.5 Failing to discuss reasonable adjustments.

### Harassment

54. Did the Respondent engage in unwanted conduct related to the Claimant's disability which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? The Claimant relies upon the following acts as amounting to harassment:

54.1 On 19 April 2021 during the Claimant's end of year review, Miss Green:

54.1.1 told the Claimant that her colleagues found her to be aggressive;

54.1.2 asked the Claimant whether she felt she could do her role as a manager;

54.1.3 raised concerns about the Claimant's conduct, attitude and her leadership skills;

54.1.4 concluded that the Claimant had missed her objectives; and

54.1.5 judged the Claimant's PDR as poor;

54.2 That between 19 May 2021 and 10 June 2021, the Claimant's mental health had been discussed amongst members of staff;

54.3 That in June/July 2021 an ex-colleague wrote a post on social media which was indirectly aimed at the Claimant;

54.4 At the end of August 2021, the Claimant met with Mr Sahota when she explained that she was struggling owing to her mental health and that she wished to

amend her working hours. The Claimant contends that Mr Sahota responded to the Claimant's request by suggesting that she step down from her current role;

54.5 On 25 August 2021 the Claimant had a brief meeting with Mr Sahota during which he asked her whether she had any issues with him. The Claimant began to get upset. The Claimant avers that Mr Sahota responded by challenging the Claimant on her emotions. The Claimant asked Mr Sahota whether he had read her WRAP and WAP forms. Mr Sahota stated that he had briefly read through the forms. The Claimant stated that her triggers has been hit but he dismissed her comments;

54.6 On 6 October 2021 the Claimant was continually questioned and undermined during an ill health meeting.

### Jurisdiction

55. In respect of some of the allegations above;

55.1 Does the alleged discrimination/harassment arise out of and is closely connected to a relationship which used to exist between the Claimant and the ex-colleague, and conduct of a description constituting the discrimination/harassment would if it occurred during the relationship contravene the 2010 Act?

55.2 Was the act done in the course of employment so that it is treated as also done by the employer?

### Time Limits

56. Are any of the claims out of time? In particular do the acts of discrimination extend over a period thereby resulting in the claims being in time? If the discrimination claims are out of time, is it just and equitable to extend time?

## **CONCLUSIONS**

### Jurisdiction

57. A number of the allegations have been presented outside the time limit set out in section 123 EA 2010. They cannot be said to be an 'act extending over a period'. They are quite separate distinct allegations often involving different individuals and different scenarios. They are therefore presented out of time.

58. However we consider that it is just and equitable to extend time to allow the allegations to proceed. The Respondent has been able to marshal its evidence despite the passage of time. It does not suffer any prejudice by reason of the delay whereas the Claimant would suffer considerable prejudice if time was not extended.

### Knowledge of disability

59. In March 2021 that the Claimant was formally diagnosed with generalised anxiety disorder and the Respondent accepts knowledge of disability from that date. However we are satisfied that the Respondent was aware or ought to have been aware from the Occupational Health Report of 12 February 2020 that the Claimant was suffering from depression. The report was apparently sent to SF, the Claimant's line manager on or around 12 February 2020.

60. We do not however accept that the Respondent would have been aware of any substantial disadvantage by the Claimant working on the shop floor for the following reasons: the Claimant indicated that she did not want to be furloughed, on the contrary she made it clear to her management that she preferred to be at work rather than at home. The Claimant did not suggest that she could not work on the shop floor at all or that she be completely removed from it, she did not indicate that the measures put in place to reduce working on the shop floor were inadequate nor did she complain in her fairly lengthy grievance about working on the shop floor. Furthermore, there was never any suggestion in the Claimant's OH referrals that the Claimant should be removed from the shop floor as an adjustment.

### Harassment

61. We do not find that Miss Green told the Claimant that her colleagues found her to be 'aggressive'. The contemporaneous note of the meeting makes no reference to the Claimant being alleged to be aggressive and the feedback on the Claimant's interaction with her colleagues did not relate to her being aggressive.

62. We accept that Miss Green did discuss with the Claimant whether she enjoyed the leadership element of the role as she raised issues on team relationships This flowed from the Claimant admitting that she was not fulfilling the role completely.

63. There was a genuine concern as to the Claimant's leadership skills and performance. She was asked whether she felt she could do her role as a manager. This was not unwanted conduct as the Claimant herself had admitted there were performance concerns about the leadership aspect of the role. The purpose of the comment was not to create a hostile environment or violate the Claimant's dignity but simply to provide feedback. The Claimant was prepared to receive feedback in the meeting. The comment was made in the context of an end of year review where employees are provided with feedback. It was not related to the Claimant's anxiety disorder.

64. It is accepted that Miss Green did raise concerns about the Claimant's conduct and leadership skills. The purpose of the comments was not to create a hostile environment or violate the Claimant's dignity but once again to provide appropriate feedback to the Claimant.

65. On 19 April 2021 Miss Green did conclude that the Claimant had missed her objectives. The Claimant was rated as 'missed' in her end of year review not adjudged to be 'poor'. There is no rating of 'poor' in such reviews. This conduct was not unwanted as the Claimant had accepted legitimate performance concerns. The rating was not related to the Claimant's anxiety disorder.

66. The only people who would have discussed the Claimant's health are likely to have been her managers to ensure they were aware of any support she required. There is no evidence that the Claimant's ill-health was discussed outside normal or acceptable parameters or that there was any suggestion it had been handled incorrectly in February 2020. The meeting where the issue was discussed was only attended by the Claimant, Miss Boniface and Miss Lesley Timms (the Claimant's representative). The Claimant does not accuse either Miss Boniface or Miss Timms of leaking any information from the meeting. Miss Boniface confirmed that she never expressed an opinion on how the ill health meeting was handled and we accept her

evidence that there was no suggestion from her that the ill health process was handled incorrectly.

67. The posting of something on social media was not done in the course of employment. Although the Claimant does not know for certain who posted the entry the accusation is against SF who had left the Respondent's employment around October 2020. The post was made 8 months after SF had left. It was not done in the course of employment. Mr Frith was correct to say that there was nothing he could do about it.

68. We accept that Mr Sahota did ask the Claimant whether she considered stepping down from her role to give her more time for caring responsibilities but we do not find that the comment had the purpose or effect of creating a hostile environment or violate the Claimant's dignity. The Claimant was openly discussing issues with her home life with Mr Sahota. It was not reasonable for the Claimant to have perceived the suggestion as an act of harassment. Given the context it was to do with the management of her husband's condition alongside the stress of the role rather than the Claimant's anxiety disorder.

69. On 25 August 2021 the Claimant had a brief meeting with Mr Sahota during which he asked her whether she had any issues with him and the Claimant became upset. We do not accept that Mr Sahota 'challenged' the Claimant on her emotions. Mr Sahota had only just started to work and there is no reason why he would challenge her. Neither in her oral evidence nor in her witness statement does the Claimant explain what 'challenging' her means. We accept that Mr Sahota had not fully read the WRAP and WAP forms but this in itself is not unfavourable treatment. He could have engaged with the Claimant for longer, and it might have been wise to do so, but he was busy and it may have appeared to the Claimant he was dismissive when he was simply under pressure of work. The comments could not reasonably have the effect of creating a hostile environment or violating the Claimant's dignity.

70. We do not accept that the Claimant was continually questioned and undermined during an ill health meeting by Mr Sahota. The notes of the meeting are in the bundle. They do not suggest the depiction put forward by the Claimant. Mr Sahota asked reasonable questions to understand the reason for the Claimant's absence and to see if there was anything that would facilitate her return to work. There is no nothing to suggest that the Claimant was undermined. For the reasons set out above the complaint of harassment is dismissed.

#### Discrimination arising from disability

71. The Respondent accepts that absences relating to anxiety arose from the Claimant's anxiety disorder. We do not find that any absence due to furlough arose from the Claimant's disability.

72. We do not find that the Claimant's perceived performance arose from her disability. It arose from her failure to meet the relevant standards, in particular the lack of relevant leadership qualities and her failure to manage her team properly. The Claimant did not say at the time that her performance was in any way impacted by her anxiety. She did not allege that as part of her grievance. Even for the purpose

of these proceedings she fails to provide any evidence or reason as to why her performance was impacted by her anxiety.

73. The Claimant was not graded as 'poor' as we have indicated already but that she had simply 'missed' her objectives. The rating was justified that is to say it was a proportionate means of achieving a legitimate aim. It must be legitimate to tell employees they have missed their targets otherwise the whole purpose of having any form of assessment is rendered meaningless.

74. We find no evidence that the Claimant's mental health was discussed outside the permitted parameters and we repeat our findings in relation to the harassment issues.

75. In relation to the social media post we have already found that this fell outside the course of employment and for the same reason that allegation is dismissed as a section 15 EA complaint.

76. We would also repeat our earlier findings in relation to the incidents with Mr Sahota. We do not find there was any unfavourable treatment and if there was, asking an employee if they can cope with doing the same job in less time when they are already failing to meet targets and standards is justified, that is it is a proportionate means of achieving a legitimate aim.

77. The allegation as to being asked questions for two and half hours is dismissed as factually wrong and contrary to the clear documentary evidence.

78. We do not find the Claimant was undermined by Mr Sahota at a meeting on 6 October 2021. Asking her questions in an ill-health meeting was a legitimate aim and the questions asked were proportionate and relevant.

79. The Respondent accepts that the Claimant's dismissal was because of her disability-related absence or absences. We find dismissal was a proportionate means of achieving a legitimate aim for the following reasons:

79.1 The Claimant had been off sick for 6 months with an 80% absence rate;

79.2 The Claimant's permanent visual manager role had to be covered by a temporary manager at the time therefore requiring operational cover;

79.3 Management time was being expended on attempting to get the Claimant back to work;

79.4 The Claimant was still being paid some level of sick pay therefore utilising the Respondent's resources;

79.5 The Claimant gave no indication when she would be able to return to work or that any adjustments could be made to facilitate a return.

80. For those reasons the complaint of discrimination arising from disability is dismissed.

Failure to comply with the duty to make reasonable adjustments

81. We accept that attending work, requiring the Claimant to work on a shop floor and undertaking a year-end review all amounted to PCPs adopted by the Respondent and applied to the Claimant. It is not however clear what substantial disadvantage is said to flow from each relevant PCP.

82. We agree that it was likely to be harder for the Claimant to attend work than a non-disabled employee in the sense that she was more likely to have absences from work but it is difficult to see how this caused a substantial disadvantage in that the Claimant generally preferred to attend work if it was possible to do so. Even if it was harder for her to attend work in the sense that she had greater absences, there is no reasonable adjustment that could remove the disadvantage. It cannot be said that a reasonable adjustment would be to not dismiss the Claimant as that would mean the Claimant could never be dismissed even in the face of lengthy and sustained absences and with no reasonable prospect of return.

83. We do not accept that the Claimant's year-end reviews were likely to be worse than a non-disabled employee and no reason is offered as to why that should be the case. The Claimant's leadership issues arose from her failure to address issues with her team which were unrelated to her disability.

84. It is difficult to see why there would be an increased risk to further injury (or indeed what injury there was in the first place) or which PCP put the Claimant to the alleged substantial disadvantage. We make the same observation in relation to increased risk of general health problems. It is wholly unclear as to why the Claimant is said to suffer 'financial loss'.

85. We do not find that removing the Claimant from working on the shop floor was a reasonable adjustment for the following reasons: the Claimant did not suggest that she could not work on the shop floor at all or that she should be removed from it. It was a key part of her role and the Claimant would no doubt have realised that if this was removed her managerial responsibilities would be at risk which she did not want. The Claimant did not indicate that the measures put in place to reduce working on the shop floor were inadequate. She did not complain in her grievance about having to work on the shop floor.

86. Insofar as it is suggested that the Respondent should have taken into account the Claimant's disability and its consequences when grading her performance we find that there was nothing to suggest at the time that this ought to be a consideration. The Claimant had a number of interactions with her managers and at no point did she mention that her disability might be impacting on her performance. It would not have been reasonable to adjust the marking of the end of year review given that the Claimant did not indicate that her mental health had impacted her performance. It would have been wrong to change the grading as this would not have led to the relevant improvement that a 'missed' is intended to introduce.

87. It is not clear what the Claimant means by putting safeguarding measures in place nor which substantial disadvantage these measures are said to alleviate.



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88. We do not find that there was a failure to make reasonable adjustment in May/June 2021 giving the Claimant an 8 rather than 4-week phased return to work. There is no substantial disadvantage because we accept the Respondent's explanation that if after 4 weeks it was reasonable to continue it for a further 4 weeks that would have been done.

89. We do not accept that it would have been a reasonable adjustment not to dismiss the Claimant for the reasons set out earlier. For those reasons the complaint of a failure to make reasonable adjustments is dismissed.

Victimisation

90. We accept that in lodging her grievance the Claimant did a protected act as it clearly referred to matters covered by the EA 2010. We do not however accept that any detrimental treatment flowed from the protected act. The grievance was investigated thoroughly and the decision to dismiss the grievance on the merits was unimpeachable.

91. It is factually wrong to say the Respondent did not keep in contact with the Claimant from October 2021 onwards. The ill-health process was paused until the outcome of the grievance, which was to the benefit of the Claimant. Mr Sahota did not cease contact but kept in touch with the Claimant via Microsoft teams. He followed up with the Claimant on 7 October 2021, tried to arrange a follow-up following the grievance outcome on 17 October 2021 and had further communication throughout November 2021. When Miss Robinson became the line manager there was an initial period where she was not directly in contact as that coincided with ACAS early conciliation but there was contact in due course. The allegation is therefore not factually proved.

92. We do not accept that there was a failure to carry out welfare checks as Mr Sahota met with the Claimant to discuss her ill health and kept in touch.

93. There was no failure to refer the Claimant to Occupational health following the grievance process. The Claimant gave her consent and the assessment was undertaken.

94. There was no failure to try and get the Claimant back to work. Mr Sahota met with her in an ill-health meeting to discuss a return to work. He followed up with her to try to re-organise the meeting if possible. Miss Robinson attempted to get the Claimant to engage in return-to-work discussions and attempted a questionnaire process to make it easier for the Claimant. The lack of engagement was on the Claimant's part not the Respondent.

95. It is not clear how the allegation of a failure to discuss reasonable adjustments flows from the protected act.

96. For those reasons the complaint of victimisation is dismissed.

Unfair dismissal

97. We are satisfied that the Respondent has discharged its obligation in establishing a potentially fair reason for dismissal and that potentially fair reason under section 98 ERA 1996 was 'capability'.

98. We are satisfied that at the point of dismissal the Respondent had done all it reasonably could to get the Claimant back to work and that they had reached a point where 'enough was enough'.

99. Mr Kohanzad argues that the dismissal was unfair as it was discriminatory. We have not found any discrimination.

100. His secondary argument is that the Respondent's failure to properly investigate the alleged data breach amounted to an act which destroyed trust and confidence. He draws an analogy with the last straw principle in a constructive dismissal case.

101. We do not accept that the reason why the Claimant did not wish to return to work was because of anything done by the Respondent or that even if the analogy is appropriate that there was any such last straw of any cumulative series of acts which caused a breakdown of trust and confidence because of the Respondent's conduct. Our reasons are as follows:

101.1 The issue of the Facebook entry (in June 2021) was largely historical at the point of ill-health dismissal in March 2022;

101.2 In her first ET1, drafted in person, the Claimant does not even make reference to the Facebook entry. The first Claim was presented on 4 January 2022 when any feelings of indignation would have been fresher in the mind. We do not consider that it was the real reason why the Claimant did not wish to return;

101.3 It is difficult to see what blameworthy conduct there was on the part of the Respondent. The post was by a former employee who had left some months earlier. The Respondent had no control over the actions of a former employee. It was removed before the Respondent had even seen it so it could not come to an independent view on whether it was referring to the Claimant. The Claimant was not accusing Ms Boniface or Mr Frith or posting it and the only other person who knew of the information allegedly disclosed was Ms Timms. The Claimant never asked Ms Timms if she knew anything about who had leaked any information in relation to the subject matter of the post;

101.4 The issue was investigated as part of the grievance investigation and appeal and the Respondent had come to the reasonable view that there was nothing they could do in the circumstances. There is therefore no substance in the suggestion that any loss of trust and confidence, as a barrier to returning to work, was in any due to the Respondent.

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103. We are satisfied that dismissal in all of the circumstances fell within the band or range of reasonable responses. We have not identified any procedural shortcomings. The dismissal was not unfair.

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Employment Judge Ahmed

Date: 5 May 2023

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