



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100912/2022

**Held at Fort William on 26, 27 and 28 June 2023
with Members' Meeting 21 July 2023**

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**Employment Judge M Robison
Tribunal Member N Elliot
Tribunal Member J McCaig**

10 **Ms J Liddell**

**Claimant
In person**

Highland Council

**Respondent
Represented by
Mr D Milne
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim for disability
20 discrimination does not succeed and is dismissed.

REASONS

1. The claimant lodged a claim in the Employment Tribunal claiming disability
discrimination, age discrimination and public interest disclosure detriment.
Only the claim for disability discrimination was pursued at this final hearing.
25 The respondent conceded disability in the latter stages of case management.
2. This claim relates to allegations by the claimant, who is still employed by the
respondent as facilities assistant based at Mallaig High School, that she has
been discriminated against because of her disability. She alleges that she was
less favourably treated by her manager, Catriona McAllister, which includes
30 rejecting her for the promoted post of facilities team leader.

3. After significant procedure and case management, the claim was listed for a final hearing, which took place in person at Fort William Sheriff Court on 26, 27 and 28 June 2023.
4. The Tribunal heard evidence from the claimant and also from Mr Mark McLean, a colleague also based at Mallaig High School. For the respondent, the Tribunal heard evidence from Ms A Dey, facilities team leader, Ms S MacRae and Ms C McAllister, both facilities officers. The claimant had intended to call Ms A Baillie, her colleague and counterpart, but decided not to given her health condition. She had also intended to call Ms P Livingstone but agreed that her attendance was unnecessary following the evidence of Ms Dey.
5. Parties referred to a joint file of productions, referenced in this judgment by page number. On the second day the claimant lodged additional documents to support her claim for loss of earnings. The respondent had lodged what was called a draft “Scott schedule” which was a table listing each incident of less favourable treatment alleged by the claimant identified in the ET1 and further particulars. Although this was not a joint document, it was referred to throughout by parties and witnesses as an aide-memoire.

Findings in fact

6. The Tribunal makes the following findings in fact based on the evidence heard and the productions lodged.
7. The claimant commenced employment with the respondent in the role of facilities assistant 2 on 19 September 2018, and continues in that role.
8. The claimant had submitted a standard application for the role of facilities assistant 2 on 5 July 2018. The respondent’s standard application procedure includes a requirement to complete a form called “HGH 8 – Standard with PVG” (page 54). That form asks the question “do you consider yourself to have a disability”, to which there is the option to answer only yes or no. The claimant answered yes. There was no scope to provide further information about that. The claimant was interviewed by Ms McAllister, and her counterpart, Ms MacRae, who had both seen her application form.

9. The claimant was engaged on a 52 week per year basis to undertake the role of facilities assistant for Mallaig High School, where she was based, and also Mallaig Primary School.
10. The claimant was engaged to work in a team with another facilities assistant, namely Anne Baillie. They worked alternate shifts, either an early shift or an afternoon shift, with an overlap of approximately one hour. Ms Baillie undertook the same role as the claimant, except she was engaged on a term-time contract, which is for 30 weeks each year.
11. The claimant's line manager is Alexandra Dey, facilities team leader, who line manages the facilities assistants in the area, including Ms Baillie.
12. Ms Dey's line manager is Catriona McAllister, facilities officer. She has responsibility for around 200 staff including facilities assistants and cleaners in a large area covering Lochaber (including Mallaig) and Skye and Lochalsh.
13. Ms Dey was appointed in August 2018 and initially focused on the Skye and Lochalsh area. Her duties in the Lochaber area were initially undertaken by her line manager Ms McAllister.
14. There is a post of "supervisor" which is a level above facilities assistant 2 and below team leader, but that post was and remains vacant for the Lochaber area.
- 20 *Role of facilities assistant*
15. The job description for the role of facilities assistant 2 (pages 58 to 59) states that the job holder is responsible to the facilities team leader (line management) (and in liaison with head teacher/responsible premises officer (RPO)).
- 25 16. The job purpose is stated to be "to assist the team leader in the provision of an effective Facilities Management service with regards to property management, building access and egress, maintenance, health and safety and to clean designated accommodation to ensure it is left in a clean and hygienic position."

17. Under key duties and responsibilities (general) this includes “work in close co-operation with the Facilities Team leader, Head Teacher/RPO, external agencies and other council staff specifically with property maintenance officers to ensure the delivery of an efficient FM operation and to meet establishment needs.”
18. Under operational area, key duties include portering duties, including the movement of furniture and equipment as well as “general and emergency cleaning as required, including environs and grounds e.g. removal of graffiti, body fluid spillages, accidental slippages”.
19. Under property management, key duties include “completion of accurate records of the fabric and condition of buildings are maintained within establishments and the reporting of maintenance work required”; “the open/close of establishments as appropriate ensuring access and egress for authorised personnel and visitors”; and “key holding responsibilities including being able to respond to emergencies.”
20. Under other duties it is stated that “the post holder may be required to perform duties appropriate to the post, other than those in the job specification. The particular duties and responsibilities to posts may vary from time to time without changing the general character of the duties or the level of responsibilities entailed”.
21. The correct procedure when school staff wish a facilities assistant to undertake a specific task is to telephone the helpline when the request would be passed on to the relevant team leader, who would allocate a task to the appropriate facilities assistant. This would mean that relevant tasks to be undertaken in the Mallaig area would be brought to the attention of Ms McAllister first, and relayed to Ms Dey, who would in turn instruct the claimant if appropriate. When she was first employed (and for up to a year or so), instructions to the claimant would come from Ms McAllister, although when Ms Dey was allocated to the Lochaber area, she would relay tasks to be undertaken to the relevant facilities assistant. On occasion, Ms McAllister may contact the facilities assistants direct, particularly if the matter is urgent.

It is known that school staff will make requests direct to facilities assistants although that was not the correct procedure.

Induction

- 5 22. On the first day of the claimant's employment, she was met by Ms McAllister to undertake induction. She gave the claimant a medical questionnaire. The claimant completed this form and signed and dated it on 19 September 2018 (page 61).
- 10 23. The claimant ticked the box "yes" in reply to the following three questions:
- a. Have you suffered from any physical condition requiring attention at hospital?
 - b. Have you suffered from any mental condition requiring medical treatment?
 - c. Are you currently receiving medical treatment for any conditions?
- 15 24. The claimant answered no to the following three questions:
- a. Is there any medical condition of which you are aware which might affect your suitability for employment?
 - b. Have you ever been rejected for, or lost employment on the grounds of being considered medically unfit?
 - 20 c. Have you lost more than five days in the past year due to illness or accident?
- 25 25. Thereafter there was a section for details but the claimant left that blank. The completed form was forwarded to Ms McAllister several weeks later.
- 25 26. By e-mail dated 5 October 2018, the claimant was sent a statement of terms and conditions of employment (page 62). The claimant replied by e-mail dated 6 October 2018 (page 62), accepting the terms of the contract.
- 30 27. Those terms and conditions of employment include provision relating to holiday entitlement which make no restrictions on when the claimant could take leave.

Return to work interview

28. The claimant was absent from work from 20 June 2019 to 21 July 2019 following a laceration to her finger.
29. On 9 August 2019, the claimant underwent a return to work interview which was conducted by Ms McAllister and took place in the office of the facilities assistants at Mallaig High School.
30. A return to work interview form was completed and signed by the claimant and by Ms McAllister (page 69). Areas for discussion included stress concerns and mental health concerns. The claimant advised Ms McAllister that she suffers from stress and anxiety, and that she had mental health concerns. The claimant advised Ms McAllister that she was on medication for it.
31. Mr Maclean, ICT technician also based at Mallaig High School, overheard the conversation when the claimant referenced her mental health concerns. The claimant subsequently discussed the fact that she had PTSD with Mr Maclean.

Request to undertake specific tasks

32. During 2018 and 2019, the claimant was asked on occasion to attend the primary schools in Morar and Arisaig to allow access for contractors. The primary school in Morar is relatively close to where she lives.
33. The claimant had initially agreed to undertake additional hours attending to these two additional primary schools in or around November 2019. However the claimant confirmed to Ms McAllister when advised that she was not to be issued with a works van, that she did not consider that it was financially beneficial for her to travel there using her own vehicle, even with the mileage allowance. Ms McAllister accepted the claimant's decision by e-mail dated 23 December 2019. The claimant agreed to undertake the role until the end of January 2020 to allow the vacant post to be advertised (page 130).
34. In December 2018 and January 2019 the claimant was requested to retrieve and replace Christmas decorations and staging from the basement at Mallaig

Primary School. This involved climbing a set of very steep stairs from the basement.

35. In or around March/April 2019, the claimant was instructed to empty the contents of the basement at Mallaig Primary School after a flood.

5 36. In or around August 2019, the claimant was asked by Ms McAllister to attend to an incident at Mallaig Primary School which involved a sewage leak. The claimant was expected to inspect and assess the situation and arrange for the appropriate contractor to attend.

Annual leave issue

10 37. During the claimant's interview in 2018 the subject of annual leave had been discussed, and the claimant was advised by Ms McAllister that she could take holidays at any time. This was because she was on a 52 week contract and would be working in a team with another facilities assistant, Ms Baillie.

15 38. The claimant's annual leave request forms were initially authorised by Ms McAllister. Ms McAllister authorised the claimant's annual leave throughout 2018 and 2019, after which that role was taken over by Ms Dey after she assumed the duties for the Lochaber area.

39. There were no restrictions on when the claimant could take annual leave, and Ms McAllister authorised leave during term time for the claimant.

20 40. There were however normally restrictions on when facilities assistants could take annual leave, and these were numerous particularly for those facilities assistants who only worked term time (30 weeks per year).

25 41. On 8 January 2020, Ms Dey forwarded to the claimant her annual leave sheet for 2020/21 by e-mail (page 138) with a two page document attached which stated that page 2 had the dates in red when she could not take annual leave (page 132). Ms Dey had received this from Ms McAllister who in turn had received it from her line manager, Evelyn Miller, who is the facilities manager based with her team in Inverness.

42. The claimant asked why she could not take leave during the red dates, which she said covered all term time and that hers was a 52 week contract. Ms Dey advised in reply that this was the holiday calendar she had been given to issue and that as far as she was aware the claimant was only able to take annual leave during the school holidays. She advised that all the full time facilities assistants in her area were issued with the same calendar (page 137).
43. The claimant replied that she was taking advice from her union, because her contract did not require her to take leave in the school holidays (page 136).
44. By e-mail dated 24 January 2020 (page 139) the claimant responded that having spoken to her union she had been advised that the respondent could not change her contract from non-restrictive leave to enforcing restrictions.
45. Ms Dey advised that she had passed the matter to Ms McAllister (page 130). When the matter was drawn to Ms McAllister's attention, it was passed to Ms Miller. The matter was also raised with Ms Miller directly by the claimant's union representative John Gibson.
46. It transpired that it was a mistake to have informed the claimant that she could take annual leave in term time, but it was accepted that this is what she had been informed at her interview and that she had been permitted subsequently to take leave in term time. A decision was made by Ms Miller to reissue the annual leave sheet to allow the claimant to continue to request annual leave during school term time dates. That decision was relayed to the claimant within about three weeks of her complaint.

Team leader role

47. During 2021, the position of facilities team leader for the Lochaber area was vacant and was advertised. This post was two levels above the claimant's current post, the post of supervisor for the area being vacant. The claimant completed an application for the role, which she submitted on 7 September 2021.
48. The closing date for applications was extended because the respondent had received only two applications. When the claimant asked why the closing date

had been extended, Ms McAllister advised that “there was insufficient candidates” (page 147). This was standard practice for the respondent and they would rarely run interviews with only two candidates, because the respondent wanted to attract as many applicants as possible to ensure they got the best person for the job.

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49. The claimant was interviewed for the job on 9 November 2021 by Ms McAllister and Ms MacRae. Interviewees were given a scenario (page 91) to consider for around 10 to 15 minutes then expected to give a very short presentation. Thereafter interviewees were asked a series of 16 questions. Both Ms McAllister and Ms MacRae took notes on a standard selection form which set out the questions with spaces for the answers.

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50. Two candidates were interviewed. After the interviews, Ms McAllister and Ms MacRae discussed the candidates’ performance and gave a score for the answer to each question out of five. The claimant scored 24 out of a possible 85 based on her answers. In regard to a number of questions it was noted that she did not answer the question and therefore scored zero.

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51. Ms McAllister thought that the claimant’s performance overall was poor. Ms MacRae considered the claimant’s performance at interview to be particularly poor, and that it was one of the worst team leader interviews she had ever undertaken.

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52. Neither the claimant nor the other interviewee were considered appointable for the job, even with training.

53. The claimant requested and was given the following feedback in an e-mail dated 15 November 2021 from Ms McAllister (page 92):

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“In general the interview went well, however we were looking for a higher standard of answers and on this occasion your answers did not meet what we were looking for in regards to the job description. We were impressed that you spoke about the rapport with staff and the importance of communication. For the scenario you missed a couple of the points and we would have hoped for some further information on what actions you would take or put in place. On a couple of the questions the answers you provided did not fully answer the

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questions asked. For example we asked you to tell us about any supervisory experience you had and your answer did not supply any evidence related to what was asked. The same also applied when asked about introducing new ways of working to the team, your response was not related to what had been asked. For the post of Team Leader we would expect the successful applicant to be able to relate their answers to previous supervisory experience and demonstrate the same experience in dealing with staffing issues, team scheduling etc”.

54. Although the post was readvertised in July 2022, there were no applications. The post remains unfilled. The vacancy has been put on hold in light of a current restructuring.

55. Since that interview, the claimant has applied, unsuccessfully, for other promoted posts in the same pay bracket in the Council and with Lochaber Housing Association.

Claimant's grievance

56. The claimant came to believe that following the “annual leave issue” that Ms McAllister was avoiding her and that Mrs McRae was complicit in that. She believed that she was being discriminated against.

57. Consequently on 2 December 2021, she contacted Acas with a view to initiating employment tribunal proceedings (page 15).

58. Also in or around December 2021, the claimant lodged a grievance raising concerns about her belief that Ms McAllister was avoiding her and about the outcome of the team leader interview, as well as making “allegations of being discriminated against” by Ms McAllister in respect of location, mental health issues and the fact that she had involved her trade union.

59. There was a hearing to consider that grievance which took place on 13 January 2022, chaired Ms Miller. The claimant was accompanied by her union representative, Mr Gibson.

60. The claimant was advised that the grievance was not upheld by letter dated 31 January 2022 (page 98).

61. On 5 February 2022, the claimant presented a claim form in connection with these employment tribunal proceedings (page 3).

62. The claimant appealed the stage 1 decision and a stage 2 grievance appeal hearing took place on 10 March 2022 which was heard by Finlay MacDonald, head of property and facilities management. The claimant was accompanied by her trade union representative Mr Gibson. The claimant was advised by letter dated 7 April 2022 (page 100) that her grievance was not upheld.

63. The claimant lodged a further appeal against that grievance outcome, which is currently on hold.

10 *Claimant's absence on sick leave*

64. In or around May 2022, the claimant was signed off sick.

65. When the claimant had intimated she was signed off, but before she had submitted her sick line, Ms McAllister asked Patricia Livingstone, who is an administrative assistant, to arrange to obtain the claimant's keys for the schools she is responsible for. This was to allow the relief facilities assistants from Fort William to open and close the premises. Ms McAllister did not have spare keys and Ms Baillie was also absent on sick leave.

66. The claimant returned to work on 31 August 2022 and a return to work interview was conducted by Ms Dey on 7 September 2022. In the return to work interview form (page 104) under "stress concerns" and "mental health concerns" Ms Dey noted "medication increase".

67. The claimant is currently on sick leave.

Tribunal deliberations and decision

Observations on the evidence and the witnesses

68. We found the respondent's witnesses to be credible and reliable. Ms Dey was straightforward, measured and candid in the evidence she gave. Ms MacRae is an experienced manager who gave clear and confident answers. We found her to be entirely credible.

69. Ms McAllister did not recall many of the events which the claimant relied on, but this is not surprising since she manages a large number of staff, and the events that loom large with the claimant which were perhaps more unusual requests for her were run of the mill for Ms McAllister. Although Ms McAllister
5 struggled on occasions to answer some questions, we accepted that her evidence was credible.
70. Although we have preferred the evidence of the respondent's witnesses to that of the claimant, and while we accept that the claimant gave evidence in a proportionate and measured way and that her concerns are genuine, we
10 found no evidence to support her belief that she was being treated less favourably than others as explained below. We formed the view that even though genuine, that she was mistaken. We did not find the claimant's evidence to be reliable because she has misremembered events from up to
15 four years ago. But even if we had found that she was being treated differently or less favourably, there was no evidence to suggest that any treatment was in any way be related to her mental health condition generally or PTSD specifically as discussed further below.
71. While we found Mr Mclean to be a credible witness, his evidence was of limited assistance to us because it largely related to evidence which was not
20 in dispute. We did note however that his recollection was that the claimant's discussion with Ms McAllister about her mental health, the general terms of which he overheard although not the detail, was during a return to work interview following sickness, rather than at or towards the start of the claimant's employment which was her position. Ms McAllister did not
25 of course deny that the claimant's mental health issues had been raised at that interview.
72. For these reasons, , where there was any conflicting or disputed evidence, we have preferred the evidence of the respondent's witnesses.
73. We did not hear from Ms Baillie or Ms Livingstone, but we did not consider
30 that their evidence would have influenced the outcome, as discussed further below.

Disability discrimination claim

74. Although the claimant had initially sought to rely on various provisions of the Equality Act 2010 to establish disability discrimination, as was clarified during the hearing, ultimately she relied only on the direct discrimination provisions of the Equality Act 2010, that is section 13.

75. Section 13(1) of the Equality Act 2010 sets out the provisions relating to direct discrimination, which is where an employer treats or would treat an employee less favourably than a comparator in the same material circumstances, because of a protected characteristic.

76. In this case the relevant protected characteristic is disability, and the claimant's disability accepted as PTSD.

77. The claimant argues that she was less favourably treated than an actual comparator (Ms Baillie) or a hypothetical comparator and this was because of her PTSD. She references a number of events, which for this hearing were listed in a "Scott schedule" and numbered one to eleven, which she alleges amount to less favourable treatment.

The reason why

78. Mr Milne suggested, and we agreed, that this was one of those cases, relying on the principles established in *Shamoon v RUC 2003 IRLR 285*, where it is appropriate to focus on the reason why the claimant was treated as she was.

79. Although the test of direct discrimination is ostensibly a two stage test, ie was there less favourable treatment and if so, was it because of disability, in some cases it is more appropriate to focus in the first instance on the reason why, that is what is the reason operating in the mind of the perpetrator, whether conscious or subconscious, for treating the claimant that way. Thus in some cases it is appropriate to ask a single question, which is whether the allegedly less favourable treatment was on the proscribed ground. The focus then is not on the treatment of comparators, hypothetical or otherwise, and whether or not they were in the same or similar circumstances, but on the reasons for any treatment which the claimant alleges is less favourable.

80. Thus, for the claimant's claim to succeed, she would need to show that the reason why she was treated that way was because of her disability, specifically because of her PTSD.

5 81. Further for the claimant to succeed, it is not sufficient for the claimant to establish only that she is disabled and that she has been subjected to less favourable treatment, but there must be "something more", that is an additional factor or factors, sometimes called Madarassay factors (see *Madarassy v Nomura International plc* 2007 IRLR 246). These are usually inferences of discrimination drawn from primary facts, or to put it colloquially, 10 facts which led the claimant to be suspicious that the reason for the less favourable treatment was her disability (and not for another reason), from which it can be inferred that the reason for the treatment was disability.

Knowledge of disability

15 82. In order for a person to treat another "because of" their disability, it stands to reason that the discriminator must know that the person is disabled. The claimant's position is that Ms McAllister knew about her disability, and knew, from either the first day of her employment or shortly thereafter, that she suffered from PTSD, or at least from stress and anxiety which are symptoms of PTSD.

20 83. However the evidence of Ms McAllister was that she did not know, until she saw the papers for this hearing, that the claimant suffered from PTSD. She was aware that the claimant had a disability because this is a question which is asked in the council's PVG form, although it gives no details, and her evidence was that they were not permitted to ask any further details at 25 interview.

84. Shortly after the claimant commenced employment, Ms McAllister would become aware that the claimant had "suffered from [a] mental condition requiring medical treatment", as well as a physical condition and that she was "currently receiving medical treatment" for one or other of these conditions. 30 This is because the claimant had ticked these boxes when she completed the medical questionnaire. Ms McAllister denied however that she and the

claimant had completed the form together, and that they had discussed each question and answer.

5 85. We accepted Ms McAllister's evidence that she had not discussed the answers to the questions listed in the medical questionnaire on the first day of the claimant's employment. We accepted her evidence that she probably gave the claimant the form to complete and return to the council, and that she saw it some weeks later (she said sometimes these form were sent from an office in Dingwall).

10 86. Ms McAllister's position was that it was not until the return to work interview in August 2019 that the claimant told her that she suffered from stress and anxiety and that she was taking medication for that condition. Her position was that she was not aware that this was because the claimant suffered from PTSD. We accepted that there was limited discussion about this at the return to work interview, but that the claimant had volunteered that she was taking
15 medication for her mental condition.

87. We concluded therefore that although Ms McAllister was aware that the claimant had a disability even before interview, she did not know any details of the claimant's disability, and only after a few weeks of employment that she suffered from a mental condition. Further, she did not know that she suffered
20 from stress and anxiety for which she was taking medication specifically until following the return to work interview on 9 August 2019. Even then she was not aware that the particular condition that she suffered from was PTSD.

88. We came to the view that Ms McAllister's became aware that the claimant suffered stress and anxiety in August 2019 and not before was not least
25 because Mr Mclean's evidence was that he overheard the discussion during a return to work interview almost a year after the claimant started work. His evidence was that he had overheard the claimant saying in that interview that she was suffering from mental problems but he did not overhear the details. He said he found it embarrassing but that he had overheard because there
30 was a pain of glass missing from the service window of the facilities assistant's office. However, he went on to discuss the detail with the claimant subsequently.

89. The claimant suggested in the paperwork in preparation for this hearing that Ms McAllister had said to her that she was surprised that she had revealed in the medical questionnaire that she suffered from a mental condition because that was unusual. There was however no evidence to that effect heard, and the claimant did not ask her about that in cross examination. Ms McAllister was however asked a general question in examination in chief, and her answer was in fact that it was not unusual for applicants to reveal that they had mental health conditions, and that she saw that box ticked "quite regularly".
90. Further Ms McAllister's evidence was that she got no impression from the claimant's behaviour that she was suffering from a condition such as PTSD. We did hear evidence that the claimant was prepared to assert herself in turning down the request to work extra hours at Morar and Arisaig primary schools, which belies that claimant's suggestion that Ms McAllister was aware that she could "not cope with conflict". The claimant did not come across as someone who was not prepared to speak up and indeed she contacted the union about the annual leave issue, but she did not lodge any formal complaints about the jobs which she was asked to do which were cause for concern. The claimant's evidence was that after getting the job her confidence was building up and she was beginning to feel back to normal but that the failure to get the team leader job had set her back. So this would suggest that she did not give the impression that she was suffering from any mental health condition.
91. Likewise the other witnesses for the respondent stated that they did not know that the claimant suffered from PTSD until they gave their witness statements for this case.
92. We bear these conclusions regarding Ms McAllister's state of knowledge in particular in mind when we come to consider the reason for the alleged less favourable treatment (as listed in the "Scott schedule").
93. Mr Milne in submissions suggested these allegations fell into six broad categories, namely requests to do specific tasks (1, 2, 4 and 5); the fact that the claimant was asked to do tasks through an intermediary (6 and 11); the

request of Ms Livingstone not to contact the claimant and the key issue (9 and 10); the attempt to change annual leave (number 3); and the interview (7 and 8). We have considered them in those groupings.

Requests to do specific tasks

- 5 94. The claimant alleged that she was required to attend both Lady Lovat (the primary school in Morar) and Arisaig Primary School to allow trade access (number 1 on Scott schedule). This was apparently not in dispute. Further, we accepted that this was the type of task which a facilities assistant might reasonably be required to do.
- 10 95. We did note that the claimant's concern appeared to be that Ms Baillie was never asked to undertake such tasks, even though she had a full driving licence. In general the evidence was that Ms Baillie undertook the same tasks as the claimant. We did hear evidence (from Mr Maclean) that he had seen her driving her husband's car.
- 15 96. More to the point, we heard that unlike the claimant Ms Baillie had a term time contract rather than a 52 week contract. The evidence of Ms McAllister is that these requests were likely to be in the school holidays, because otherwise there would be staff at the schools to open the buildings. If the claimant got the impression that Ms Baillie was not asked to do such tasks while she was,
20 if there was any substance to that it was likely to be that Ms Baillie was not working that day.
97. The claimant also complained that she was requested to fetch and replace Christmas decorations and staging from the basement at Mallaig Primary School (in December 2018 and January 2019) (number 2 Scott schedule).
25 Again we did not understand this to be in dispute. We accepted that this is the kind of task that a facilities assistant would be reasonably be requested to do. We also became aware that the steps at Mallaig Primary School to the basement are very steep, and indeed that Mr Mclean had described them as "treacherous". There was some evidence however in regard to tasks which a
30 facilities assistant might do that it would depend on the circumstances, for example how heavy they were, so that carrying a box of tinsel might well be

reasonable but moving staging might require two or more people. We heard evidence that it was a matter for an individual facilities assistant to assess and to request assistance if appropriate. We heard that the claimant did not raise any concerns about this particular instruction with Ms McAllister at the time or subsequently.

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98. The claimant complained that she was instructed to clear up the basement at Mallaig Primary School after a flood (in March/April 2019) (number 4, Scott schedule). Again we understood that there was no dispute about that. Again we accepted that this was a reasonable request, as a task which is listed in the job description. We heard that it was around Easter, so again may have been in the Easter holidays when Ms Baillie was not working. Again we heard that the claimant made no complaint about it at the time.

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99. The claimant also alleges that she was instructed to attend a basement cupboard at Mallaig Primary School which had a sewage leak. She complained that Ms McAllister had waited until her shift had started before making this request (number 5 on Scott schedule). Again, Ms McAllister had no specific recollection of this instruction. However, she did accept that she may well have contacted the claimant to make such a request, that is she may well have by-passed Ms Dey because it was urgent. She also said in evidence that she would have waited until the claimant came on shift because she would not have contacted her with such a request when she was not at work. The claimant said this happened in August 2019. Thus again it may well have been in the school holidays when Ms Baillie was not working. In any event, Ms McAllister said that all that would be expected of a facilities assistant for such an event was to attend to assess the situation and then to arrange for the appropriate contractors to attend and deal with the matter.

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100. In short then the reason why the claimant was asked to undertake these tasks was because they fell squarely in the role of facilities assistant.

101. Although the evidence from the respondent's witnesses was that the same types of tasks were allocated to Ms Baillie, if on occasion the claimant's impression was that she was not asked to do particular tasks, this was

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because there was a relevant and material difference in their circumstances relating to their different contracts.

Requests to do tasks through intermediaries

- 5 102. The claimant alleges (point 6 of the Scott schedule) that Ms McAllister does not engage with her, but uses other staff to relay instructions, and that she had done so since January 2020. The claimant also alleged that during 2020 to 2022, Ms McAllister would contact the temporary cleaner (Diane Tarn) to ask the claimant to complete tasks, rather than asking Ms Baillie (Scott schedule, point 11).
- 10 103. Ms McAllister denied both of these allegations. However, she accepted in evidence that she would relay instructions through Ms Dey because as we understood it, that is strictly speaking the correct procedure, since Ms Dey is the claimant's line manager and the team leader of facilities assistants in the area.
- 15 104. In general we noted that Ms McAllister is the facilities officer and we understand that she is in charge of relaying instructions from the helpline to facilities assistants through the team leaders. We also heard that she was responsible for around 200 staff, that is the facilities assistants and cleaners in the area, assisted by team leaders and in some areas supervisors; that she had to cover a very wide geographical area; and that her visits to Mallaig High School were relatively infrequent and may of course have been when Ms Baillie was on shift. Given that role, we would not necessarily expect the claimant to have had much direct contact with the claimant.
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- 25 105. On the matter of contact with Ms Tarn, who is a relief facilities assistant and relief cleaner, Ms McAllister's position is that if she contacted her it would be to instruct her to do the necessary task, and she would not need to ask her to ask the claimant to do something.
- 30 106. Accordingly, we did not accept the claimant's evidence that Ms McAllister deliberately instructed Ms Tarn or others to pass on instructions to the claimant, except to the extent as appropriate through Ms Dey. We preferred the evidence of Ms McAllister, there being no evidence to support the

claimant's position beyond her own impression which failed to take account of all the surrounding circumstances.

Contact with Pamela Livingstone and the key issue

- 5 107. The claimant alleges that Ms McAllister told Ms Livingstone that she was not to make direct contact with the claimant (point number 9 of the Scott schedule). The claimant also alleges that Ms McAllister informed Ms Dey that she should obtain the claimant's keys to the premises she covered when she went on sick leave in May 2022 (at number 10).
- 10 108. We heard evidence from Ms Dey that she had understood from Ms Livingstone that Ms Dey was to contact the claimant, because Ms Livingstone had been told by Ms McAllister that she was not to make contact with her. Ms McAllister denied that she had told Ms Livingstone not to contact the claimant direct. Ms Dey's evidence was not that she had heard that from Ms McAllister, but rather than she had heard it from Ms Livingstone.
- 15 109. The claimant had initially intended to call Ms Livingstone to give evidence. Her evidence would have related to that one incident. Mr Milne accepted that it would be relevant evidence. Although a witness order had been issued, apparently Ms Livingstone had not received it.
- 20 110. There was however in the end no need to re-issue it because, as it transpired, the claimant decided that she did not require to call Ms Livingstone. This as we understand it was because Ms Dey had confirmed what she believed, which was that she had been told by Ms Livingstone that she was to contact the claimant and that Ms Livingstone was not to.
- 25 111. Ms McAllister denied saying such a thing. On the contrary, her evidence was that she had instructed Ms Livingstone to contact the claimant to obtain keys to the premises she managed (the claimant had suggested that it was Ms Dey). We heard evidence about the reason for that. This was around May 2022 when the claimant went on sick leave. At that time, Ms Baillie was also on sick leave. She agreed that would have been before the respondent had received the claimant's sick line because she needed to ensure that the relief facilities assistants, who would be attending from Fort William, could gain
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access to the schools. When asked specifically, she said that she did not ask Ms Baillie for her keys because she did not want to disturb her or her family given she was recovering from brain surgery.

5 112. So Ms Dey said that Ms Livingstone told her she was not to make contact with the claimant; she did not hear it from Ms McAllister herself. It may well be that had Ms Livingstone been called to give evidence she could have cleared up the matter. We were of the view that if she were to have given evidence, it would relate to that one issue alone, and would not make the difference between the claimant succeeding or not succeeding with her claim.

10 113. This is because even if it had been established that Ms McAllister had told Ms Livingstone not to contact the claimant, there was no evidence to show, or which would allow us to raise any inference, that the reason Ms McAllister might ask Ms Livingstone not to make direct contact with the claimant had anything to do with her disability.

15 *The annual leave issue*

114. The claimant alleges that Ms McAllister attempted to change the claimant's annual leave entitlements. We have found above that the claimant was advised at interview that there would be no restriction on when she could take annual leave. Ms McAllister admitted she had said that because she had
20 assumed that would be permitted, given that the claimant would be working in a team with another facilities assistant who worked only term time. She did not deny that she had signed the claimant's annual leave requests up to January 2020 and she accepted that she had permitted leave in term time so that was not in fact in dispute. Ms Dey sent out the annual leave calendar in
25 January 2020, on instruction from Ms McAllister who had received it from Ms Miller. It transpired that this form come from Ms Miller's team and not Ms McAllister although it seems that the claimant was not aware of that until the grievance hearing.

115. It does seem that it was around this time that the claimant came to perceive
30 that Ms McAllister's attitude towards her changed in some way, given that it was after this that she lodged the grievance. At that time it seems that she

5 thought it was because she had approached her union representative to complain about her. But it is not clear if Ms McAllister even knew that; and the claimant seemed rather surprised to find out that it was Ms Miller's team who had issued the claimant's annual leave form rather than Ms McAllister, and it was Ms Miller who confirmed that the claimant's leave arrangements should be honoured. The fact is the matter was sorted quickly and easily and the position restored.

10 116. So far as the claimant's perception is concerned, we did note that it had been around this time that Ms Dey had more fully taken over from Ms McAllister the role of managing the facilities assistants in the Lochaber area.

117. We conclude therefore that this episode had nothing to do with the claimant's disability, her mental health, or her PTSD. It was quite simply a mistake that got rectified quickly.

Team leader Interview

15 118. The claimant alleges that she was not offered the post of team leader which she asserts was less favourable treatment because of her disability. Specifically, she alleged that another employee (whom we understood during evidence to be Helen Mann) was invited to be interviewed for the post of team leader (point number 7 of the Scott schedule). She also alleged that Ms
20 McAllister had extended the closing date for applications for a further two weeks.

25 119. Although there was a lack of clarity about whether Ms Mann had or had not been invited to interview, so that we have made no findings in fact in that regard, we did hear that she did not get the job of team leader. In any event as Mr Milne argued, it would be entirely appropriate for the respondent to invite council employees to apply for a role, especially when there were a limited number of candidates.

30 120. We also heard that it was for that reason that the closing date had been extended, that is that there were only two applicants, that it is common to extend the closing date where there are insufficient applicants, and they rarely proceed to interview with only two candidates, because one may not appear

for interview on the day and it is appropriate to try to have a bigger pool with a view to selecting the best person for the job.

121. In regard to the claim relating to the failure to be appointed to the team leader post, the interview process was conducted jointly by Ms McAllister and Ms
5 MacRae. The claimant's position is that it was Ms McAllister who discriminated against her because of her disability. However, Ms MacRae was also involved in the decision making process. She is an experienced manager and has conducted a large number of interviews for facilities assistants.

122. It was clear to us that the reason why the claimant was not appointed was
10 because, on that occasion, she did not perform well at interview. The claimant appears to recall that she mentioned her police experience during the interview, but we accepted the respondent's witness evidence that she had only referenced it fleetingly and her answers to the questions were overall poor.

15 123. We had no hesitation in concluding that the reason the claimant did not get offered the job of team leader was because she was not appointable following interview and nothing to do with her disability.

Conclusion on disability claim

124. The claimant appears to have come to the view that Ms McAllister has taken
20 a dislike to her and does not wish to communicate with her. We heard no evidence however to justify that view. We heard that she is not her line manager, but line manages her line manager, although the claimant may not have appreciated that. We heard evidence that Ms McAllister does not attend Mallaig High School frequently because she covers such a wide area, and
25 even after the pandemic she does not visit as much as she used to. We also heard that she is responsible for a large number of staff. Given those circumstances, we would not necessarily expect to hear that Ms McAllister would have much if any direct contact with the claimant. She said in evidence that she had more contact with the claimant when she first started because
30 her line manager Ms Dey had just started before she did (in August 2018), and that she was focusing initially on the Skye and Lochalsh area. Ms

McAllister suggested that was for about six months, but it does appear that may have been longer than that, perhaps until January 2020. The evidence indicates that there are no clear cut demarcation lines between Ms McAllister and Ms Dey's roles in practice, so for example Ms McAllister might contact a facilities assistant direct in an emergency situation. That might explain why the claimant got the impression that she initially heard a lot from Ms McAllister but that she no longer does.

125. In the paperwork lodged for this hearing, in particular the ET1, the claimant states that she is not sure of the reason for this alleged treatment by Ms McAllister, but she suggested a number of reasons, including her age and the fact that she had raised a complaint through the union about the annual leave, as well as her mental health. It appears then that the claimant was not herself sure of the reason for any perceived treatment. But even if there was another reason operating in the mind of Ms McAllister, that would not preclude the claimant succeeding in a claim for disability discrimination, so long as her disability was an important although not necessarily the main cause of the treatment.

126. Indeed, the claimant stressed in this hearing that she believed that she was being treated less favourably because of her mental health. The main factor she relied on to support that was that Ms McAllister knew that she had PTSD, or at least knew that she suffered from stress and anxiety. We have found that Ms McAllister did not know that the claimant suffered PTSD until this hearing; and that she did not know that the claimant suffered stress and anxiety until August 2019, although the claimant alleged less favourable treatment prior to that date. The claimant relies on two things to support her argument: her belief that Ms McAllister knew that she suffered from PTSD (or at least stress and anxiety) and her belief that Ms Baillie was treated differently.

127. When pressed (by the Employment Judge) about why she believed that any treatment was because of her mental health, she said Ms McAllister thereby knew she could not deal with conflict, the implication being that Ms McAllister could ask the claimant to undertake tasks and she would not refuse. Even if

the evidence supported that, this still does not support a conclusion that the reason Ms McAllister treated her as she did was her disability, particularly since latterly the alleged “treatment” was to deal with her through others.

128. We have formed the view that Ms McAllister could have no motive, connected with the claimant’s mental health, to treat the claimant less favourably, or indeed to discuss any adjustments, because the claimant’s PTSD was not presenting any problem apparently for the claimant or for Ms McAllister. Indeed, as discussed at length above, we have found that there is no evidence to support the claim that any treatment of the claimant by Ms McAllister was because of her disability.

Time bar

129. In submissions, Mr Milne addressed us first on the issue of time bar, because in essence he argued that the incidents numbered 1 to 5 in the Scott schedule were lodged outwith the relevant time limit, and there being no connection between them, it should not be accepted that they were part of a continuing act. He did accept that the interview and other subsequent incidents could be part of a course of conduct if it was proved that they were discriminatory, and therefore in time.

130. We have however found that none of the treatment the claimant complains about was because of her disability, so that there can be no connection between them for time bar purposes. Accordingly there is no requirement for us to consider the time bar question.

Conclusion

131. The claim for disability discrimination does not succeed, so this claim is dismissed.

Employment Judge: M Robison
Date of Judgment: 25th July 2023
Entered in register: 25th July 2023
and copied to parties