EMPLOYMENT TRIBUNALS

Claimant:	And	**Respondents:**
Ms N McKenzie		Ministry of Justice

Heard in person **On**: 17-25 May 2023

Before: Employment Judge Nicolle

Nonlegal members: Mr P Shaw and Mr P Alleyne

Representation:

Claimant: in person
Respondent: Mr S Stevens of counsel.

JUDGMENT

1. The claims for direct disability discrimination pursuant to s13 of the Equality Act 2010 (the EQA), discrimination arising from a disability pursuant to s15 of the EQA, failure to make reasonable adjustments on account of disability under s20 of the EQA and harassment related to a disability under s26 of the EQA fail and are dismissed.

Reasons

2. Oral reasons were given to the parties on 25 May 2023 and the Claimant subsequently requested written reasons. These written reasons have been transcribed based on the oral judgment delivered but as explained to the parties in advance of oral judgment being given certain sections of that judgment were delivered in summary form to avoid the oral judgment being excessively long, in particular the summary of the relevant law, and are set out in full in these written reasons.

The Hearing

<u>Accommodations for the Claimant's disability and other health issues</u>

3. The Claimant had requested that she gave evidence remotely and gave her evidence and otherwise participated on video screen via CVP. The CVP link worked well without any significant difficulties during the hearing.

4. The Tribunal was cognisant of the fact that the Claimant has various disabilities and at times during the hearing was struggling with those health issues and also that she was taken unwell over middle weekend. The Tribunal accommodated this by extended breaks and concluding earlier than would normally be the case on the Monday. We were satisfied that the accommodations made enabled the Claimant to fully participate in the hearing.

Claimant's applications

5. The Tribunal heard various applications on the first morning and then spent the remainder of the day reading relevant sections of the bundle and the witness statements. On day two the Tribunal heard a series of applications in relation to matters within the Respondent's witness statement which the Claimant objected to on the basis that they were prejudicial to her in relation to the finalisation of the list of issues and also in relation to the Claimant's application for a significant volume of additional documents to be included in the bundle. Those issues were all dealt with on the second day and there is no need for the purposes of this judgment to record them further.

Witness evidence

6. The Tribunal heard witness evidence from the Claimant and on behalf of the Respondent from Ms Membu, Delivery Manager (Ms Membu) and Ms Hill, Operations Manager (Ms Hill).

Bundle of documents

7. There was a bundle of documents comprising of 613 pages which was supplemented by a relatively small number of additional documents added during the hearing.

8. The Respondent provided the Tribunal with skeleton opening and closing submissions. There was an agreed chronology.

List of issues

9. There was an agreed list of issues as set out in the case management order dated 27 July 2021 of EJ Spencer. I will not set them out in full now but they should be taken as read into the judgment and are set out in the conclusions.

10. The Tribunal permitted the Claimant to include certain additional allegations of direct discrimination under s.13 of the EQA as set out in an email of 2 August 2021 seeking to amend that case management order. The Tribunal, however, refused the Claimant's application to amend her claim to permit a complaint pertaining to the taking of annual leave.

11. The Respondent had previously conceded that the Claimant had a disability during the material period, in relation to Lupus and/or the accumulative effect of a number of different medical conditions and that it had knowledge of that disability and the effect it had on the Claimant.

12. There is an issue regarding whether all of the acts and omissions relied on by the Claimant were within time and we will return to this in our conclusions. The Respondent says that many of the acts or omissions relied upon by the Claimant are out of time, do not form part of a continuing course of conduct and that we should not exercise our discretion on the basis that it would be just and equitable to do so.

Findings of Fact

The Claimant

13. The Claimant has been employed by the Respondent since 19 May 2003. She remains in continuing employment but on the closure of the Camberwell Magistrates Court (Camberwell) moved to an alternative role with effect from 1 February 2020 in respect of which we did not hear evidence and which is not relevant to our findings.

14. The Claimant was engaged as a Team Leader and at the material time of the complaints giving rise to these proceedings, from about 2014 onwards, was based at Camberwell.

The Respondent

15. The Respondent is responsible for the administration of Criminal, Civil and Family Courts and Tribunals in England and Wales. Whilst the claim was originally brought against HM Courts and Tribunal Service that was subsequently amended at the case management hearing in 2021 to the Ministry of Justice and therefore the Ministry of Justice is the correct Respondent to the proceedings.

The Claimant's health

16. The Claimants health issues became increasingly impactful on her ability to undertake normal day to day activities from around about 2013/2014. There are a series of Occupational Health reports in the bundle. It is not necessary to refer

to all of them but it is appropriate to refer to certain extracts from some of those reports.

Occupational Health Report completed by Ms Christine Pearson dated 1 May 2014

17. The report referred to the Claimant having been diagnosed with Lupus in September 2013. It said that this caused her to suffer from debilitating fatigue. It made various recommendations to include more frequent rest breaks, that she was likely to require an increased level of sickness absence as a result of the condition and recommended a change in working hours.

Involvement of Jan Martin-Essoui

18. The Claimant was sent an email by Jan Martin-Essoui, Operations Manager with responsibility for the South Group (Mr Martin- Essoui) on 28 July 2014. He said that the Claimant would benefit from regular fixed hours each day, proposed a trial period with reduced hours, said that it had been agreed that other managers in the group could be told of the Claimant's general medical condition in order to gain their understanding and cooperation and willingness to therefore provide assistance.

19. The Claimant undertook an individual stress assessment with Mr Martin-Essoui on 10 September 2015. This set out various tasks and recommended steps and particular matters which could cause her condition to be exacerbated so, for example, minimising multi-tasking and last minute deadlines and referring to reasonable adjustments to include the use of Dragon Dictate, a voice recognition system to enable documents to be produced orally rather than typing (Dragon).

Occupational Health Report completed by Ms Lisa Aldridge dated 19 October 2015

20. The report referred to the Claimant having a complex medical history, that she was seeing 7 different consultants for her medical conditions and was awaiting surgery for a gynaecological condition. It said she was fit for her job subject to the advice as set out and then made various recommendations to include micro-rest breaks in the afternoon, no post room duties and avoiding late nights.

Reasonable Adjustment Action Plan dated 15 December 2015

21. The Claimant was given a reviewed and updated reasonable adjustment action plan dated 15 December 2015. This included Dragon software being installed on the Claimant's computer and that training on the use of Dragon was awaited.

Access to Work Holistic Assessment report dated 13 July 2017

22. This was undertaken by an organisation called People Plus. It made various recommendations to include that the Claimant should be provided with four x two hours workplace strategy coaching sessions which would include the impact of her disability on work, stress, and time management. It recommended four half day one-to-one Dragon training sessions so that she could become effective in its use as quickly as possible. It made reference to the Claimant suffering from reduced concentration and fatigue and sensitivity to ultraviolet light. It recommended that she be moved into the Operations Manager's Office which had a larger desk and she would have greater control of the lighting.

Claimant's email to Ms Membu of 14 February 2018

23. The Claimant referred to various unresolved items from the access to work report one of which has been outstanding for three years. We presume that this related to the provision of the Dragon training. The Claimant had set out various matters from the workplace assessment in an earlier email of 9 February 2018. It was accepted that the provision of the wide screen monitor, risk assessment, and is appropriately sized desk had been undertaken but that the Dragon training was still awaited and the coaching sessions had not taken place.

Display screen equipment risk assessment dated 20 February 2018

24. The Claimant in relation to desk area reported no problems and that a bigger desk with ample leg space had been provided. There is a section on the template document which refers to noise and it records that the Claimant reported no issues. It was suggested by the Claimant that this may relate to noise from her computer or other IT equipment as opposed to ambient background noise. We do not accept the Claimant's assertion based on the nature of the form, reference to things such as lighting and also our own experience of such workplace assessments where noise in our view self-evidently relates to the ambient noise in the office area rather than noise emanating from the IT equipment.

25. This is relevant given that the Claimant contends that there was an excessive level of noise in the office which impacted on her ability to use Dragon.

Email from Ms Membu to the Claimant of 9 March 2018

26. Ms Membu referenced Dragon training and she said that the Claimant had notified her that it was not really an urgent necessity as not having the training was not preventing her from returning to work. She then referred to welcoming the Claimant back to work on 12 March 2018 given that the Claimant had been off work as a result of a surgical procedure since October 2017.

April 2018 discussion with the Claimant regarding workplace matters

27. On an unspecified date in In April 2018 the Claimant had a one to one discussion regarding matters in the workplace. The note of the discussion referred to her having been provided with bespoke workplace equipment which

consisted of a mouse, chair, dictaphone, keyboard, document holder, pen grip and Dragon software and that she attends rehabilitation sessions twice a week. It said that the Claimant works fixed hours due to fatigue and does not complete post duties for medical reasons. The Respondent asserts that this would have been an opportunity for the Claimant to raise any concerns regarding background noise impacting her ability to use Dragon and that she had failed to do so.

Use of Dragon

28. The Respondent says that the Claimant had plenty of quite areas within the office to use Dragon if she chose to do so, to include the post room, the Operations Manager's office, when not occupied by Ms Hill and Court rooms 6 or 7 and that she was seen using those rooms on occasions. The Claimant says that whilst she could do so it was difficult as she would not have her bespoke equipment with her.

29. The Respondent says that the Claimant primarily worked in an open plan area alongside approximately six other employees and that they were approximately eight to ten feet apart. The Claimant says that this compromised her ability to use Dragon either because of ambient background noise or alternatively as a result of concerns as to confidentiality and data protection. These are matters we will return to in our conclusions.

Email from the Claimant to were Ms Membu of 6 June 2018

30. The Claimant raised a concern that an issue had been raised in front of her deputy regarding her team which should have been addressed with her confidentially. It concerns the Claimant's reasons for not being able to work in the post room and she complains that at a similar time she was asked to inform her team members of her whereabouts. She says this compromised her confidentiality and potentially undermined her with her team members. Again we will return to this issue in our conclusions.

Post room duties in June 2018

31. The Claimant takes issue with a request made by the Respondent for her to supervise the opening of the post. The Claimant did not actually pursue this task given that she had raised an objection. Further, it was not a case of the Claimant actually opening the post but rather her supervising a team member doing so who we were told had difficulty reading and assigning post to the correct recipients. This task would have taken the Claimant approximately ten minutes. The Claimant objected to the request for her to undertake this task in strident terms and it formed a significant part of her grievance. Her objections were based on a number of grounds to include the potential adverse effect on her compromised immunity as a result of being in the vicinity of post. We find this not to be the case given that the Claimant was not actually opening post merely being in its vicinity and could keep a distance away from envelopes being opened.

32. The Claimant then referred to dust in the post room. We find that not to be substantiated given the evidence that she would have meetings in the post room

and on occasions was observed eating her lunch there so if dust had been a problem it would have been an equal problem on those occasions.

33. The Claimant then referred to the risk of infection but given that she would have only been in the company of one other employee, and there was no suggestion that employee was more prone to spreading contagious conditions than any other member of staff, we find that not to be a substantiated ground of objection.

Claimant's email to Ms Hill of 22 June 2018

34. The Claimant said that she was concerned about staffing levels in the customer service section. She listed a series of duties performed by the Customer Services Department to include matters the Counter, putting up court lists in public areas, the attendance register, statutory declarations and so on. Mr Stevens cross examined the Claimant in detail as to the extent of these various tasks. His position, which we accept on the basis of the responses given by the Claimant, was that her role was primarily supervisory and that many of these tasks were of a relatively de minimis nature, for example, putting up the court list involved either receipt of a hardcopy court list or the printing out of a court list and attaching it to notice boards within the court premises. We therefore find that many of these tasks were minimal and/or infrequent, for example, bail deposits.

Claimant's grievance of 25 June 2018

35. The Claimant referred to continual harassment to do duties which would compromise her medical condition, the Respondent ignoring or disputing medical evidence contained on file, that she felt she had to justify her medical condition openly in front of her team leader colleagues, being side lined and frozen out of decisions regarding her areas of responsibility and the Respondent taking too long to make timely decisions on matters effecting her health and personal circumstances and her medical conditions thereby being aggravated. She requested an official apology.

36. The Claimant attended a grievance meeting with Mr Anthony Walcott on 9 November 2018. She referred to the continuing harassment and made particular reference to being requested to perform the post room duties.

37. Ms Membu produced a detailed memorandum for Mr Walcott in relation to the grievance dated 21 November 2018 to which there were multiple attachments. This email is in our view symptomatic of what we perceive to be Ms Membu's increasing frustration regarding the management of the Claimant. It goes beyond responding to her grievance to list a series of what Ms Membu perceived to be deficiencies in the Claimant's performance and the reaction of her team in respect of those matters.

Occupational Health Assessment with Dr Philippa Beatson-Hird of 14 December 2018

38. The report said that the Claimant had now been provided with Dragon but she was unable to use it mainly for confidentiality reasons. It made reference to there being a quiet room available but it was not set up for her use. It said that the Claimant was fit for her role with adjustments in place, referred to consideration being given to her working from home on the two days per week, Tuesday and Thursday, that she attended rehabilitation at a gym, says that her performance is likely to be impacted by her health conditions as she may suffer from more fatigue and that working from home may as an additional adjustment help her manage this fatigue.

Email from Ms Membu to Claimant of 30 January 2020

39. The Claimant objects to this email and in particular the comment made by Ms Membu which reads "the reason being that you use your hands to navigate your mobile phone more regularly than you are at workstation considering the fact that you work for certain hours in the day, have appointments to attend and do not work Saturday and Sunday". The Claimant responded saying that being unable to use Dragon since 2014 had contributed to her need for surgery. The Claimant was suffering from Carpal Tunnel syndrome, which she at least in part considers to be attributable to the amount of typing she had to do whilst employed by the Respondent. She says that she would on occasions have to type quite long documents, some of four or five pages, on matters such as performance assessments and sickness absence management processes. We find that she would occasionally type longer documents but the need to do so was relatively limited. We also find that there would have been potential options available to the Claimant to reduce that level of typing by recording meetings, by producing documents in more abbreviated form or by filing in template documents rather than producing verbatim notes of meetings.

The Law

Jurisdiction on the grounds of time

40. S123 provides:

> (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.
>
> (3) For the purposes of this section

> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

41. For acts extending over a period, it is relevant to consider whether a discriminatory regime, rule, practice or principle, which had a clear and adverse effect on a complainant, existed. There is a distinction between a continuing state of affairs and a one-off act with ongoing consequences.

42. Guidance was provided in analysing what constitutes conduct extending over a period in Hendricks v. Metropolitan Police Commissioner [2003] IRLR 96 to include per Mummery LJ in the Court of Appeal at paragraph 48:

> "the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs, by the concept of an act extending over a period".

43. Extension of time under s123(3) is the exception rather than the rule Robertson v. Bexley Community Centre [2003] IRLR 434. The factors that may be taken into account are broad as in s33 Limitation Act and include:

a) the length and reason for delay;
b) the extent to which the cogency of the evidence is affected;
c) promptness with which claimant acted; and
d) steps taken to obtain advice.

44. The checklist of factors in s.33 of the Limitation Act 1980 is a useful guide of factors likely to be relevant, but a tribunal will not make an error of law by failing to consider the matters listed in s.33 provided that no materially relevant consideration is left out of account: Neary v Governing Body of St Albans Girls' School [2010] ICR 473.

45. Prejudice is a relevant factor. A respondent may be prejudiced by having to meet a claim they would not otherwise have to do so but they may also suffer forensic prejudice due to fading memories, lack of witnesses and lost documents.

46. The onus is on a claimant to put forward potential reasons to explain why there was a delay and why a tribunal's discretion should be exercised to enable an otherwise out of time claim to proceed. Ultimately time limits are strict, it is a

matter of discretion and it is not a right to allow a claim to proceed when it is outside the primary time limit.

47. Whilst discretion is greater for a tribunal in a discrimination claim that does not mean to say there is any automatic expectation that it will be exercised. It involves a fact sensitive enquiry regarding the circumstances, the reasons for the delay, the promptness of action and the potential prejudice to the respondent of a long period of delay in terms of the cogency of the evidence and their ability to defend allegations which have become increasingly stale.

Direct disability discrimination

48. Under s13 (1) of the EQA read with s.9, direct discrimination takes place where a person treats the claimant less favourably because of the protected characteristic than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

49. Discrimination includes subjecting a worker to a detriment (S.39 EQA).

50. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the protected characteristic. However, in some cases, for example, where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was.

51. We directed ourselves as to relevant case law including what constitutes less favourable treatment being an objective matter, the difference in treatment alone is not less favourable without more as per the decision in Chief Constable of West Yorkshire v Khan [2001] ICR 1065. We looked at what constitutes less favourable treatment both in the context of a hypothetical comparator and that such treatment would need to be on the grounds of the claimant's protected characteristic.

Conscious or unconscious thoughts of the alleged discriminator

52. An act may be rendered discriminatory by the mental processes, conscious or nonconscious, of the alleged discriminator: Nagarajan v London Regional Transport [1999] ICR 877, HL. In such cases, the Tribunal must ask itself what the reason was for the alleged discriminator's actions. If it is that the complainant possessed the protected characteristic, then direct discrimination is made out. If the reason is the protected characteristic, that answers the question of whether the claimant was treated less favourably than a hypothetical comparator; they are, in effect, two sides of the same coin. per Lord Nicholls:

> "In every case…it is necessary to enquire why the claimant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance because the claimant was not so well qualified for the job. Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision."

53. A benign motive is irrelevant when considering direct discrimination: Nagarajan at 884G-885D, per Lord Nicholls. It is irrelevant whether the alleged discriminator thought the reason for the treatment was the protected characteristic, as there may be subconscious motivation: Nagarajan at 885E H:

> "I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes, and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the Tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of s.1(1)(a). The employer treated the complainant less favourably on racial grounds."

Discrimination arising from disability under S 15 of the EQA

54. In relation to discrimination arising from disability we must consider whether under s.15 of the EQA the claimant has shown that the respondent treated her unfavourably, that the unfavourable treatment was because of something and that something arose in consequence of her disability.

Reasonable adjustments on account of disability

55. We reminded ourselves of the relevant provisions regarding reasonable adjustments to include the need for the existence of a provision, criterion or practice (PCP). We took account of the duty under s.39(5) of the EQA to make reasonable adjustments and referred to sections 20, 21 and 22 and Schedule 8 of the EQA. In particular we took account of s.22 (2) which provides that where a PCP of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled

that the employer is under a duty to take such steps as it is reasonable to have to avoid the disadvantage.

56. We took account of guidance in cases such as Environmental Agency v Rowan [2008] IRLR 20 that a tribunal must identify the PCP, the identity of non-disabled comparators (where appropriate) and the nature and extent of the substantial disadvantage suffered by the claimant. There is a requirement to look at the overall picture.

57. We took account of the guidance regarding what a PCP constitutes in paragraph 6.10 of the Code and that the purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular PCP disadvantages the disabled person in question. There is no requirement to actually identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person. Substantial disadvantage is something that is more than minor or trivial. We took into account paragraph 6.2.8 of the Code as to what reasonable steps may involve in terms of trying to alleviate the effect of the substantial disadvantage.

Harassment on the grounds of disability under S 26 of the EQA

58. Under s26, EQA, a person harasses the claimant if he or she engages in unwanted conduct related to age, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

59. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, where Mr Justice Underhill (as he then was) gave this guidance:

> "An employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

60. General Municipal and Boilermakers Union v Henderson [2015] IRLR 451 provides that a single incident is unlikely to be sufficient to create an environment sufficient to give rise to an offence of harassment.

Harassment and detriment claims

61. Under S 212 of the EQA "detriment" does not…… include conduct which amounts to harassment".

62. The effect of S 212 (1) is that harassment and direct discrimination claims are mutually exclusive, meaning that a claimant cannot claim that both definitions are satisfied simultaneously by the same course of conduct. A claimant must choose one or run alternative claims.

The burden of proof

63. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless a respondent can show that it did not contravene the provision.

64. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.) The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g., race) and a difference in treatment. LJ Mummery stated at paragraph 56:

> "Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870.

"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Drawing of inferences

65. It is not sufficient for to draw an inference of discrimination based on an "intuitive hunch" without findings of primary fact to back it: Chapman and Anor v Simon [1994] IRLR 124.

66. The process of drawing inferences is a demanding task. If a tribunal is to make a finding of discrimination on the basis of inference, per Mummery J in Qureshi v Victoria University of Manchester [2001] ICR 863:

> "It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the tribunal in its fact-finding role, so that the validity of the inference can be examined. Either the facts justifying such inference exist or they do not, but only the tribunal can say what those facts are. An intuitive hunch, for example, that there has been unlawful discrimination is insufficient without facts being found to support that conclusion."

67. In determining whether a claimant has established a prima facie case, the Tribunal must reach findings as to the primary facts and any circumstantial matters that it considers relevant: Anya v University of Oxford and Anor [2001] IRLR 377 (CA). Having established those facts, the tribunal must decide whether those facts are sufficient to justify an inference that discrimination has taken place.

68. Where there are multiple allegations, the tribunal should consider whether the burden of proof has shifted in relation to each one. It should not take an "across the board approach" when deciding if the burden of proof shifted in respect of all allegations: Essex County Council v Jarrett UKEAT/19/JOJ.

69. The less favourable treatment must be because of a protected characteristic and that requires the tribunal to consider the reason why the claimant was treated less favourably in accordance with the guidance in Nagarajan. The tribunal needs to consider the conscious or subconscious mental processes which led the respondent to take a particular course of action in respect of the claimant and to consider whether her gender played a significant part in the treatment: CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439.

Conclusions

Approach taken to the time issue

70. In respect of the Respondent's contention that certain claims are out of time we will address these points individually. We are satisfied that various individual matters should be looked at as discreet complaints, rather than an overarching approach pertaining to all matters relating to disability forming part of a continuing course of conduct. For example, we find that the Claimant's request to

work from home was a discreet issue and should not be caught under the general umbrella of adjustments on account of an ongoing disability.

71. Whilst the Claimant gave significant evidence in relation to the use of Dragon the list of issues did not contain a specific complaint that she had not been provided to her with training therefore preventing her use it. To the extent to which such a complaint is pursued we would in any event find it to be out of time in so far as training was provided by Mr Spratt on 23 March 2018. Any claim in relation to failure to provide training would therefore run from that date at the latest and whilst we consider that the Respondent was tardy in the provision of that training, and that undoubtedly caused the Claimant stress and unnecessary concern, it had ceased to be an issue with the provision of that training at that date and therefore the failure to provide Dragon training was nearly two years out of time at the time the claim was issued.

72. Taking the issues in the order in which they appear in the case management order.

Failure to make reasonable adjustments

Did the Respondent have the following PCPs?

Requiring the Claimant to work in the office?

73. We find that that this constituted a PCP.

Requiring the Claimant to work in a place which did not allow the effective use of Dragon.

74. We find that that this constituted a PCP.

Requiring the Claimant to work in a highly pressurised environment?

75. We do not consider this constituted a PCP. On the Claimant's own evidence it is a subjective concept as to what constitutes "highly pressurised" so we conclude it is too nebulous to be characterised as a PCP.

Did any such PCP put the Claimant at a substantial disadvantage in comparison to persons who were not disabled, in that:

Travelling to work increased the Claimant's fatigue?

76. The Claimant lives in Lewisham and her journey by car to Camberwell took on average 25 minutes each way. We are not satisfied that this journey would in itself have been a significant contributory factor to the Claimant's fatigue. We do not consider that there is any medical evidence to support this contention.

Working in a place where there was background noise prevented her use of Dragon so that she would have to type, causing pain and weakening of her hands.

77. We do not accept the Claimants evidence that noise precluded her from using Dragon. We find that the Claimants evidence on this particular subject was inconsistent in that she variously referred to lack of training on Dragon, noise, confidentiality and data protection issues and an inability to move her bespoke workplace equipment and technology with her to an alternative location. We accept the Respondent's evidence that there would occasionally be noise but that the overall noise in the office was not so excessive to preclude the use of Dragon, or if there was a noise we are satisfied that the Claimant would have been able to find a way of overcoming this by moving temporarily to an a quieter location or alternatively using her dictaphone to record matters which could subsequently be transcribed.

78. We find generally in relation to Dragon that whilst the Respondent was extremely tardy from 2014 to 23 March 2018, when Mr Spratt finally provided the Claimant with a day's training, that the Claimant lacked initiative in learning the basics of the operation of Dragon given that it has tuition materials as part of the package and that its basic functions, to record and produce documentation based on the spoken word, are largely intuitive.

79. We consider that the Claimant gave conflicting evidence regarding matters such as confidentiality and data protection We consider that the Claimant could have overcome those concerns by simply avoiding use of individual names which could subsequently have been added in a more confidential setting so it would not have prevented the use of Dragon in its entirety.

Working in a place where she could be overheard prevented her being able to dictate confidential emails and memos, requiring her to type, causing pain and weakening her hands.

80. As set out above we find this unsubstantiated. We find that the production of confidential documents was a relatively minor part of the Claimant's role as it would only be matters such as performance assessments and sickness absence reports which would be confidential.

Did the Respondent not know and could it not reasonably have been expected to know the Claimant was a disabled person?

81. We find that the Respondent was aware of the Claimant's disability and that it was reasonable to expect it would know that she would be placed at a potential disadvantage.

Were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The steps the Claimant alleges should have been taken are:

Allowing the Claimant to work from home

82. We find that the Respondent in the pre covid environment had an absolute policy that employees working in an operational role in its courts and Tribunals would work entirely from the Court/Tribunal premises. Therefore whilst the possibility of working from home for part of the time had been referred to in the Occupational Health Reports, we are satisfied that the Respondent from 2015 onwards and in particular the attendance note of the meeting between Ms Hill and the Claimant on 12 November 2015, had unequivocally explained to the Claimant that working from home for front line staff was not suitable for business needs.

83. Whilst the Claimant suggested that certain functions could be performed at home, for example, completing sickness absence reports a substantial proportion of her role as a team leader involved supervising team members and as such we find that her role in a Court based environment could only realistically be properly undertaken by daily Court attendance.

84. Further, we find this to be a decision which whilst it had continuing consequences for the Claimant was not a continuing course of conduct and therefore we find that this claim to be substantially out of time even if we had not found that it was not made out on its substantive facts.

If the Claimant had to work in the office, providing her with a quiet space where she could use Dragon

85. We are satisfied that the Claimant was provided with various quiet places. Whilst the Operations Manager's office was available to the Claimant part of the time it would used by the Operations Manager on other occasions. Whilst we consider that the Respondent could potentially have worked harder to find a room which the Claimant could use on a regular basis we take account of the competing demands on the its room space. We are satisfied that the Respondent complied with its obligation in respect of provision of a quiet space.

Reducing the Claimant's work load and providing effective support by removing tasks as appropriate. The Claimant gave an example of a task that should have been removed from her being required to deal with the sickness absence of a colleague Ms H Mohammed.

86. We find it significant that from the beginning 2017 onwards the Claimant was unable to point to any significant period when she was working her full time contractual hours. We find that in those periods she was working she was typically working around about 18 hours per week based on four hours on three days and three hours on the other two days when she attended rehabilitation. So she already had a significantly reduced workload. She continued to be paid in full throughout notwithstanding that reduced pattern of working. There were also significant periods when the Claimant was absent from work on account of sickness, or what the Respondent refers to as disability leave and from late 2017 when the Claimant says she was awaiting for adjustments to be made before she

was able to return to the workplace. So in that context we are satisfied that there had been a substantial reduction in the Claimant's workload.

87. The Claimant referred specifically to the disability management process in relation to Ms Mohammed which she said was a particularly onerous responsibility and that it became increasingly onerous as a result of her absences and having to pick up the file. She says that responsibility for Ms Mohammed should have been reallocated. We do not consider this would have been a necessary or reasonable adjustment in so far handling issues relating to Ms Mohammed formed part of the core functions of the Claimant's role as a team leader. In any event we were told by the Respondent, and we accept this evidence, that names were in effect put in a hat and drawn out so that there was a complete fairness in the distribution of more difficult and easier team leader management responsibilities particularly in relation to issues of sickness.

Discrimination arising from disability

88. There is some overlap from issues previously covered so there will be a little bit of overarching coverage of these points where they duplicate.

Did the Respondent (Ms Membu) treat the Claimant unfavourably by requiring her to send emails to colleagues to tell everyone where she was whenever she had a medical appointment?

89. We accept the Respondent's position that the requirement was not to tell staff members the nature of the appointment but simply to advise team members that the Clamant was going to be absent from work on a particular day for an estimated period of time. We accept the Respondent's evidence that this was necessary from a management perspective so plans could be made as to how her duties would be covered and also on grounds of health and safety. Whilst we accept that the Claimant's attendance at a significant number of medical appointments was largely on account of her disability we find that the treatment that she was subject to, having to tell people when she was out of the office, was not in itself unfavourable treatment on account of her disability.

90. Further, we find that the Respondent's requirement in this respect constituted a proportionate means of achieving a legitimate aim i.e. the operational efficiency of the its business.

Direct discrimination

Did the Respondent treat the Claimant less favourably because of her disability than it treated or would treat others who were not disabled when her line manager Ms Membu:

Required her to send emails to colleagues to tell everyone where she was whenever she had a medical appointment?

91. The issue of emails sent to colleagues has already been addressed. We accept that emails to colleagues regarding the Claimant's absence were on

account of her disability but nevertheless we do not consider it constituted less favourable treatment.

Post room duties and the Claimant's complaint that she was asked to justify her position in relation to a colleague on or about 8 June 2018.

92. The Respondent accepts that another team leader raised the issue as to why the Claimant could not perform post room duties. The Claimant was asked to explain. She says that this constituted less favourable treatment and in effect the Respondent should have closed the request down. We consider that it was not unreasonable for Ms Membu to invite the Claimant to set out the position. We have already referred to the fact that in one of the earlier meetings the Claimant had said that she was content in general terms for her colleagues to be informed of the nature of her condition and the potential impact it was going to have on her.

93. Further, we consider it inevitable that other team leaders, and the team working with the Claimant, would have been aware of her condition, the effect it was having on her and the significant absences she therefore had from workplace. Therefore asking the Claimant to explain why she could not do a particular task would not in our view constitute less favourable treatment.

94. In any event we find that given that incident arose in June 2018 that it was significantly out of time and it was not a continuing course of conduct.

Communications with her the Claimant's team

95. Again this overlaps with previously addressed issues in terms of having to notify people where she was and as previously stated we find that the Respondent's position was reasonable and did not constitute less favourable treatment on account of the Claimant's disability.

Post opening duty

96. We find that the Claimant was not treated differently to people who were not disabled. The Claimant was not required to perform this role which in any event was nominal in terms of time it would have incurred. Had she performed the role we find that it would not have had any less favourable impact on her. We find that the Claimant's objection was arguably at least in part on the basis that she simply did not want to perform the task rather than any substantiated ground that it would have an adverse impact on her as result of her health conditions.

97. In any event given that that was a one off incident in June 2018 we find that it was significantly out of time.

Direct disability discrimination claim, but also under harassment, the email of 30 January 2020 in which the Claimant complained that Mi Membu insinuated or directly stated that her health condition was at least in part attributable to her excessive use of her mobile phone.

98. We find that the comment made by Ms Membu was undesirable in so far as it certainly carries a potentially pejorative element or an insinuation that the Claimant had some responsibility for her own condition. To an extent though we think that that was symptomatic of the undoubted level of frustration which Ms Membu had developed by this time regarding the Claimant as refenced by matters such as her detailed response to the Claimant's grievance in December 2018. Nevertheless, do not consider that this comment was made as a result of the Claimant's disability in other words a similar comment would have been made to an employee with a health condition not constituting a disability who had an inability to perform certain tasks and was complaining that the employer/workplace had caused or contributed to that condition.

99. Further, we do not consider that even if the comment were attributable to disability it would be sufficient to constitute less favourable treatment when the totality of the email exchange, both before and afterwards, is considered. Indeed It is notable that the Claimant responded to this email, in an email sent from her I-phone literally hours after it had been sent, and whilst the Claimant suggested that this could have been created using voice recognition software on her phone, she did not give unequivocal evidence that she was producing the various emails sent from her I-phone by that method. On balance we are of the view that those emails were more likely to have been typed than produced by voice recognition, so it provides context to the comment made by Ms Membu and also implies that at the time the Claimant did not appear to take particular exception to the remark.

100. In terms of the allegation that it constitutes harassment we did not hear specific evidence from the Claimant that she had suffered any significant injury to feeling as a result of the remark. Applying the guidance of LJ Underhill in Richmond Pharmacology consider this to be a one off act of a relatively minimum nature and not one sufficient in itself to constitute harassment. So, whilst this claim would be in time it is not upheld.

Final conclusions and the time issue

101. We reject all of the Claimant's allegations. We find them not to be substantiated but in any event with the exception of the claim pertaining to the email of 30 January 2020 we find that all of the earlier acts or omissions were discreet and severable and were out of time. There was no continuing course of conduct.

102. The burden is on the Claimant to establish why it would be appropriate to extend time. We are not satisfied that she did. Whilst in response to a question from the Judge during her closing submissions, the Claimant referred to the effect of surgery in 2019/2020, we heard no evidence on that and we are not satisfied that in itself it would have precluded the earlier initiation of an ACAS earlier conciliation procedure. The Claimant's evidence was that the reason for starting that process in early 2020 was to address issues going forward in her new position. Therefore we are not satisfied that it would be appropriate to exercise our discretion to extend time.

103. The claims in their entirety fail and are dismissed.

Employment Judge Nicolle

23 August 2023

Sent to the parties on:
23/08/2023

For the Tribunal: