EMPLOYMENT TRIBUNALS

Claimant: **Mrs D Flanagan**

Respondent: **The Chief Constable of Essex Police**

Heard at: **East London Hearing Centre (via CVP)**

On: **11, 12, 13, 14, 18, 19 & 20 July 2023**

Before: **Employment Judge Povey**
Members: **Ms M Legg**
Mr M Rowe

Representation:
Claimant: In person
Respondent: Ms Winstone (Counsel)

JUDGMENT having been sent to the parties on 2 August 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Background

1. At the culmination of the hearing of these claims, and following deliberations, the Tribunal provided its judgment and reasons orally to the parties on the afternoon of 20 July 2023.

2. On 8 August 2023, the Claimant made a request for a transcript of the Tribunal's reasons. This is that transcript (save for the inclusion of the relevant legal provisions at Paragraphs 7 – 13).

3. Unfortunately, the Claimant's request was not forwarded to me as the presiding employment judge until 11 September 2023. I apologise to the Claimant for the delay that has caused.

Introduction

4. The Claimant is employed by the Respondent as a file adjudicator. Her employment commenced in October 2002 and is continuing. By a claim presented to the Employment Tribunal ('the Tribunal') on 21 October 2020, the Claimant makes complaints of direct disability discrimination

and failure to make reasonable adjustments. There was a case management order dated 25 May 2021 where a List of Issues were agreed upon and which were subsequently amended (upon the Respondent conceding that the Claimant was disabled at the relevant time).

5. The complaints of discrimination are resisted in full by the Respondent.

6. The Respondent accepts that the Claimant is disabled as defined by section 6 of the Equality Act 2010 at the relevant time by reason of depression and anxiety. However, the Respondent says that it did not have knowledge that the Claimant was disabled until June or July 2020. It is also the Respondent's position that many of the complaints are out of time and it is not just and equitable to extend time.

The Relevant Law

Discrimination

7. Section 39(2) of the Equality Act 2010 ('EqA 2010') states:

> An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment.

8. Disability is a protected characteristic (per section 4 of the EqA 2010). Section 6 of the EqA 2010 defines disability for the purposes of the Act.

9. Section 13(1) of the EqA 2010 defines direct discrimination as follows:

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

10. Section 20 sets out the duties to make reasonable adjustments in respect of disabled persons. So far as relevant, section 20 states:

> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following … requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> …

11. Schedule 8 to the EqA 2010 provides more details as to the duty to make reasonable adjustments. In addition, section 212 EqA 2010 defines "substantial" as "more than minor or trivial."

12. If a person fails to comply with the duty to make reasonable adjustments, that person discriminates against the disabled person (per section 21 EqA 2010).

13. Section 123 of the EqA 2010 requires that proceedings under the EqA 2010 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. By reason of section 123(3), conduct done over a period of time is treated as being done at the end of the period, for the purpose of calculating the three month time limit for bringing proceedings.

The Hearing

14. The final hearing was conducted over five days via the Cloud Video Platform (CVP). On day six and half of day seven, the Tribunal undertook its deliberations.

15. During the hearing, we heard evidence from the Claimant. For the Respondent, we heard from the following witnesses (all of whom are employed by the Respondent):

    15.1. Amanda Humphrey (Head of Health & Well-Being, who initially decided the Claimant's application for extension of her entitlement to full pay whilst on sick leave);

    15.2. Elizabeth Bennett-Riley (Assistant Manager, Criminal Justice Unit, South Branch, the Claimant's line manager at the relevant time);

    15.3. Dorothy Bird (Manager of Criminal Justice Unit, South Branch, Mrs Bennett-Riley's line manager at the relevant time);

    15.4. Glenn Caton (Head of Criminal Justice Command, who conducted the appeal in the respect of the Claimant's first grievance); and

    15.5. David Manion-Marshall (at the relevant time, Head of Business Services and undertook the review into Mr Caton's appeal process and conducted the appeal in respect of the Claimant's second grievance).

16. Each witness we heard from confirmed and adopted their respective witness statements. We were also provided with a statement by Alison Brett (who conducting the Claimant's appeal against Ms Humphrey's decision not to extend her entitlement to full pay whilst on sick leave). However, Ms Brett did not attend the hearing and we were properly invited by Ms Winstone for the Respondent to afford limited weight to her statement.

17. We were provided with a paginated, indexed bundle of documents ('the Bundle') plus a number of additional documents adduced by the Claimant on the first morning of the hearing (to which the Respondent did not object). We received oral and written submissions from Ms Winstone for the Respondent and oral submissions from the Claimant. We have taken all the evidence and the submissions into account in reaching our decisions.

18. The Claimant is a litigant in person. The Tribunal had regard to the Claimant's health conditions and their effects in how it managed the hearing, including affording the Claimant regular breaks. In addition, we explained the process and procedures to the Claimant, checked her understanding, encouraged her to ask questions and gave her guidance throughout. The Tribunal was satisfied that the Claimant was able to fully engage in the process and present her claim to the best of her abilities. Indeed, the Tribunal was impressed by the Claimant's clarity and focus, her understanding of the importance of the List of Issues and the adept and professional manner in which she questioned the Respondent's witnesses.

19. The Tribunal are grateful to the Claimant and Ms Winstone for the assistance they have provided and the work they have undoubtedly undertaken both before and during the hearing. We are also grateful to all witnesses, including the Claimant, who attended and answered the questions asked of them to the best of their recollections.

20. At outset of hearing, we checked that the issues as agreed earlier in the management of this case remained the issues we were required to determine. The parties confirmed that they were.

21. The complaints relate to:

    21.1. Requests made by the Claimant to make changes to her working hours and her working location;

    21.2. A discussion between the Claimant and Mrs Reilly-Bennett about the Claimant's social media use;

    21.3. The Respondent's refusal to increase the Claimant's sick pay; and

    21.4. The conduct and resolution of two grievances which the Claimant raised as a result of the above matters.

22. We find that all the witnesses we heard from tried to assist the Tribunal to the best of their abilities. We do not find that any witness was obstructive or deceitful. They all genuinely believed in their testimony and were prepared to concede matters of which they had no or limited recollection. However, there were a number of factual disputes between the Claimant and the Respondent's witnesses which we have had to resolve. That is one of our roles. We have done so based upon the evidence provided to us and mindful that the events discussed occurred between three to four years ago.

23. We have also reminded ourselves of the limitations and challenges of memory. We will explain why we have preferred one account to another. It will invariably have been because of our assessment of evidence which arose much closer in time to the events in dispute. However, we do not say that those whose accounts are not accepted have lied or been in any way deceitful. What they have done, at most, is misremembered, a trait which is far more common that many realise. We also recognise that recollections, even inaccurate ones, can become more certain and more entrenched when challenged, as is the case in grievances and in tribunal proceedings that, like here, involve factual disputes.

24. The discomfort felt when those recollections are challenged is common and natural. It is sometimes referred to as cognitive dissonance. It may be felt by some of those listening to or reading this judgment. Any such discomfort should not be mistaken for criticism on our part of any of the witnesses. As we say, we accept that each witness recalled what they genuinely believed to have happened.

25. We only make findings required to determine complaints brought by the Claimant. A number of other matters were raised by both parties in the course of their oral and written evidence. We have not engaged with those, save where they were relevant to the determination of the issues.

26. We will explain our reasoning in accordance with the List of Issues, save that we deal with the time issues last.

The Tribunal's Findings

Knowledge of Disability

27. The Respondent accepts that the Claimant had mental health impairments at the relevant time but denies knowledge, reasonable or otherwise prior to June or July 2020. The Respondent says that the trigger was that by then, the Claimant been off work for nine months and the Respondent accepts that at that point, the Claimant's mental health impairments were long term and causing an adverse impact on her ability to carry out normal day to day activities.

28. In considering when the Respondent knew or reasonably ought to have known that the Claimant was disabled, we considered what information was available to the Respondent at the time.

29. The Respondent as in possession of occupational health reports. Six were obtained over a 12 month period from August 2019 to August 2020 plus a further one in November 2021. The Respondent also had fit notes from the Claimant's GP confirming that at various times the Claimant was not fit for work. We also have the subjective information from the Claimant about how she reports her mental health, in the form of the grievances which she raised.

30. Whilst we have to take account of fact that the Claimant was attending work until September 2019 and, whilst off work, began and engaged in two grievance processes, given the amount of information being provided to the Respondent by occupational health and the Claimant in particular, we were less inclined to find that the Respondent was not aware (or reasonably aware) of the fact that the Claimant's mental health was having a significant adverse impact on her normal day to day activities. However, we find more force in the submission that the Respondent did not know and could not know that such adverse effects were likely to last for at least 12 months.

31. There was evidence from the occupational health reports of the Claimant indicating that she was making progress and at times an indication of a return to work earlier than she actually returned. There was also evidence of the Claimant reporting that her psychological conditions had become more acute. It was clearly a fluctuating condition.

32. Standing back and looking at what was known to the Respondent at the time, we concluded that the occupational health report of 23 March 2020, which reported the Claimant reporting her psychological symptoms becoming more acute, an increase in medication and her referral for additional psychological support, was the point at which the Respondent knew (or ought reasonably to have known) that the Claimant's mental health impairment was likely to last for at least 12 months.

33. We therefore find that the Respondent had knowledge that the Claimant disabled on or around 23 March 2020.

34. The consequences of that finding are that a number of the complaints raised by the Claimant cannot have been disability discrimination because those allegedly discriminating against her were not aware (or reasonable aware) that the Claimant was disabled at the time.

35. However, notwithstanding that, as we heard evidence on all of the complaints, we have gone on to determine them nonetheless.

Direct disability discrimination

36. The Claimant raises seven complaints of direct discrimination which we considered in turn (based upon the agreed List of Issues).

Complaint 1

37. The first complaint is as follows:

> *In August 2019, the Respondent refused the Claimant's application to work two days at the Respondent's Rayleigh office and two days from the Southend office*

38. So far as relevant, the Claimant was already working one day per week at Rayleigh when, on 9 August 2019, she requested to work two days per week at Rayleigh. On 16 September 2019, that request was agreed to by

the Respondent. On that basis, it is simply not the case that the request was refused. The Claimant subsequently raised issues in the hearing about delay and interim measures, albeit these were not within the agreed List of Issues.

39. Notwithstanding that, the Tribunal did not find that there was an unreasonable delay in granting the Claimant's request. The Respondent was actively considering the Claimant's request including seeking advice from occupational health (as to the impact on the Claimant of being isolated from her team by being in Rayleigh) and undertaking a visit to the office itself (by Mrs Reilly-Bennett following concerns raised by the Claimant about working conditions in the office). All those steps took time and were focussed on the Claimant's well-being and welfare.

40. The only feasible interim measure appeared to be allowing the Claimant to increase her days in Rayleigh straight away and then look into whether or not there were adverse consequences in doing so. But that appears to be at odds with the reasonable concerns the Respondent had about the Claimant being isolated and the suitability of the office. It was not unreasonable for the Respondent to await the outcome of its own enquiries before agreeing to the request.

41. However, we reiterate that the actual complaint was that the request was refused but, as we have found, it was not.

42. For those reasons, there was no less favourable treatment of the Claimant and this complaint of direct disability discrimination is not made out.

Complaint 2

43. The second complaint of direct discrimination is as follows:

> *On 27 September 2019, the Respondent reprimanded the Claimant for posting her hobby crafting and family social activities on social media, while on sick leave and required her to stop this activity.*

44. There were two aspects to this complaint - the alleged reprimand and the allegation of being told not to post on social media (in this case, Facebook). This complaint related to a conversation between the Claimant and Mrs Bennett-Reilly which took place on 27 September 2019.

45. Was the Claimant reprimanded? In our findings, she was not. There was contemporaneous documentary evidence that showed that the Respondent did not reprimand the Claimant for posting on Facebook. On the contrary, Mrs Bennett-Reilly was consistently clear that the Claimant had not done anything wrong nor had she breached the Respondent's social media policy. Rather, there were concerns about negative perceptions by colleagues of the Claimant's posts, as she was off sick at the time.

46. Was the Claimant told to stop posting on Facebook? This was a recuring theme throughout the subsequent grievances brought by the Claimant and in the evidence and documents before us.

47. The Tribunal found that the best evidence was in the documents and communications which were created or took place immediately before and after the interaction on 27 September 2019 and before the Claimant raised her first grievance. These serve as the most reliable record of what was discussed as they pre-date the raising of the first grievance and were written without that grievance, the second grievance or these proceedings in mind.

48. Mrs Bennett-Reilly made a note of her conversation with the Claimant, which she wrote on the same day (and which appeared at [260] of the Bundle). The note did not categorically state that she told the Claimant to stop posting.

49. However, there was other contemporaneous documentation supportive of the request to stop posting:

    49.1. Email exchanges between Mrs Bennett-Riley and Ms Bird on 25 & 26 September 2020 which included Ms Bird saying the following to Mrs Bennett-Reilly (at [257] & [259] of the Bundle):

> Katie [Severn] suggested a home visit where a conversation could be had regarding this [a ref to the risk of negative perception amongst fellow staff] and gently suggest that she stops the posting
>
> Following on from the AMG [Absence Management Group meeting] this morning… it was agreed that she [the Claimant] needs to be asked to stop posting onto face book regarding the work she is doing at home as the perception of this may not be positive.

    49.2. Entries made onto the Claimant's HR records and completed shortly after the 27 September 2020 conversation by Mrs Bennett-Reilly (at [262] & [264] of the Bundle), including:

> She [the Claimant] discussed in this sessions [sic] about the perception of posting work she is doing at home online whilst off work on Facebook to avoid any negative connotations being applied to this. Her therapists felt this was part of the therapy, I asked Dawn to just be aware of the potential for something negative to come out of it due to the nature of social media and who is on her Facebook.
>
> Dawn and I have discussed that the updates she has posted on Facebook regarding work she is doing at home may be perceived negatively whilst she remains off work, this may be therapeutic and assisting Dawn but should not be posted on Facebook while she is off work.
>
> Dawn has acknowledged this and discussed this with her therapist who felt this was part of the therapy. I advised Dawn that she just needs to be aware and understands the potential for negative perceptions and consider this within her therapy sessions and what can help.

49.3. The above entry was repeated in an Attendance Support Meeting ('ASM') record of 21 November 2019. If it were inaccurate, it was open to Mrs Bennett-Riley to amend or update it but she did not.

49.4. An entry from the Attendance Management Group ('AMG') meeting of 26 September 2019 included the following (at [274] of the Bundle):

> …advised…to discuss FB posts with her [the Claimant] as causing ill feeling in office, she is posting kitchen renovations…

50. In summary, Mrs Bennett-Reilly received instruction consistent with the Claimant's recollection of being asked to stop posting. The above evidence was supportive of the Claimant being asked to stop posting and the Tribunal find that on balance that that is what happened.

51. However, we also find that the request was motivated by genuine concerns about negative perceptions of the Claimant by others and was not done to reprimand or punish her. It was also clear that Mrs Bennett-Reilly approached the request in a supportive manner, explaining the context and the reasons for the request. Importantly, her note also records that the Claimant understood the potential negative impression and said she would not post for that reason.

52. As such, we find that Mrs Bennet-Reilly did ask the Claimant to stop posting on Facebook but it was part of a wider discussion about the risk of negative perceptions whilst the Claimant was on sick leave and about narrowing who she shared her posts and achievements with regarding her crafting, in the context of its therapeutic value to the Claimant. In addition, as noted, the Claimant indicated that she understood those concerns and would stop posting.

53. Both recollections contain elements of accuracy and elements of inaccuracy. The witnesses' recollections will have been further entrenched by this process. That is why we prefer and have referred to the contemporaneous documents. The Claimant is right that she was asked not to post but she is not right that she was also reprimanded, told repeatedly to stop or told to delete posts.

54. Mrs Bennett-Reilly was correct that the request to stop posting was made in the context of the impact of any negative perceptions on the part of the Claimant's work colleagues and that she discussed it within the context of that concern, which included consideration for the Claimant's own welfare. Mrs Bennett-Reilly was inaccurate in recalling that she did not ask the Claimant to stop posting.

55. As regards less favourable treatment, the Claimant relies on Stephanie Paul (another employee of the Respondent) as her comparator on the basis that whilst she was off sick, Ms Paul was not told that she should not post about her activities or interests (which we were told was amateur dramatics) on Facebook during her absence.

56. The Tribunal makes the following observations regarding Ms Paul as an appropriate comparator:

    56.1. The Claimant claims to use Ms Paul as comparator but provides no evidence in support of Ms Paul's circumstances;

    56.2. There was no evidence of Ms Paul's Facebook use;

    56.3. Ms Paul was absent from work with lymphoma;

    56.4. The Respondent says it has no record of Ms Paul's line manager advising her about negative perceptions or not to post on Facebook (at [742] of the Bundle); and

    56.5. Ms Paul was not managed by Mrs Bennett- Reilly but Mrs Bennett-Reilly's evidence was that she would have spoken to Ms Paul in same way as she spoke to the Claimant, if she had line managed Ms Paul.

57. We do not find that Ms Paul is an appropriate comparator. There was a distinct lack of detail about Ms Paul's circumstances and Facebook activity, although we had no reason to doubt that Mrs Bennett-Reilly would have treated her in same way as she treated the Claimant, namely flag up the risk of negative perception and, if appropriate, ask her to stop posting.

58. In the alternative, and using a hypothetical comparator, we cannot find that the Respondent would have spoken to the Claimant about posting but not to someone in identical circumstances who did not have the Claimant's mental health disability.

59. The Tribunal were provided with examples, albeit not on the same grounds, of the Respondent addressing staff use of social media. Ms Bird was spoken to (after the Claimant had raised the issue of her social media activities) and Mr Caton in his evidence referred to another employee who posted about skiing whilst on sick leave.

60. As such and for all those reasons, we find that the Claimant was not treated less favourable than a hypothetical comparator.

61. In the alternative, even if the Claimant had been treated less favourably, it was not because she was disabled but because of concerns regarding her Facebook use and the consequential risk of negative perceptions. The evidence was consistent throughout. The Respondent raised the issue with the Claimant because of the risk of, and concerns around, possible negative perceptions of the Claimant by other members of staff.

62. Indeed, even the Claimant has suggested at times that she was not subjected to less favourable treatment because of her disability but because she believed Ms Bird had a grudge against her for complaining about her social media use.

63. In conclusion and for those reasons, there was no direct discrimination on the grounds of disability in respect of the Facebook issue.

Complaints 3 & 4

64. The third complaint of direct discrimination is as follows:

> *On 27 September 2019, the Respondent said words to the effect "you have to be aware of the negative views (or perceptions) of your co-workers" to the Claimant;*

65. The fourth complaint of direct discrimination is as follows:

> *On 6 September 2020, the Respondent repeated the phrase "you have to be aware of the negative views (or perceptions) of your co-workers" to the Claimant and told her that this was a reasonable comment.*

66. The Tribunal considered the third and fourth complaints together.

67. It was not in dispute that Mrs Bennett-Reilly said what was alleged (or something along those lines) during her conversation with the Claimant on 27 September 2019.

68. In his oral evidence, Mr Mannion-Marshall agreed that words to that effect were said by him but he could not recall whether it was on or around 6 September 2020. Mr Mannion-Marshall recalled a conversation with the Claimant on 27 August 2020 but not later, although there were email communications between him and the Claimant after 27 August 2020.

69. On 7 September 2020, Mr Mannion-Marshall issued his appeal report (in respect of the Claimant's second grievance). The evidence of the email exchanges between them (at [661] – [663] of the Bundle) suggest that the conversation actually took place on 26 August 2020 and that is when, on balance, we find it to have taken place.

70. The Claimant again relies on Ms Paul as a comparator. For the same reasons explained earlier, we do not find her to be an appropriate comparator. Applying a hypothetical comparator, the Respondent would have spoken to any employee about negative perceptions arising from social media use. It is, in our judgment, a reasonable, supportive and sensible issue to alert staff to.

71. It follows that the Claimant was not subjected to less favourable treatment and nothing in either of these complaints was remotely related to the fact that she was disabled by reason of anxiety and depression.

72. As such, the Tribunal finds that there was no direct discrimination in respect of either of these complaints.

Complaint 5

73. The fifth compliant of direct disability discrimination is as follows:

In December 2019, the Respondent did not deal with the grievance in a timely manner; specifically taking longer than the five days (said by the Claimant to be) provided for under the grievance policy to complete the hearing and resolution her grievances. The Claimant alleges the appeal heard by Mr Caton took 35 days to complete; A review of the first grievance appeal and the second grievance heard by Mr Mannion-Marshall on 11 May 2020 took 119 days to complete.

74. The chronology of the Claimant's first grievance was not in dispute and was helpfully recorded at [674] – [675] of the Bundle.

75. The Respondent's Grievance Protocol was also in evidence and, so far as relevant included the following:

> It is essential that the relevant timescales are adhered to throughout the process; but where there is a failure to meet these timescales, the reason for this failure should be recorded and explained to the individual as soon as possible…(at [183] - [184] of the Bundle)
>
> Guided procedure for grievances: manager must endeavour to resolve grievance in 28 working days (at [190] of the Bundle)
>
> Guided procedure on Appeals; must endeavour respond to appeal within 5 working days; if not, must acknowledge and given complainant indication of when will be determined (at [192] of Bundle)

76. As can be seen from these extracts, the Claimant is wrong in her complaint as to what the Grievance Protocol says about completing and resolving grievances in five days. The time frame is in fact 28 working days. Five days relates to appeals, albeit it is five working days and the Grievance Protocol allows for those timescales not to be adhered to provided the complainant is kept informed of the reason for failure and the likely new timescales.

77. On that basis, the Claimant submitted her first grievance on 11 December 2019 and Chief Inspector John Hallworth (as he then was) determined it on 3 January 2020, within the recommended 28 working days.

78. The Claimant appealed against Chief Inspector Hallworth's decision on 6 January 2020 and the appeal outcome by Mr Caton was provided 26 February 2020. That was outside the proposed five day time frame, taking instead 38 working days. Mr Caton met with the Claimant on 14 January 2020. Between 17 to 28 January 2020, Mr Caton was on leave. He met with Mrs Bennett-Reilly on 13 February 2020 and sent a record of his discussion with her to the Claimant on 17 February 2020. There followed communications between the Claimant and Mr Caton on 18 and 19 February 2020. There was a degree of confusion over whether Mr Caton agreed to put the decision on hold or not but in any event, he sent his appeal outcome report to the Claimant on 27 February 2020.

79. The issue for us is whether or not the Respondent failed to deal with the first grievance in a timely manner and/or in breach of its own policy. The

initial grievance was completed in accordance with protocol guidance on time frames. The appeal was not completed within five working days but that is not a requirement of protocol, which simply requires the appeal manager to endeavour to respond in five working days, with arrangements for indicating how long the process is likely to take if it is going to exceed five working days.

80. Mr Caton kept the Claimant informed and was in regular contact with her. In addition, Mr Caton had a period of leave. Taken in the round, the Tribunal found that the grievance appeal was conducted in a timely manner and in accordance with the Respondent's grievance protocol.

81. The review of Mr Caton's appeal decision by Mr Mannion-Marshall was undertaken outside of the protocol and because of complaints raised by the Claimant on or around 28 February 2020 about the impartiality of Mr Caton. As such, there was no applicable guidance or policy on time frames. Mr Mannion-Marshall issued his review report on 24 April 2020, 40 working days after the Claimant first raised concerns about Mr Caton, during which time the country went into lockdown. Mr Mannion-Marshall was conducting a process which was not covered by the protocol. In the all the circumstances, the time it took Mr Mannion-Marshall to review Mr Caton's decision was reasonable.

82. The second grievance was raised by the Claimant on 11 May 2020 and, in the interests of trying to resolve the continuing issue, the Respondent treated it as another grievance, albeit it raised essentially the same complaints (at [543] of the Bundle). We pause to reflect that it was reasonably open to the Respondent to have actually said that the grievance process had concluded but it chose not to in hope to finding a resolution. On 8 June 2020, Superintendent Hallworth (as he had become) sent his formal stage response to the Claimant (dated 7 June 2020), which was again within 28 working days as per the protocol.

83. The Claimant submitted her appeal against Superintendent Hallworth's decision on 12 June 2020. Mr Mannion-Marshall was appointed to determine the appeal. He met with the Claimant and her trade union representative on 8 July 2020. He updated the Claimant on 15 July 2020. He gave the Claimant a further update on 22 July 2020. Mr Mannion-Marshall was on annual leave from 24 July to 15 August 2020. He contacted the Claimant again on 18 August 2020 to confirm that he had completed his enquiries. The Claimant provided further information to Mr Mannion-Marshall following a subject access request she had made. Thereafter, Mr Mannion-Marshall completed his report and gave his verbal outcome to the Claimant on 27 August 2020. The Claimant sent Mr Mannion-Marshall further documents on 1 September 2020 and Mr Mannion-Marshall issued his written appeal outcome on 7 September 2020.

84. Like the first grievance appeal, whilst outside the five working days envisaged in protocol, Mr Mannion-Marshall kept the Claimant updated and informed throughout and was also provided with further documents by the Claimant which he needed to consider. In addition, he had a period

of leave and was still operating against the backdrop of the Covid pandemic.

85. For those reasons, the Tribunal finds again that the Respondent's appeal decision process in respect of the second grievance was timely and in accordance with protocol.

86. As such, we do not find that the Respondent failed to conduct any of the grievances, appeals or reviews in a timely manner or in breach of its grievance protocol. It follows that the acts complained of giving rise to the alleged less favourable treatment did not happen and the complaint is not made out.

Complaint 6

87. The sixth complaint of direct disability discrimination is as follows:

The Claimant also alleges that Mr Caton was unsympathetic and dismissive towards her when she contacted him and that he would not have behaved in the same way if she had a physical condition, such as a broken leg.

88. The Tribunal had some difficulty with what this complaint specifically referred to. Mr Caton's involvement, as far as these complaints are concerned, was as appeal officer in the first grievance. Two alleged comments in particular were relied upon by the Claimant and attributed to Mr Caton at her meeting with him on 14 January 2020 (per paragraphs 29 & 30 of the Claimant's witness statement), namely:

> You got me into trouble over raising an issue in the course of a consultation.
>
> It's often the case that people who lose grievances leave Essex Police.

89. In addition, at paragraph 34 of her witness statement, the Claimant says that on 19 February 2020 Mr Caton made a comment about knowing how Mrs Bennett-Reilly felt dealing with her.

90. Mr Caton denied saying any of the alleged comments.

91. There was in evidence an internal HR email of 3 March 2020 regarding the complaint the Claimant had raised against Mr Caton the previous day (at [441] – [442] of the Bundle). It purported to recount a telephone conversation between the HR officer and the Claimant on 2 March 2020. Whilst the Tribunal treated the email with some caution because it was hearsay and the author did not provide a statement nor was cross-examined, it did record the Claimant complaining that Mr Caton had said to her that he knew how people felt dealing with her and he remembered what she had been like about moving to Southend (which we took as a reference to the consultation exercise).

92. The Tribunal also had sight of an email of 4 March 2020 from the Claimant to Mr Caton in which the Claimant did not raise any issues about Mr

Caton's approach or comments he allegedly made to her (at [446] – [449] of the Bundle). This email was apparently written after the Claimant had complained to HR about Mr Caton's impartiality. She does not raise those concerns with Mr Caton himself.

93. There appears to be some consistency between what the Claimant alleged Mr Caton told her at the time and what she alleges now but we have to be mindful that the Claimant originally raised her concerns in light of receiving Mr Caton's appeal report with which she did not agree.

94. In addition, Mr Mannion-Marshall reviewed Mr Caton's appeal report and found nothing untoward in the process.

95. The Tribunal concluded that we did not have sufficient evidence to find that Mr Caton said what he is alleged to have said to the Claimant at that time or subsequently. In reality, it was her recollection against his and as it is for the Claimant to prove her case, we were unable to find on balance that the comments were made.

96. However, as recorded in the List of Issues, this is not specifically about what Mr Caton said but how he treated the Claimant. In that regard, there was evidence of him actively engaging in the appeal process that he was tasked with, of him visiting the Claimant at home on 14 January 2020, of making a PAM update on 15 January 2020 to support the Claimant (at [343] of the Bundle), sending the Claimant a form on 16 January 2020 for her to register her business interests (at [346]) and of him keeping her informed and updated in a courteous and professional manner.

97. As such and contrary what was alleged by the Claimant, we did not find that Mr Caton was unsympathetic and dismissive towards her, whatever her perceptions of him may have been. It follows that the complaint of less favourable treatment by reason of disability is not made out.

Complaint 7

98. The final complaint of direct disability discrimination is as follows:

Reducing the Claimant's pay to half pay as a result of her sickness absence.

99. It is not in dispute that the Respondent did reduce the Claimant's pay when she was on sick leave.

100. The Claimant's relevant period of sick leave began on 13 September 2019. Given her length of service and in accordance with the Respondent's Managing Attendance Protocol, the Claimant was entitled to full pay until 10 March 2020, half pay from 11 March 2020 and no pay from 7 September 2020 (the applicable version of the protocol is at [165] – [182] of the Bundle).

101. The Managing Attendance Protocol provides for an extension of pay (including at full pay) upon application. Paragraph 3.21.4 sets out the criteria (at [180] of the Bundle):

> The Central Attendance Management Group will determine whether exceptional circumstances exist and pay should be extended by considering one or more of the following factors:
>
> • Illness or injury resulting whilst undertaking the requirement of the role;
>
> • Advice from Occupational Health on the prognosis of the condition resulting in a significant welfare issue, e.g., terminal illness;
>
> • The individual's career and attendance record;
>
> • Whether the individual is awaiting surgery, or other treatment, and if the delay in returning to work is caused through NHS waiting lists.

102. On 16 February 2020, the Claimant appealed against the reduction of her pay to half. By a letter dated 24 February 2020, the appeal was rejected (at [393] of the Bundle).

103. The Claimant returned to work on 24 August 2020 (namely, before she moved from half pay to no pay).

104. To demonstrate less favourable treatment, the Claimant again relies on Ms Paul as an appropriate comparator, as Ms Paul remained on full pay for the duration of her sick leave. Ms Paul had lymphoma and Amanda Humphreys' evidence was that at the time, it was looking bleak for Ms Paul as to recovery, compared with indications that the Claimant was hopeful of returning to work soon.

105. In addition, Ms Paul had been employed by the Respondent for a shorter period of time than the Claimant, such that her reduction in pay was scheduled to take effect much sooner and the advice of OH was that Ms Paul's prognosis would result in significant welfare issues including an adverse impact on her immune system caused by chemotherapy treatment (at paragraph 15 of Ms Humphreys witness statement).

106. Again, the Tribunal does not find Ms Paul to be an appropriate comparator because of her illness, its treatment and its prognosis were materially different from the Claimant's circumstances.

107. When we consider a hypothetical comparator (namely, someone with same circumstances as the Claimant's save not disabled by reason of depression and anxiety), there is nothing to suggest that the Respondent's decision not to maintain the Claimant on full pay was because of the Claimant's disability. Instead, the Respondent applied the criteria in its protocol and exercised a discretion which was reasonably open to it. The decision, whilst disappointing to the Claimant, was not less favourable treatment because of her mental health.

<u>Conclusion; Direct Disability Discrimination</u>

108. As none of the complaints of direct disability discrimination have been made out, the complaint as a whole fails and is dismissed.

Reasonable Adjustments

109. The Claimant relies upon five alleged provision, criterion or practices ('PCP') which she says were applied by the Respondent and resulted in substantial disadvantage to her by reason of her disability in comparison with persons who were not diabled. We consider each in turn.

PCP 1

110. The first PCP is as follows:

Requiring the Claimant to work fixed/specified hours.

111. It is not in dispute that the Respondent had that PCP and applied it to the Claimant.

112. However, in our judgment, there was no substantial disadvantage caused to the Claimant by reason of her disability. All of the Respondent's staff had to work core hours and could apply if they wanted to vary or change those hours (which the Claimant did successfully, both in respect of her hours and her location).

113. As the PCP did not cause any substantial disadvantage to the Claimant by reason of her disability, there was no duty of the Respondent to make reasonable adjustments. As there was no duty, there could be no breach of the duty and for those reason the complaint fails.

PCP 2

114. The second PCP relied upon is as follows:

In March 2019, the Respondent refused the Claimant's request to adjust her working hours (to arrive and leave work 10 mins earlier).

115. This alleged PCP was factually wrong. The Respondent did not refuse the Claimant's request to adjust her working hours (see, for example, at [225] – [226] of the Bundle). As such, the Respondent did not operate the PCP alleged by the Claimant and so no duty to make reasonable adjustments can arise.

PCP 3

116. The third PCP is as follows:

In March 2019, the Respondent failed to inform the Claimant to apply to adjust her hours under the flexible working policy (by Ms Dorothy Bird failing to inform the Claimant of the policy).

117. It was not in dispute that the Claimant started a flexible working application herself after Ms Bird had told her she would try to adjust her hours via the Respondent's HR system.

118. However, that was not a failure by Ms Bird to inform the Claimant to apply via the flexible working policy. The policy was readily available and it is reasonable to conclude that after working for the Respondent for so long (since October 2002), the Claimant would be aware of or able to access the applicable policies. She was also involved in trade union activities in work, which were again suggestive that she could reasonable access and be aware of relevant policies and protocols.

119. At its highest, the complaint is of a one-off event and is not capable in law of being a PCP.

120. In addition, there is no evidence of any substantial disadvantage to the Claimant. She went to HR, liaised with her trade union and submitted the application herself. At most, it delayed the application, which was swiftly approved. That falls some way short of being a substantial disadvantage.

121. As there was no PCP and/or there was no substantial disadvantage, there was no duty on the Respondent to make reasonable adjustments and, by extension, no breach of any duty.

PCP 4

122. The fourth PCP relied upon is as follows:

Requiring the Claimant to work at /attend specified locations: In August 2019, refusing the Claimant's application to work two days at the Respondent's Rayleigh office and two days from the Southend office;

123. Again, the basis of the alleged PCP is factual incorrect. The Respondent did not refuse the Claimant's request to change her working pattern and location. Rather, and as already found in respect of her first disability discrimination complaint (see above), on 9 August 2019, the Claimant made a request to work two days per week at Rayleigh (increased from one day per week). On 16 September 2019, that request was agreed to by the Respondent.

124. It follows that the PCP as alleged by the Claimant was not applied by the Respondent to her. As such, there was no substantial disadvantage, no duty to make reasonable adjustments and no breach of any such duty.

PCP 5

125. The fifth and final PCP relied upon is as follows:

Informing the Claimant that she would have to attend a panel meeting in Colchester, a 70 mile round trip, because she had disputes with her manager over her flexible working applications.

126. We initially struggled to identify what this related to. At paragraph 59 of her witness statement, the Claimant refers to being redeployed from the South CJU Team to the North CJU Team with reference to a letter confirming the same. That letter was in the Bundle (at [739]), is dated 23 June 2021 and refers to the Claimant's medical redeployment from the South team to the North team.

127. There appeared to be, as part of the redeployment process, a requirement to attend a capability hearing (see, for example, paragraphs 60 – 64 of the Respondent's ET3 form at [50] of the Bundle). However, by a letter of 18 December 2020 from Linda Garner of the Respondent's HR department to the Claimant (at [799]), it was suggested that the Claimant be redeployed rather than continue with the capability process. The Claimant appears to have agreed and was redeployed to the North team, albeit working from home.

128. As such, we find that the Respondent did inform the Claimant that she would have to attend a capability meeting in Colchester but the meeting did not take place as the matter resolved by way of medical redeployment. As such, there was no substantial disadvantage.

129. It is a PCP to have a capability process and to hold meetings as part of that process. However, the PCP here appears to emphasise the length and distance of the journey to the panel meeting, rather than the meeting itself. The location of the meeting from the Claimant's home is not a PCP and/or did not create any substantial disadvantage by reason of the Claimant being a disabled person.

130. In any event, even if it is a PCP, for the reasons explained the meeting did not take place and there was no substantial disadvantage.

Conclusion: Reasonable Adjustments

131. It follows that none of the PCPs relied upon were implemented or put the Claimant to any substantial disadvantage or were in fact PCPs. As the duty to make reasonable adjustments only arises when a PCP operated by an employer places a disabled employee at a substantial disadvantage compared to a non-disabled person, no such duty arose on the Respondent in respect of the Claimant.

132. As there was no duty to make reasonable adjustments, there can be no breach of the duty to make reasonable adjustments.

133. As none of the complaints of breaches of the duty to make reasonable adjustments have been made out, the complaint as a whole fails and is dismissed.

Conclusion on Complaints

134. As we have found, there was evidence of the Respondent's managers having the Claimant's interests in mind and trying to genuinely act in a supportive and constructive manner. Problems appear to have arisen

because of how the Claimant perceived the Respondents' attempts to support her, to manage her work requests and to manage her sickness absence.

135. The gap between what the Respondent intended and what the Claimant perceived was the root cause of the problems that arose. In contrast, we found there were no vendettas, no grudges and, most importantly, no unlawful discrimination.

Time limits

136. By virtue of the EqA 2010, complaints of discrimination must be presented to the Tribunal within three months of the alleged act of discrimination occurring (subject to the effects of the ACAS Early Conciliation process which, if started within the three month time limit, serves to stop the clock for the duration of the Early Conciliation and/or extend the time limit by a month if the three month time limit expires during Early Conciliation). Whether or not complaints have been brought in time goes to the Tribunal's power to be able to consider and determine them, otherwise known as the Tribunal's jurisdiction.

137. So far as relevant, the Claimant began ACAS Early Conciliation on 27 August 2020 and it ended on 2 October 2020. She presented her claim to the Tribunal on 21 October 2020.

138. The List of Issues, based upon when the Claimant began Early Conciliation and then presented her claim to the Tribunal, records that anything that occurred prior to 28 May 2020 is potentially out of time. That date is, with respect, incorrect. The correct date prior to which anything complained is out of time is 16 June 2020 (which takes account of the further 19 days after the end of Early Conciliation before the Claimant presented her claim to the Tribunal).

139. Those complaints that pre-date 16 June 2020 can only be in time and importantly only be considered by Tribunal (as a matter jurisdiction) if either they are part of a continuing act of discrimination, the last act of which post-dates 16 June 2020 (in which case all complaints in the continuum are deemed to have been brought in time) or the Tribunal exercises its discretion under the EqA 2010 and extends time.

140. Even taken at their highest, the complaints relate to different events and are disparate. Whilst they all pertain to the Claimant, the allegations are against different people, different processes and different events. Even if they were acts of discrimination (which for various reasons, we have found they were not), they were not a continuing act of discrimination, in the sense required to enable them to all be deemed to be in time where the last of those acts occurred after 16 June 2020.

141. Therefore, should the Tribunal extend time in respect of those allegations which pre-date 16 June 2020?

142. Although no formal application has been made by the Claimant to extend time, save for what she detailed in her oral submissions, the lack of an application per se was not a point taken by the Respondent. As such, we have treated the Claimant as making an application to extend time.

143. The test is whether, in all the circumstances, the complaints were presented within such other period of time as the Tribunal thinks just and equitable (per section 123(1)(b) of the EqA 2010). That includes a consideration of why the complaints were brought out of time, how out of time they are, the merits of the complaints and the balance between the likely prejudice caused to each party of granting or refusing the application to extend time.

144. Some of the complaints are significantly out of time. The Claimant says that she was not aware of being discriminated against at the time and it was only when she looked back and saw a pattern of treatment that she believed that she had been subject to discrimination. However, the Claimant clearly believed that she was not being treated how should have been treated from at least December 2019 when she raised her first grievance. She was similarly concerned at the manner in which that grievance was handled, such that she complained about the impartiality of Mr Caton and commenced a second grievance in May 2020. The Claimant was also in receipt of assistance from her trade union during this time.

145. The Claimant was disabled by reason of her mental health at the time. However, she was able to work for part of the time and was able to engage in two grievance processes. And there was an indication that the Claimant was of the view that she had been treated less favourably because of her mental health. For example, in her first grievance, the Claimant expresses the hope that the Respondent will "*revisit how they dealt with people off with depression*" (at [283] of the Bundle).

146. Refusing to extend time would prejudice the Claimant in that she would be unable to bring many of these complaints, complaints which only a month prior to issuing her claim were being considered by the Respondent under the second grievance process. We are also mindful that the Claimant is a litigant in person with a mental health disability.

147. The prejudice to the Respondent is that the complaints are somewhat old. However, at the time that the ET1 claim form was presented, it was only a few weeks after the conclusion of the second grievance, a grievance which was in large part based on the same allegations as the first grievance, which related to the complaints being pursued by the Claimant in these proceedings. In addition, we note that we have been able to resolve one of the key issues in dispute by reference to contemporaneous documents (the Facebook postings issue), which was at least supportive of the fact that the Respondent had not been unduly prejudiced in evidencing its defence to the allegations of discrimination.

148. For those reasons, we find that the balance of prejudice falls in favour of the Claimant and it is just and equitable to extend time for all the

complaints being presented. It follows that Tribunal does have jurisdiction to consider and determine them.

149. However, for the reasons we have set out, none of the complaints have been made out and all have been dismissed.

Employment Judge Povey

19 September 2023