EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss F Abdulla	**v**	1. Stonewater Ltd 2. Dongling Shi

Heard at: Reading Employment Tribunal
On: 9 - 13 October 2023
Before: Employment Judge George
Members: Miss D Ballard
Mr A Morgan

Appearances
For the Claimant: In person
For the Respondents: Ms J Headford, solicitor

JUDGMENT

1. The complaint of direct disability discrimination is not well-founded and is dismissed.

2. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

3. The complaint of indirect disability discrimination is not well-founded and is dismissed.

4. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

5. The complaint of victimisation is not well-founded and is dismissed.

For the avoidance of doubt, this disposes of all claims brought by the claimant within these proceedings.

REASONS

1) In this five day hearing we have had the benefit of a file of documents with pagination that ran from page 1 to 252. However, because there are a number of stroke pages in that file, there are more than 252 pages in it. The electronic version had 287 pages including the index at the outset but a number of page numbers were added. Pages 21A to 21E were inserted at the outset of the hearing: that was a document provided to the respondent

by the claimant in response to an order that she provide a statement setting out the impact on her of her disabling condition of anxiety and depression.

2) The claimant had attended for the hearing with the hardcopy file that had been prepared for the preliminary hearing (or PH) to determine the issue of disability but without the file for the final hearing or the witness statements – although both had been sent to her in advance. She was provided with a spare copy of the final hearing file and had time while the Tribunal was reading to orientate herself within the final hearing file and prepare questions for the respondents and their witnesses who gave evidence after her own was completed. She realised by the outset of day 2 that some documents that were in the PH file were not in the final hearing file. By consent, pages B75 to 78F and C82 to 101 from the PH file were inserted into the final hearing file immediately after page 21E. We did not amend the pagination in order that the page numbering on the documents could be clear to all concerned. That is why in these reasons, on occasions, the page numbering referred to is simply page 12, or as the case may be, and sometimes there is a reference to page B75 or as the case may be.

3) The claim arises out of the claimant's employment as a Financial Reporting Accountant that started on 28 October 2019 and ended on 24 February 2020. She entered into conciliation separately as she is required to do, with the two respondents and following that presented a claim on 20 May 2020 (page 3). We refer to but do not repeat the full details of the procedural history of the claim set out in the previous case management order so that these reasons should not be unnecessarily long.

4) In addition to hearing from the claimant, who adopted a witness statement as her evidence in chief and was cross examined upon it, we heard from the Second Respondent, who had two witness statements both of which were adopted in evidence, and also from three other witnesses called by the First Respondent.

   a) Mrs Nicola Mason
   b) Kathy Jalali, and
   c) Naomi Warner

5) The last two of those had produced two witness statements both of which were adopted in evidence, the second of which were more relevant to questions of remedy.

6) It was agreed that when the case was timetabled that we would decide first the issues relating to liability, that is in the List of Issues up to and including paragraph 23, and then, if necessary and if time permitted, to go on to consider questions of remedy. However, because this case had originally been prepared for a final hearing in March 2021, at a time when the respondents had not yet been given permission to participate in the proceedings because of a late presentation of the ET3, the schedule of loss that is in the hearing file was prepared as at that date. It was agreed at the end of closing submissions that, in any event, should we need to consider remedy that that would have to be done at a later date when updated information about losses had been provided. In the event, a remedy hearing will not be needed and will not now take place.

7) I circulated to the parties at the outset of day 3 a proposed self-direction on the law in order that both parties should know those legal authorities it seemed to the tribunal were most relevant to the decision that we have to make. This would enable Ms Headford to reduce the length of her submissions to address only those questions of law which were not covered in the proposed direction. It would mean that the claimant would not be disadvantaged by having a lay person's understanding of the relevant legal principles. She is degree-educated and is evidently an intelligent person who has presented her claim competently.

The issues

8) The issues were agreed between the parties at a time when the claimant had the benefit of legal representation. They are appended to an order of Employment Judge Eeley following a hearing that had been scheduled to decide whether the claimant was disabled within the meaning of s.6 of the Equality Act 2020 (hereafter the EQA). As a result of documentation that had been provided by the claimant between the October scheduled hearing date and the December scheduled hearing date the respondent conceded that question and the List of Issues at page 75E is the agreed list that the parties have used as the basis of their preparation for final hearing from that date onwards. We refer to but do not incorporated that List of Issues (hereafter the LOI) into these reasons.

9) Before I move on to our findings of facts I need to say something about the scope of the list of issues because three points were taken by Ms Headford during her closing submissions as being matters that it appeared the claimant wished to advance that Ms Headford argued should not be advanced as not being within the scope of the list of issues.

10) The first was that, where the claimant's victimisation claims stated that she relies upon the protected act of the retraction of her resignation (LOI para.22), that had been understood by the respondent to be a reference to page 202, an email of 13 February to HR retracting the resignation. However, the claimant's evidence was that she, in her mind, was referring to that and, in addition, an email sent the following day to Ms Shi and to Peoples Services that is at page 202a. This further explains her decision.

11) No date is given in the List of Issues for the protected act (paragraph 22 on page 75K); no date is given for that retraction. It does seem to us that the claimant's explanation that she, in her mind, regards these two letters as being effectively a continuation the one of the other which need to be read together is a fair and reasonable position for her to take. We accept that that is what she meant to refer to. It seems to us to be a case of lack of particularity in the List of Issues rather than an attempt by the claimant to change it. We do not consider that the respondent has been disadvantaged by this (despite it happening at trial) and therefore, we that think that in fact this is a permissible clarification of the List of Issues rather than an attempt to change the claim.

12) The next alleged amendment is that it was said that the claimant was raising an additional alleged reasonable adjustment of a longer probationary period. In cross-examination the claimant did suggest that she might benefit from a

longer probationary period. However, that is something that has been suggested specifically in relation to the s.19 indirect discrimination claim. So, looking at LOI 14.a., a longer probation period is said to be part of the disadvantage relied on and it is not specifically referred to in the reasonable adjustments claim. That List of Issues was drafted at a time when the claimant had legal advice and particular elements seemed to have been argued in relation to particular legal heads of claim. For the List of Issues agreed at the first hearing to interpret the narrative particulars of complaint set out by a claimant acting in person in a way that gives structure to the legal and factual questions is not unusual. We do consider that in those circumstances, what that has been done with the benefit of legal advice, it would be a late amendment of the basis on which the claim is put in order to allege that consideration should be given to whether a reasonable adjustment of a longer probationary period (the claimant, in evidence, suggested up to nine months), should have been allowed for. We do not think that that is something that is within the scope of the agreed issues.

13) Finally, it was suggested that the claim as presently articulated and as reflected in the list of issues, does not complain about the appeal. The appeal is not listed as a fact for consideration in the list of issues itself and it is perfectly correct that, in discrimination cases, the act of dismissal should be regarded as separate to the acts of refusal of an appeal because, typically, for a fair appeal to take place, it would be a different individual who is making that decision. Therefore the mental processes of a different individual would be under consideration. The particulars that were attached to the claim form are at page 19 and those do set out, in the first full paragraph, the circumstances of the appeal. However, it seems to us that giving a fair and true reading to those particulars as a whole, the claimant does not specifically say that Mrs Mason had done anything wrong rather than set out the circumstances of the appeal as part of the narrative. That paragraph does not say that the claimant is intending to complain about the decision of Mrs Mason, it is only Ms Shi who is named in the claim form and the reference to a “line manager” later on in those particulars is to the second respondent. When the claimant articulated what her complaint was against Ms Mason during the present hearing, it amounted a complaint that Mrs Mason did not look into her allegation that Ms Shi had used performance as a pretext to dismiss when the real reason for her decision was mental health. As articulated in that way, it is not an allegation on the face of the claim form, and that reinforces the impression that there was no allegation of discrimination of any kind against Mrs Mason either set out in the list of issues or in the claim form. It is too late, we consider, to add it to the complaints if in fact, that is what the claimant is seeking to do.

Findings of Fact

14) We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on

different occasions when set against contemporaneous documents where they exist.

15) The claimant was interviewed for the position of Financial Reporting Accountant as a part-qualified candidate and was offered the position on 1 October 2019. We see the job offer at page 99 and the contract is at page 110. It was made subject to a six month probationary period as appears at page 111.

16) The claimant had filled in a Supplementary Information for CV Applications form (page 102) and there is also an Equality and Diversity form (page 105) that was submitted on her application. In those, in answer to the question "Do you have a disability", she circled it to indicate, yes, she had a disability and stated "mild depression – does not affect daily life" or, as put on page 105 "does not affect duties at all". The claimant argues that when she made that disclosure it should have been apparent that she considers herself to have a disability and the respondent was put on notice that it was a long-term condition. She argues it is implicit that she is saying she considers herself to have a condition that meets the statutory definition in the EQA.

17) We heard from Ms Warner that Peoples Services, the team in HR who see these documents, should have reacted to seeing that disclosure on a form. It appears from page 118.a that on 2 October 2019, after the offer was made to the claimant, Ms Shi was told about the contents of the form and sought advice. It says there:

> "Sannah has just feedback. Faiza has disclosed mild depression on her forms under the disability section (supplementary information form and equality and diversity form).
>
> I wonder if there is anything training materials for line managers to be mindful when manage the people with depression. Thanks."

18) We are satisfied, based on that and Ms Shi's oral evidence, that she took steps to find out information from HR what she should do in those circumstances. It therefore seems to us that information was provided to the prospective line manager at the right time, namely after appointment and this happens more than a month before the claimant was due to start work. Ms Warner could not remember the request for information that was sent to her as we see at page 118.a. We accept Ms Shi's evidence that she spoke to Ms Warner in person for advice and that is a satisfactory explanation for the lack of email response.

19) The advice she received was that she should talk to the claimant about the disclosure, find out what triggers the effects of her condition and to watch out for those triggers. That is a paraphrase of the oral evidence that was given by Ms Shi. To substantiate her evidence about the advice, she pointed to a comment in the minutes of the three month review (page 208). She says that the advice was to have a conversation with the claimant to see what the problem really was, what the triggers might be and to watch out for the triggers and for change of behaviour. She said that that was why she had a conversation with the claimant on the first month probation review

meeting. Ms Shi considered that to be good advice because, ultimately, the claimant needed to tell her what she was suffering from.

20) By this it seems to us that Ms Shi took sensible steps to find out from the claimant what, if any, impact her disclosed health condition had on her at work and on her ability to carry out her work. We are satisfied that Ms Shi reflected on the form and the contents and took action. Her evidence is that when she spoke to the claimant she was told that depression was not a present problem for the claimant. Despite this, we are also satisfied that she tailored her plans for inducting the claimant with the knowledge that she needed above average support. So she provided for a buddy who, contrary to the claimant's evidence we accept was sufficiently accessible to her. Ms Shi talks about taking steps on the first day to familiarise the claimant with the organisation and providing her with a starter pack, a delayed start on the first day; making the booking for induction training. The second respondent seems to have taken steps throughout the period of the claimant's employment to find out whether the claimant was benefiting from and understanding the training provided. She asked the claimant on more than one occasion whether she needed Ms Shi to fill in any gaps in the training.

21) The claimant argues that it was bad advice to be told to watch out for changes in behaviour. Ms Shi seems to have informed the claimant that she was given advice to that effect in the probation review meeting on 24 February because there is a reference to that in the minutes (page 208). Had that been a blunt statement made without any other context, then we agree that it might seem crass and potentially misleading but that was not the totality of what Ms Shi was told. What she was advised was to have a conversation with the claimant to see what the problem really was and what the triggers might be; we infer that to mean what the triggers might be for increased impact or deterioration of health. She was advised to watch out for those triggers and changes in behaviour. As a whole, that seems to us to be sensible advice.

22) The claimant started work on 6 November: She had a number of aspects of training including with Aisha on payroll and financial systems training on 13 November. There was a full handover from the outgoing member of staff who was themselves still in the team because they were receiving handover from somebody else whose position they had moved into. The claimant complains about the training she received for a number of reasons. She first alleges that those who provided it were, in many cases, for practical reasons, unavailable and she points to the individual who gave her instruction in prepayments as one such example. She argues that Ms Kirk, who was Ms Shi's own line manager, was on a phased return and therefore was not sufficiently available. However, that is inconsistent with Ms Kirk's email signature and also with Ms Shi's evidence which we prefer as generally having been consistent with the documentary evidence in the case. It also seems to us from contemporaneous emails that Isabelle Kirk was quite engaged with oversight of the claimant's progress and that seems to suggest that she was present and involved.

23) Our overall impression is that Ms Shi was approachable, she was firm about her evidence and stood her ground when challenged but did not come across as at all intimidating. Her emails frequently invite the claimant to

raise concerns and there is nothing about the way that she came across in her evidence to suggest that this was not a true reflection of her approachability.

24) The claimant has also made a number of criticisms of the provision for mental health support generally in the First Respondent organisation. Her essential allegation is that the support was superficial and she made particular reliance on comment made by Mrs Mason, or said to have been made by Mrs Mason in the appeal hearing, to the effect that training for managers was being rolled out. The claimant argues that that suggests that managers had not had training thus far in how to manage those with mental health problems and therefore there was inadequate training provided. She also pointed to the comment that Ms Shi made that she was advised to look out for changes in behaviour as indicating inadequate support to management. We have already explained our findings on that. On its own it might have led a manager to look out for stereotypical views of someone with mental health difficulties but it was not the full advice given.

25) It appears from Mrs Jalali's evidence that shortly before the claimant arrived the First Respondent had started to increase the provision of mental health support throughout the organisation. Mrs Mason could not recall commenting that it was not possible to be trained in all conditions but, in our experience, it is not the purpose of effective training to managers to train them in the impacts of specific conditions. The purpose of effective training to managers is to enable them to support colleagues and direct reports in the workplace. One would not expect an effective and appropriate training to address a wide variety of specific conditions but to equip managers with foresight and awareness that these can be hidden disabilities and to give them the confidence to know when and where to go for further advice if they need it. The responsibility of the employer is to provide effective signposting. The actions taken by Ms Shi on appointment of the claimant suggests to us that she understood her obligations in this regard notwithstanding not having received specific targeted training from the First Respondent. The First Respondent has demonstrated that in the organisation as a whole the signposting to individuals about where to find support was good, although the screenshot with links to support was not contemporaneous and therefore we disregard it. We accept that internal networks had links to similar sources of support at the time the claimant was working there and we accept that it is highly unlikely that the claimant was unaware of this source of advice.

26) The First Respondent had a team of Mental Health First Aiders and the claimant was aware of them. She states that she was told that none were operating out of the Reading office but we accept that they provided information through a team talk in November 2019, see page 109.a. Even if the claimant was not in the organisation at that time, which may be the case, Mrs Jalali says that a similar talk took place in January 2020 (see her second statement at paragraph 4) . We accept evidence that there were a number of steps to raise awareness of mental health support, such as support of national initiatives, the biscuit competition, and leaflets available in the Reading office. This we find was evidence that the First Respondent was supporting and facilitating events and that demonstrates openness to

talking about mental health and a culture in which they wanted employees to feel able to speak up.

27) The claimant talked about the stigma of mental health in the workplace and as a general proposition we accept that that can happen. However, we did not get the sense that there were any specific incidents during her employment at the First Respondent on which she relied as indicating that poor mental health was stigmatised. By contrast, the First Respondent has provided a wealth of information about the general culture which is contradictory to such an environment existing.

28) A two-day training course was provided to a group of volunteers including Mrs Jalali, to become Mental Health First Aiders and that itself shows commitment. It is improbable that the claimant was told that she could not have access to such a Mental Health First Aider. Their accessibility seems to have been emphasised. The availability of CareFirst was flagged. Mental health support to employees of the First Respondent during the period of the claimant's employment was more than adequate, in our view, and showed real commitment to addressing any needs that were raised.

29) Ms Shi arranged for fee allocation training to take place with Isabelle Kirk on 15 November 2019 and there is also evidence in the bundle of a number of monthly one-to-ones at one of which happened on 18 November.

30) One of the issues in the case is whether the claimant was allowed from time to time to work from home and there is evidence of one such instance at page 150 and others in the file from around December. It was mentioned in interview that the claimant wished to have the ability to work flexibly. Ms Shi was of the view that it was unwise for the claimant during training or during her probationary period to have a fixed day working from home. That in itself is reasonable. If someone is new and is absent on a regular basis there is a risk of them becoming isolated. It was not a permanent refusal and the document at page 150 does show that, on an ad hoc basis, there were occasions when the claimant was given the ability to work from home.

31) The first four week review took place on 9 December. We accept that, by that stage, Ms Shi was already concerned about some aspects of the claimant's performance because she explains that toward the end of November she had had to assist the claimant with month end closing. The review, which is evidenced in the form at page 154, is not entirely positive. It includes in it a statement to the claimant to make sure that in future her performance addresses particular concerns, specifically that she should complete the future month end within the timeframe or raise issues in time to manage with support. We take that to mean to manage a timely close with support. We found Ms Shi entirely credible on the extent that she needed to assist the claimant and this is supported by documentary evidence which we consider in more detail in respect of the January month end. Mrs Shi at this point suggests a task list be drawn up as a check list.

32) Ms Shi's evidence is that when the performance review meeting had concluded, she took the opportunity being in private room with the claimant to ask her about her health. She does not say so specifically in her paragraph 24 that she asked the claimant about mental health directly.

However, in oral evidence, she stated that she did so as had been advised by HR prior to the claimant starting. Her enquiry was not immediately when the claimant started but it was at the four week review, so within a reasonable time of starting. The second respondent told us that the claimant reassured her that she was fine and said words to the effect "it's a long time in the past and she was fine now". Ms Shi said "you said that you used to be on pills and are not any more". The claimant's version of events is that a conversation about medication took place at her desk, not in a private room, and that the claimant had specifically said there had been a change of medication and not that she was no longer on pills.

33) The evidence that Ms Shi gives about this conversation is consistent with the claimant's approach when asking for flexible working later in her employment; then the claimant gave as a pretext for the request that she needed flexible working for childcare. That is common ground and it does appear that the claimant, for whatever reason, minimised or concealed the impact on her of her depression and anxiety when making the application. We also note statement made in the appeal hearing at page 216, where she says something to the effect that if she had brought it Ms Shi's attention more then maybe she would not have lost her job. The claimant takes issue with this part of the notes. It is not the only criticism she has of the notes but it is a point at which she says the notes are positively inaccurate.

34) The claimant's oral evidence was that she had seen the inaccuracy at the time and had sought to correct that minute. We find that evidence to be not credible. It is implausible for essentially the reasons explained by Mrs Jalali who took the notes. It is implausible that the claimant should have seen what Mrs Jalali had written and had taken the opportunity to ask for them to be corrected. It is unlikely that the claimant could have seen and read the manuscript notes. We do not think there is any possible reason why Mrs Jalali would have persisted in setting out something that she had been told was inaccurate. Furthermore, looking at the entry as a whole, simply making that one correction or change would mean that the passage as a whole made no sense. So, it seems much more likely that the claimant, as she said in the appeal hearing, did seek to minimise or even to conceal the medication that she was presently on at the time of her employment and what the impact on her was of her health condition. It is more likely than not that the appeal minute is accurate in this respect. We also think that the conversation about medication at the claimant's desk is far more likely to have been about the claimant seeking antibiotics for a chest infection in December 2019 as explained by Ms Shi.

35) There was another monthly one-to-one on 19 December 2019 and the chest infection that we have already referred to meant that the claimant had one day sickness absence in December 2019.

36) There is an exchange of emails between 20 and 24 December 2019 at pages 160 to 164 about the preparations for the end of that month; they need to be read in reverse as is common with print outs of emails. The claimant argues that part of this is evidence of Ms Shi showing a lack of flexibility, a lack of permission to the claimant to allow her to work beyond her nine to five hours. Looking at the full run, the picture that emerges from them is more that the claimant is overstretched and is not open about it. It

appears that an error has emerged in the posting, for whatever reason, and the claimant was asked to correct it, because of the knock-on effect on other teams of that error. The real challenge disclosed by this is that for Ms Shi who lacked sufficient communication from the claimant about her situation. The exchange does not show Ms Shi preventing the claimant from working more flexibly but supports Ms Shi's evidence that the claimant did not manage her time efficiently and was not forthcoming about any problems that she was experiencing in enough time for action to be taken to ensure that the close should happen in the time that was required. It is one example where people other than Ms Shi had observed and were impacted by the claimant's actions (a later email from Ms Kirk is another).

37) There is a meeting on 10 January, referred to at page 174, where it appears that Ms Shi asked to look at and review the task checklist that she and the claimant had agreed should be drawn up. Ms Shi says that the previous incumbent had not needed one and her evidence is that it was her suggestion, see her paragraph 10. The claimant's version is that she asked for it but, either way, the claimant's allegation is that matters such as this were deliberately set up in order to cause her to fail. That seems to us to be setting her case at a very improbable height. Something such as this would require the team to know that the incoming person had a disability if the suggestion is that the claimant was being targeted by the lack of a task checklist prior to her drawing one up. It is far more likely that the reason there was not one is because the previous occupant of the job had not needed one because of the way that he works.

38) The checklist was reviewed on 13 January, see page 175. This monitoring of progress towards completing tasks by the end of the month by Ms Shi shows a number of things. First it shows that she is supporting the claimant in attempting to manage her time. Secondly, it is early enough in the time period for the next month that it should have had a positive impact on the claimant's timely performance.

39) At about this time there was Entity Pack training. Ms Shi sent an email, (page 176) to inform her team who was responsible for which entity when providing the information for an Entity Pack and to notify them of the training to be provided by Mrs Kirk. After that training, Mrs Kirk reflected to Ms Shi that she had thought that the claimant had spoken to her own manager, Ms Shi, in a rather rough or slightly rude way. This detail emerged when Ms Shi was in cross-examination asked about the conversation she subsequently had with the claimant to caution her that she had come across that way. Ms Shi's evidence was that she had defended the claimant on the spot to Mrs Kirk saying that she, herself, was heavy skinned and did not take offence but, as a manager, she thought that she ought to give feedback to the claimant to be mindful that that was the perception that the claimant had given to others. She had not thought it was something to be critical of the claimant of and drew attention to the fact that in the subsequent probation review it was not something marked down as being a negative.

40) Ms Shi said that the claimant's response had been that she had been rough but never rude and this had happened because she was just processing information. Ms Shi said that she had not thought the claimant had been

rude, just a bit rough, and had put that down as being an aspect of her personality.

41) There is an element of common ground about the explanation given by the claimant to Ms Shi for this conversation. The claimant argues that, as a result of this conversation, Ms Shi ought to have realised that she, Ms Abdulla, had worsening mental health. Ms Shi made a valid point that she did not regard this as a point of criticism and she did not think worse of the claimant as a result. The claimant's explanation that she had just been processing information or Ms Shi's presumption that speaking slightly roughly was an aspect of the claimant's personality provided Ms Shi with a sufficient explanation and it was reasonable for her to accept that.

42) Over the course of the next four or five days there were a number of exchanges relevant to the preparation of the Entity Pack. Ms Shi offered support, as we see from the Skype conversation at page 177. The Entity Pack is, as described to us in the hearing, comprises information provided quarterly about each entity in the business to external organisations including to the banks. It is subject to a series of reviews at increasing levels of seniority. Ms Shi had set up a meeting with the claimant which was to take place at 10.30 AM on 23 January. This was, presumably, as a result of her asking for a meeting a couple of days previously. That meeting got pushed back to 1.30 AM and then to 4.30 PM as we see from the respective meeting invitations. Ms Shi provides an explanation for that in her paragraph 16, namely an alleged is a lack of progress by the claimant. The fact of the sequence of meetings does give some credence to that explanation.

43) When the claimant was asked about the Entity Pack her only real response was to say that she remembered it being an issue but her recollection was simply that Ms Shi had been unhappy that she (Ms Shi) had had to work over the weekend. The claimant did not really engage with questions in cross-examination about whether these meetings had been postponed because she, herself, was not ready. She blamed the template that she had been given as being inadequate and leading her into error. However, that does not explain why a meeting would need to be postponed. If the meeting had been arranged for the purpose of Ms Shi to review what the claimant had done and the claimant did not consider herself able to fulfil that because of some inadequacy in the tools that she had been provided with then that would be a reason to have the meeting earlier rather than to postpone it; surely the claimant would need to explain the problem and seek guidance on what to do. on the basis that the claimant had not completed the tasks. This is consistent, at the very least, with the claimant not explaining her problems to Ms Shi. It is more likely than not that Ms Shi's recollection on this is reliable and we accept it.

44) By this time, as we see from the text at page 179, Ms Shi had made comments on one draft and left a printout with those comments for the claimant's attention. This means that any inadequacy of the template, in our view, is not relevant to whether the work was ready on time. The claimant had been provided with the draft pack the day before the meeting was due; there was no real explanation consistent with the rescheduling of the meetings other than that the claimant was not ready for them. She

appears to have been asking relevant people for necessary information to be added after the deadline by which the pack should have been completed and this does provide objective evidence that she had an issue with her time management despite the availability, by then, of the task checklist. Her explanations before us have not included that there were specific impacts of her mental health condition that meant that this work was not done. She blames other people for the tools available to her rather than a particular consequence of her health condition. She does argue that because of her general mental health challenges she was unable to find the tools useful but that is an extremely vague allegation. It is not supported by more detailed evidence or by medical evidence specifically about effects of depression on the claimant or of medication. At the time she was not open or forthcoming about the difficulties that she was having, if any.

45) Also relevant are the circumstances of the January 2020 month end set out in Ms Shi's paragraph 13. She sent a schedule (page 185) and stated in written and oral evidence that she had checked in with the claimant to see whether she would make a 12 noon deadline and received no response. Completion happened at 5 PM and that was unexpected to Ms Shi. The only explanation provided by the claimant at the time was that she had been working on something else and when that was put to her in the probation review meeting (page 207), she accepted that she could have prioritised better.

46) The respondents state that the claimant's problems with analytical skills are illustrated by the Skype message from Isabelle Kirk to Ms Shi on page 221, dated 9 January, which suggests that the inputting of costs relating to group management (which was part of the claimant's responsibility) had been done incorrectly leading to the mistaken picture that Corporate was making a £1 million loss. This may be a relatively small detail and it could be explained by a lack of familiarity with a particular system but it is surprising to us that that document should have left the claimant's hands in that state. She should at least have contacted Ms Shi to say that she must have made an inputting error and needed assistance in understanding how the particular system of the First Respondent should be accessed.

47) Those above matters show objective evidence that was available to Ms Shi at the three month review that supported her conclusions that the claimant's performance was unsatisfactory in the various respects that she highlighted at that meeting.

48) Following the difficulties in relation to the Entity Pack there was a Skype conversation between Ms Shi and the claimant on 28 January (page 219). Ms Shi checked in with the claimant to see if she was alright once the Entity Pack has been completed ("are you ok – do you like to call you now?"). That is inconsistent with Ms Shi being angry about having to work over the weekend.

49) It is clear that the document at page 219 to 220 is not a complete series of messages. There do appear to be two sets of messages that are cut and pasted together which include exchanges from at least two different days if one looks at the timing of the messages. The date of the second part of the alleged exchange is not included which is why it appears cut and pasted.

The claimant was unwilling to accept entirely the reliability of the document for that reason. Ms Shi does not give evidence about the second part of the exchange, if one looks carefully at her paragraph 17, but she does about the first part of the exchange (up to the message "hi" timed at 16.36 which appears to be from a different day to those which precede it). Despite those question marks about the evidence, it does seem to us that it is reliable evidence that the claimant first raised the question about whether she was the right fit for the role ("I have been having concerns about my role, and I know its still early days but sometimes I think maybe this isn't the role for me."). The subsequent arrangement to talk supports Ms Shi's evidence that she had a conversation in person with the claimant the following day.

50) On around 29 January 2020 (the same day that the second respondent and the claimant spoke) there was a meeting between the claimant, Ms Shi and Ms Kirk which is referred to in DLS paragraph 19. It does not read to us as though, at this point, Ms Shi herself, had made a final decision about the claimant's future; she appears to have been looking to understand what additional support might help. The claimant did not then give concrete examples of concerns or training needs, despite what she now says about her training in the hearing before us. The claimant's position is that she requested this meeting but that is unsubstantiated and is contrary to the email at page 181. The fact that the claimant did not appear to raise questions about training then is inconsistent with her present position and it is not in her statement that she made this request. What the claimant does say in her paragraph 25 is that it is about this time that she made a request for flexible working under the guise of having parental or childcare needs. It was not a formal request in writing and, as we have already explained, it was not given an outright refusal but a refusal for the duration of her probationary period although she was given permission to work from home on occasions.

51) On 31 January, Ms Shi, as we see from page 186, provided a detailed plan for completing the month end and we have already set out some information about that.

52) The three month review meeting with the claimant took place on 10 February and is evidenced by the form at page 193. Three points are highlighted on that form. A lack of analytical skills, lack of time management and a need to work on attention to detail to make sure that she is correct. There was a discussion about whether the claimant would resign but there is some difference between the parties about whether that was the same day or on the following day. Ms Shi says that a discussion immediately followed the three month review and the claimant says it too place on the following day. However, that is not the most important distinction between the accounts: there clearly was a discussion about whether the claimant would resign or not, either shortly after or the following day after the three month review.

53) The claimant's case is that Ms Shi told her to hand in her resignation (C para.13). It is Ms Shi's evidence that it was the claimant who raised the question of whether the role was right for her and that is consistent with the earlier Skype message. We accept that she probably did. There probably was a conversation about how long the claimant would have to look for a job

and Ms Shi had clearly decided that formal proceedings should commence. The second respondent was relatively new in the organisation herself and it is consistent with that that she should seek advice from her manager and HR about the approach taken by this employer towards problems during probation. If an employee responds to being told that they are being referred for an HR meeting during their probationary period because their line manager considers their performance to be unsatisfactory, by saying that they are considering resigning, it is not unreasonable for the line manager to discuss extending notice periods to facilitate the best outcome for the employee which is, in essence, what Ms Shi did.

54) But the claimant's account is very different. She alleges that this happened the following day and that Ms Shi made clear that if she failed her probation it would be recorded in her HR file which would affect her reference. As it was put in cross examination, it was suggested that it was said by Ms Shi that it would affect her career prospects.

55) It may have been in the claimant's mind that it would look better if she resigned but we do not think that anything was said to her by Ms Shi to make her think that. The details on her reference obviously were a matter of concern for the claimant because she was reassured by being told in the probation review meeting that a standard reference would be provided either way.

56) As many witnesses have said, we find that the claimant presented in this meeting, and in other meetings, as being very accepting of the situation and took the stance that the role did not appear to be for her and she wished to reconsider her position. They agreed to delay her probationary review meeting until she returned from holiday. The claimant did not argue at the probationary review meeting itself that the judgment that her performance was unsatisfactory was not well founded nor that it was affected by the impact of her mental health condition or the medication she was taking to treat it.

57) The claimant's case is that she raised her mental health problems on a number of occasions but she has not pinpointed specific instances of doing so, apart from one. That is the conversation which she alleges happened at her desk about her medication but we have rejected the claimant's account and prefer Ms Shi's account that the only conversation at the claimant's desk about medication concerned the latter's unsuccessful attempt to obtain antibiotics for a chest infection. The claimant's overall case on this was contradicted by Ms Shi whose evidence was that she gave the claimant many opportunities to raise difficulties which were not taken, and held at least one conversation where she directly asked about the claimant's written disclosure that she had mild depression. Ms Shi's position is generally supported by the documents: the claimant's is supported by no documentation. Her assertion is inconsistent with the reasons she gave for withdrawing the resignation, namely that she considered she had been insufficiently open about her mental health (page 202a) and inconsistent with the claimant's present position that she gave the pretext of non-disability related reason for the flexible working application. There would be no good reason to conceal a mental health related reason for such an

application if she had frequently mentioned mental health challenges previously.

58) For all those reasons, we find the claimant's account that she made multiple express disclosures of the effect on her of her mental health condition, not credible.

59) The email at page 201 from Ms Shi to HR is also generally supportive of her position that nothing had been decided by that point.

60) The claimant mailed the team on 11 February off the back of a meeting invite to a MS Teams meeting. In her mail she stated that the contract was going to be ended by mutual agreement. She actually sent a resignation email in on 12 February 2020 given an end date of 6 March and then varied that to 1 March; she stated that the job was not a good fit (page 199).

61) The following day 13 February 2020, the claimant withdrew her resignation saying that she had spoken to her doctor, see page 202. Ms Shi discussed the situation with Ms Warner and decided to accept the withdrawal and to proceed with the probation review meeting.

62) According to Ms Shi, her response to page 202 was to go to speak to the claimant. The fact that she did so is evidenced in emails on the same page in which she informed Ms Warner that the claimant wanted to proceed with the probation review meeting instead of resigning. According to Ms Shi, when she spoke to the claimant, she asked what Ms Abdulla had meant when she referred to speaking to her GP and asked her whether she was ok. The claimant when cross-examined, said she had no recollection of that although alleged Ms Shi gasping when reading the email. We think that the fact that Ms Shi had a conversation is evidenced in the emails. Furthermore, in general the whole of the second respondent's evidence had coherence and consistency. We accept this particular part of her evidence and find that she did not audibly express shock at the withdrawal and did seek to find out what the claimant meant by saying that seeing her GP had caused her to change her mind.

63) The following day, see page 202.a., the claimant emailed HR and Ms Shi alleging that the probation review was not correct because it did not take into account depression and anxiety. She also asserted that there was nothing wrong with her skills and knowledge. She stated that she could explain further in the HR meeting.

64) According to Ms Shi's paragraph 23, at this point she took advice from Mr Law (another HR adviser), Ms Warner and Ms Kirk and the decision was taken to explore this further with the claimant in a probation review meeting. The invite to that was sent out on 17 February. It appears that Ms Shi must have spoken to Mr Law between then and the hearing, as we see from the email at page 212. That contains an indication that Mr Law had advised Ms Shi that the safest thing to do was to give the claimant a couple more weeks to see if things can improve "as now we have heard her medical issue" and Ms Shi said that they would explore than in the meeting.

65) That meeting took place the same day as that email, 24 February 2020, the minutes are at page 206. We need to consider what information the

claimant was asked to provide about her mental health given that the intention that appears from the email at page 212, was that the respondents would explore the medical issues with the claimant in that meeting. The minutes do not provide a verbatim note and they are slightly difficult to follow at times but it appears (page 207) that the claimant stated that she had been advised by the GP to be more open about her mental health and the effect on her work. She explained that her depression started during pregnancy and she had then been suffering from it for seven and a half years but was a lot better than she had previously been. The minutes do not record that she stated in this meeting that she was then taking antidepressants. The claimant and did not in these proceedings say that she had said that or challenge the accuracy of the notes in that respect. She is recorded as saying:

> "In my mind it says they don't like you - I step back and tell myself no that's not the case. That's why it may look like I'm lost - just dealing with the thought process. May look like taking longer not - because of skills - issues in my mind.

66) When Ms Shi puts to the claimant in that meeting that she had offered support at the first four week meeting and at the January one-to-one meeting, the claimant did not deny it. She agreed in a couple of places that she was struggling with the role; comments such as "I agreed I was lost with it" are recorded. We do bear in mind that the notes are not merely verbatim, they are somewhat disjointed but even taking that into account the implication is clear that the claimant acknowledged difficulties with the role notwithstanding that she said she appeared to take time to process information.

67) The claimant does appear to us to need processing time when providing answers. Her approach to this litigation has been quite passive. Both of those observations are consistent with what she said about the effect of her condition at the time. There is an obligation on the respondent in this sort of meeting, with an employee with these challenges, to give them the open opportunity and space to explain what they mean. At 40 minutes it was a relatively short meeting.

68) In the claimant's witness statement, at paragraph 14, she alleges that she openly and honestly discussed her thought processes and feelings and explained why she took longer than a non-disabled employee to do tasks and stated that that meant that the length of time she took in dealing with the workload was not a true reflection of her skills. However, apart from the short entry referred to, the meeting minutes do not reflect that. The claimant had the opportunity to correct the notes and did not take it nor did she make that a ground of her appeal. Therefore, we do not accept that, in that meeting, she explained the challenges that she faced in the way she sets out in her witness statement despite having the opportunity to do so.

69) There was at least one open question from the respondent when with Mr Law asked "Did you receive the support you needed from us" and the claimant answered with reference to some element of the challenges that she faced. Ms Shi's evidence was that during the 20 minute adjournment they did not specifically consider whether to continue the probationary period for a couple of weeks.

70) The outcome letter at page 209 supports the evidence that the reasons for the dismissal were "A failure to achieve the standard required specifically in relation to your time management, attention to detail and analytical skills" and these, we find, were the reasons for the dismissal.

71) The claimant's case under s.15 EQA is that the respondent dismissed her because she took longer to do the tasks. She has also brought an allegation of direct disability discrimination but we need to consider the allegation that among the reasons for dismissal were that she took longer to do the tasks associated with her role.

72) We reject that. The claimant has not alleged that her time management or her ability to prioritise was impacted by her condition or medication. That would have been a different case to the one she is running in any event. Ms Shi has shown on a number of occasions that, provided she has notice of it and can accommodate it, simply taking longer is not an issue for her. Her evidence when the claimant asked her about whether she accepted that she took longer seemed genuine and not that of a line manager who is bullying and seeking to force someone out of her job. What she said was this:

> "You did say that it takes longer to do things which I do understand and I appreciate that but I reviewed your workload and to the best of my knowledge it was well-paced even for your situation. someone with mild depression. You do things slower but because your role was in corporate directory … it's the simplest directory. I was supporting it I reviewed your workload and it was well paced for each day. I worked with her since the month end to pace the tasks - not to leave things to the end of the month but to spread the workload during the month rather than leave them to the month end and I emphasized that she should create a checklist to make sure she keeps track. But the third month she did not meet the deadline and when the time was mentioned the reason she gave was that she was doing something else."

73) We find that the explanation that was given for not meeting the deadline on the third month was the reason that Ms Shi came to the conclusion there was nothing more that she could do. The respondent might have chosen the route of continuing the probation for a few weeks but it had not been given any reason to think that any of their concerns were actually impacted by the disability rather than an inability to prioritise appropriately and time management. Also, informally, Ms Shi seems to have made allowances or adjustments for the claimant's disability providing support to her that she did not provide for others.

74) The claimant appealed the same day and that is at page 210. The appeal hearing was heard before Mrs Mason on 12 March 2020. In the appeal, despite saying that on the one hand she regretted not being more open about her mental health condition, on the other she attributed her lack of achievement to a lack of policies and processes and a lack of training. She did say that her anxiety was made worse by the way she was presented with the information and that is possible in a new job. We also consider that the claimant and she had a greater number of open opportunities in the appeal hearing but she still did not specifically explain links between her mental health and performance as alleged before us. So, neither orally at the appeal hearing nor in the written appeal document (page 210) did she explain why the mental health condition meant her performance was

inadequate in the ways that the respondent has alleged or explain what more the respondent could have done. She mostly put forward explanations external to herself stating:

> "My performance in my job role was impacted by the conditions at Stonewater, and not by a lack of skills or experience."

75) She criticised training and support – that is what we mean by saying that she puts forward explanations for performance concerns which are external to herself. She did not make specific allegations against Ms Shi. Indeed in the final paragraph, where she specifically mentioned mental health, what she said was:

> "One of the biggest factors involved in my reduced performance at Stonewater was the complete lack of mental health support, for myself taking on a new role whilst having anxiety/depression.

76) In this, she criticises the support by HR, expressly exculpates Ms Shi and she appears to say that there is an institutional problem. We have found that not to be the case, but what we note in terms of the reasons for dismissal is that, in our view, an argument of lack of support generally, does not and cannot reasonably be understood as an argument that her mental health caused her performance problems. She did not at the appeal stage explain any alleged link between her performance and a lack of mental health support.

Law applicable to the issues in dispute

Knowledge of disability

77) Knowledge of disability is, by reason of the statutory definitions, a necessary element of two types of claims of disability discrimination. In discrimination arising in consequence of disability (contrary to s.15 EQA) it is a potential defence. If the respondent can prove that they did not have actual or constructive knowledge of disability that is a defence to the claim. In claims of a breach of the duty to make reasonable adjustments it is for the claimant to prove both that the respondent had actual or constructive knowledge of disability and that they had actual or constructive knowledge of the substantial disadvantage relied on. However, a disabled employee will not be able show that their employer treated them less favourably than they would have treated a non-disabled person on grounds of that disability (contrary to s.13 EQA) if the employer was unaware of the disability. Knowledge is not an element of indirect discrimination.

78) A person has a disability, for the purposes of the EQA, if they have a mental or physical impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Substantial in this context means more than trivial: s.212(1) EQA . Paragraph 2(1)(b) of Schedule 1 to the 2010 Act defines long term, so far as material to this case, as "likely to last at least 12 months". "Likely" in this context means "could well happen": see Boyle v SCA Packaging Ltd. [2009] UKHL 37, [2009] ICR 1056. To have knowledge of disability, the employer will need

actual or constructive knowledge that a health condition fell within that definition.

79) The position on knowledge was summarised by Rimer LJ in Gallop v Newport City Council [2013] EWCA Civ 1583, [2014] IRLR 211. At para. 36 of his judgment (p. 217), he says:

> "[Counsel] were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in [section 6 of the EQA]. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2) . I agree with counsel that this is the correct legal position."

80) This statement of the law was cited with approval in Donelien v Liberata UK Ltd [2018] IRLR 535 CA

Direct discrimination

81) The claimant alleges that a number of acts of the respondents, including dismissal, were acts of direct disability discrimination contrary to s.13 EQA which prohibits direct discrimination. Direct discrimination contrary to s.13, for the present purposes, is where, by dismissing their employee (A) or subjecting her to any other detriment, the employer treats A less favourably than they treat, or would treat, another employee (B) in materially identical circumstances apart from that of disability and does so because of A's disability.

82) In the case of direct disability discrimination, the requirement in s.23(1) EQA to compare the treatment of A with that of an actual or hypothetical person in materially identical circumstances means that the appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself): para 3.29 EHRC Employment Code (2011) and Stockton on Tees Borough Council v Aylott [2010] ICR 1278 CA.

83) All claims under the EQA (including direct discrimination, discrimination for a reason arising in consequence of discrimination, victimisation and harassment) are subject to the statutory burden of proof as set out in s.136 EQA.

a. When deciding whether or not the claimant has been the victim of direct discrimination, the employment tribunal must consider whether she has satisfied us, on the balance of probabilities, of

facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was disability. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of disability.

b. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by disability we must have a sound evidential basis for that inference.

84) The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of disability. The burden of proof provisions may be of assistance if there are considerations of subconscious discrimination. However, the Tribunal needs to take care that findings of subconscious discrimination are evidence based. A finding that the respondents' conduct towards the claimant was unreasonable does not of itself give rise to inferences that the motive or reason must have been because of the protected characteristic. Per Elias J in Law Society v Bahl [2003] IRLR 640 at para [99] – [100] (expressly approved by the CA at [2004] IRLR 799.

85) Furthermore, although the law anticipates a two-stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

86) Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the

treatment complained of was not that of disability, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

Breach of the duty to make reasonable adjustments

87) The obligation upon an employer to make reasonable adjustments in relation to disabled employees so far as it is relevant to this claim is found in ss. 20, 21, 139 and 136 and Schedule 8 EQA.

88) By s.20(3) and Sch.8 paras.2 & 5 that duty includes the requirement where a PCP applied by or on behalf of the employer puts a disabled person, such as the claimant, at a substantial disadvantage in relation to his employment in comparison to persons who are not disabled to take such steps as are reasonable to have to take to avoid the disadvantage.

89) When considering whether the duty to make reasonable adjustments has arisen, the Tribunal must separately identify the following: the PCP; the identity of non-disabled comparators and the nature and extent of the substantial disadvantage: Environment Agency v Rowan [2008] ICR 218 EAT.

90) By s.21 EQA a failure to comply with the above requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against their disabled employee if they fail to comply with the duty to make reasonable adjustments.

91) The equivalent provision to s.136 EQA in the previously applicable legislation was interpreted in Project Management Institute v Latif [2007] IRLR 579 EAT in relation to an allegation of a breach of the duty to make reasonable adjustments to mean that the claimant must not only establish that the duty has arisen but also that there are facts from which it could reasonably be inferred, absent any other explanation, that it has been breached. This requires evidence of some apparently reasonable adjustment which could be made.

92) Sch 8 para. 20 provides that the employer is not subject to a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage in question. EHRC Employment Code (2011) para.6.19 explains that Sch 8 para.20(1)(b) requires an objective assessment by the tribunal of what the employer knew or ought to have known. The employer must however do all they can reasonably be expected to do to find out whether the worker has a disability and whether they are or are likely to be placed at a substantial disadvantage.

93) It is clear from paragraph 4.5 of the EHRC Code of Practice Employment (2011) that the term PCP should interpreted widely so as to include “any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.”

94) The duty imposed on an employer to make reasonable adjustments was considered at the highest level in the case of Archibald v Fife Council [2004] IRLR 651 HL where it was described as being "triggered" when the employee becomes so disabled that he or she can no longer meet the requirements of their job description. In Mrs Archibald's case her inability, physically, to carry out the demands of her job description exposed her to the implied condition of her employment that if she was not physically fit she was liable to be dismissed. That put her at a substantial disadvantage when compared with others who, not being disabled, were not at risk of being dismissed for incapacity. Thus the duty to make reasonable adjustments arose.

95) Lord Rodgers made the point, as appears from paragraph 38 of the report of Archibald v Fife Council, in relation to the comparative part of the test that the comparison need not be with fit people who are in exactly the same situation as the disabled employee. This was relied upon in Fareham College Corporation v Walters [2009] IRLR 991 EAT where it was explained that the identity of the non-disabled comparators can in many cases be worked out from the PCP. So there the PCP had been a refusal to allow a phased return to work and the comparator group was other employees who were not disabled and were therefore forthwith able to attend work and carry out their essential tasks; the comparators were not liable to be dismissed whereas the disabled employee who could not do her job, was.

96) In Archibald v Fife Council, having posed the question whether there were any adjustments which the employer could have made to remove the disadvantage and when considering the adjustments which were made Lord Hope explained ([2004] IRLRL 651 at page 654 para.15) that,

> "The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on behalf of the employer or any physical features of premises which the employer occupies"

97) Furthermore (at para.19);

> "The performance of this duty may require the employer, when making adjustments, to treat a disabled person who is in this position more favourably to remove the disadvantage which is attributable to the disability."

98) The requirement on the employer is, in the words of s.20, to take "such steps as it is reasonable to have to take to avoid the disadvantage". The test for a breach of the duty to make reasonable adjustments is an objective one and thus does not depend solely upon the subjective opinion of the respondent based upon, for example, the information or medical evidence available to it.

Discrimination arising from disability

99) Section 15 EQA provides as follows:

> **"15 Discrimination arising from disability**

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

100) The Court of Appeal considered s.15 EQA in City of York Council v Grosset [2018] ICR 1492 CA and held as follows:

a. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability?

b. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something".

c. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something".

d. Section 15(1)(a) does not require that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability.

e. The test of justification is an objective one, according to which the employment tribunal must make its own assessment: see Hardy & Hansons plc v Lax [2005] ICR 1565 , paras 31–32, and Chief Constable of West Yorkshire Police v Homer [2012] ICR 704 , paras 20, 24–26 per Baroness Hale of Richmond JSC, with whom the other members of the court agreed. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. This is for the respondent to prove.

101) The other potential defence is lack of knowledge of disability. The EHRC Code of Practice (2011) paras.5.13 to 5.15 makes a similar point about knowledge in relation to a s.15 EQA claim to that made above (para.92 above). If an employer's agent or employee (such as an occupational health adviser or an HR officer) knows, in that capacity, of a worker's disability, the employer will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled person to discrimination arising from disability (para.5.17).

Indirect discrimination

102) Indirect disability discrimination contrary to s.19 EQA, for these purposes, is where the employer applies a rule; a provision, criterion, or practice ("PCP") which does not on the face of it discriminate between people who share the claimant's disability of depression and anxiety and people who do not have those conditions, but which puts, or would put, persons who have depression and anxiety generally at a particular disadvantage and puts, or would put the claimant at that disadvantage.

103) If those elements are made out, and there is – on the face of it - indirect discrimination, it is open to the discriminator to justify their PCP and escape liability if they can show that it was a proportionate means of achieving a legitimate end. This is to be judged in accordance with the principles in Land Registry v Houghton UKEAT/0149/14 and in the same way as set out in para.100)e above in relation to the s.15 EQA claim.

Victimisation

104) Victimisation is defined in s.27 EQA as follows:

> **27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (4) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

105) Section 39(4) EQA forbids an employer to victimise an employee

> "(a) as to [their] terms of employment;
> (b) in the way [they] afford [them] access … to opportunities for promotion, transfer or training …;
> (c) by dismissing [them];
> (d) by subjecting [them] to any other detriment"

106) The first question in the present case is therefore whether the claimant did a protected act within the meaning of s.27(2) as set out above. If so, the next question is whether the acts complained of, so far as they have been proved to have happened, were done because the claimant did a protected act.

107) The then applicable provision of the Race Relations Act 1976 was considered by the House of Lords in The Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, HL. The wording of the applicable definition of victimisation has changed somewhat between the RRA and the EQA. However Khan is still of relevance in considering what is meant by the requirement that the act complained of be done "because of" a prohibited act. Lord Nicholls said this, at paragraph 29 of the report,

> "The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact"

108) Therefore when deciding whether or not the claimant suffered victimisation the tribunal first needs to decide whether or not she did a protected act. Next the tribunal needs to go on to consider whether she suffered a detriment and finally we should look at the mental element. What, subjectively, was the reason that the respondents acted as they did.

Conclusions

109) We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

110) The first step when considering the question of knowledge of disability to set out what are the facts amounting to the relevant disability (to some extent these supplement our findings of fact above). The statement of information about the impact on the claimant of her condition is at page 21A. She has had depression and anxiety since 2012. As at May 2020, to judge by the NHS Boarding Card at page C89, she was on Citalopram 20mg daily and had been for a year (see page C95). The quote there is that "The client reports finding it good". This is dated from shortly after the end of the employment with the First Respondent.

111) The description she gave at the time of that Boarding Card about how she was feeling and her state of health at that time is not particularly helpful evidence about how the mental health condition impacted on her and her ability to carry out her role during her employment. She produced an information sheet about the side effects of medication (page C98 and 99) and stated in the impact statement that without medication she is physically unable to get up for work. She continues that with Citalopram "I am able to work, but severely hampered still by my disability". However, she does not

explain specifically how she is hampered – she states that the side effects include nausea and tiredness and those are side effects that are listed on the information sheet. She states that some days she is more tired than on others and that is evidence that she has given orally to us. That scant information are the facts which amount to the disability.

112) She accepted that there was no reference in the medical documents to support her evidence that she was on medication and specifically on Citalopram at the time she was employed. She did not point to anything in writing that informed the respondent about that. We can believe that she experiences tiredness and nausea and find that she did and also accept her oral evidence that, contrary to what she told the respondent, she was taking Citalopram throughout her employment. Tiredness and nausea are listed as possible side effects of that medication. The evidence from during the employment is that, while on medication, she functioned well enough to be able to say truthfully in the application form that the condition of depression does not have an impact on her daily activities or daily duties.

113) Our conclusion on knowledge is that the respondent had actual knowledge that the claimant considered herself to have a disability, see the information provided by the claimant in onboarding forms referred to at para.16 above we have described the description that is in those forms. We accept the claimant's argument that when she stated that she had a disability she was, in effect, telling the first respondent that she considered herself to have a long-term condition.

114) As a matter of fact, the system seems to have worked as intended in that People Services informed Ms Shi of this information and Ms Shi took steps no later than 9 December 2019, possibly before, to finds out more from the claimant. The claimant did not provide any additional information beyond the disclosure that she had in the past been on medication but was not presently on medication. She did not say what that had been. She did not state that she had anxiety.

115) This amounts to either actual or constructive knowledge of the disability of depression but not actual or constructive knowledge of any specific effect on the claimant's ability to carry out her role. Twice prior to employment the claimant emphasised that the condition did not have a continuing effect and was effectively well controlled and did not take the opportunity to explain further when that was openly given in December 2019.

116) The claimant alleges for the purposes of the s.15 claim that the one aspect of the "something arising from disability" is that it took her longer for her to do a task and then also that she had difficulty in analysing matters in great detail as a result of her disability. She has evidenced tiredness and taking longer to do a task but not what might be described as difficulties in understanding beyond taking longer, not cognitive impairment in that sense. She explained that her current employer allows her to work longer hours when she feels able to and shorter hours when she does not and says that tiredness means that she has difficulty working fixed hours but that is not the same as saying that it took longer to do particular tasks; such a need can be accommodated by scheduling. Time management, in our view, is something different again. In the probation review meeting the claimant

referred to appearing to take longer for her to do tasks but said that that was because she was processing information. Ms Shi acknowledged that and said that the claimant has shown that she takes longer to do things because either of the effect of the disability itself or the medication she takes for it.

117) As to the difficulty in analysing matters, as we have already said, the claimant has not alleged that she has cognitive difficulties or that there are particular times of day that are difficult compared with others. To the extent that a difficulty in analysing matters is said to be distinct from taking longer to do tasks or being tired that it has not been shown to be a consequence of disability.

Direct disability discrimination

118) Quite a number of the acts alleged to be direct discrimination have not been shown to have occurred as alleged by the claimant. So, using the paragraph numbering in the List of Issues (page 75E):

a) LOI.1(a): We do not accept that there was limited training or that inaccurate directions were given.

b) LOI.1(b): The limited extent to which it has been shown that there was an initial a lack of something in writing is that we accept that a task list that was created to provide structure to the claimant's working time in January 2020. It has not been shown that inaccurate verbal instructions were given to her. To the extent that the claimant did not immediately understand that she could do tasks during the course of the course of the month, that was addressed by Ms Shi through the task list in January. That is set against the detailed training provided to the claimant.

c) LOI.1(c): We are satisfied that the claimant had ample support from her managers.

d) LOI.1(e): It would be inconsistent with our view of Ms Shi for her to have told the claimant off for spending 10 or 15 minutes attending a biscuit baking competition. The most that might have been said was that Ms Shi had an expectation that the work would still be done on time and that is nothing a reasonable employee could take offence at. So to the extent that we think that this incident happened, it was not a detriment.

e) LOI.1(f): The claimant was not told to resign or warned that if she did not she would be put through a formal process. The only discussion about resignation was instigated by the claimant and Ms Shi responded appropriately to that.

f) LOI.1(g): This allegations was not made out because there was ample and extensive mental health support provided by the first respondent.

g) LOI.1(h): The claimant has not shown that the first respondent this. When she was cross examined about it she, herself, was unclear which guidance was referred to so we are not satisfied that that has been made out.

h) LOI.1(i): As to training provided by the first respondent in mental health issues, there were 15 Mental Health First Aiders who were available to employees and managers. As put, it is an extremely broad allegation. There were clearly signposted sources of advice for managers, which they took, as it appears from Ms Shi's actions. So, the training does appear adequate even if more training for managers was planned.

119) All the rest of the allegations are directed at Ms Shi, the second respondent. To the extent that any of the above allegations were shown to have occurred as a matter of fact, there is nothing to suggest that they were targeted at the claimant. Many of the allegations, on the face of them, appear to be matters that would apply to anybody and, therefore, they are unsuitable for a direct discrimination claim. There is no evidence that the claimant was treated less favourably on grounds of disability in relation to any of the actions set out above at para.118).

120) Going back to the list of issues:

a) LOI.1(d): The claimant alleges that she was told by the second respondent that she had approached HR asking for advice regarding her mental health and HR had advised Ms Shi to look out for changes in behaviours. Our findings are that this did not happen exactly as alleged by the claimant. The statement relied on by the claimant is that set out in the probation review meeting minutes. If the complaint is about being told in the probation review meeting that Ms Shi had received that advice, then there is no evidence that Ms Shi would have failed to pass on to any other probationer, in a probation review meeting, advice received by HR relevant to the management of them regardless of whether that probationer had a disability or not. If the complaint is that HR provided the advice, then that allegation should have been made against another individual but, in any event, it has been taken out of context. In its proper context, the advice was, in our view, good, and does not amount to a detriment to the claimant (see paras.19 - 21 above).

b) LOI.1(j) to (l) We take these allegations together. The allegation of neglect by the First Respondent of the claimant's needs is, in effect, made against the Second Respondent since she was responsible for supporting the claimant needs to the extent that that was required by her role as line manager. We take that allegation against Ms Shi together with the allegation that Ms Shi was demeaning and that she made the claimant believe she was not capable of doing the job. As put, those allegations are inconsistent with our findings generally about Ms Shi's management of the claimant. The evidence is clear that Ms Shi wanted the claimant to succeed and took considerable steps to try to assist her to do so. The underlying allegations are not made out.

c) LOI.1(m):The allegation of bullying the claimant to hand in her resignation is one that we reject. The claimant first raised the question of resignation and Ms Shi's response could not reasonably be regarded as a detriment (see para.53)).

d) LOI.1(n): This allegation is based on Ms Shi addressing the way the claimant spoke to her (see our findings in para.39) to 41) above). She did on one occasion in January 2020 pass on a comment that the claimant's manner of speaking came across as rough and could be perceived as rude. She did so because her own manager had made that observation to her about the claimant's comment to Ms Shi herself. However, she did not mark the claimant as unsatisfactory in the three month probation meeting for this quality. This was not a criticism as such and she did not mark the claimant down for it in her probationary review. The claimant did allege that she explained it was a consequence of anxiety which meant that she blurted things out but Ms Shi's account, which we prefer, was that there was no mention of anxiety at the time, There is nothing from which to infer that Ms Shi would not have addressed this mild concern with any other direct report whose words had been criticised by her own manager regardless of whether that direct report had a disability or not. The claimant has not shown facts from which discrimination could be inferred.

121) The final allegation of direct discrimination is dismissal. There is sufficient objective evidence as we have set out in our findings to support Ms Shi's conclusion that there were performance concerns. Therefore, any comparator would have had to be somebody who had demonstrated, over the period of three months of their probation, the same indications that their performance was unsatisfactory. We are satisfied that those concerns, and those concerns alone, were the reasons for dismissal.

Discrimination arising from disability

122) We turn to the s.15 discrimination arising in consequence of disability claim. The respondents did have knowledge of disability but not of all of the effects on the claimant which she now alleges she was experiencing at the time, However, that is irrelevant to the s.15 claim. They do not need to have knowledge that the something arises from disability in order for the claimant to succeed if the respondents had knowledge of disability and the claimant can show that the "something" arose in consequence of disability and was at least part of the reason for dismissal.

123) In LOI.6 the two acts relied on as alleged unfavourable treatment are the dismissal of the claimant and an allegation of neglect by the first respondent of the claimant's needs to get through her day-to-day tasks. The respondents accept that the second respondent, on behalf of the first, decided to dismiss the claimant. However, our findings are that the claimant's needs were not neglective, quite the reverse. The second alleged act of unfavourable treatment did not occur.

124) LOI 7 sets out the alleged consequences of disability relied on by the claimant. For reasons already explained (para.116 above) the claimant has shown that it took longer for her to do a task and that that arose in consequence of disability either directly or in consequence of medication she takes to manage her condition. However, she has not shown that any difficulty analysing matters arose in consequence of her disability of

depression and anxiety beyond the need to take more time to do so (see para.117).

125) Our findings (paras.71 to 73) are that the reasons for dismissal did not include the fact that it took the claimant longer to do a task in itself. The reasons were a failure to achieve the standards required in relation to time management, attention to detail and analytical skills. The claimant does not allege that her time management was impacted by her condition or by the medication and we consider that to be a different issue for Ms Shi than taking longer to do the task. As we say above, we accept that Ms Shi urged the claimant to be open if she needed more time well enough in advance for deadlines to be kept while supporting the claimant (see para.72 above). So, the claimant has not shown what she needs to show in order to transfer the burden of justifying their actions to the respondent and we are not required to consider whether dismissal was a legitimate means of achieving a proportionate aim.

126) As a matter of fact, we have considered that in any event. The aim set out in LOI. 8 (page 75H) is that the respondent needed to ensure for compliance purposes that financial reporting accounts deliver accurate and timely financial and management reporting information. The claimant accepted in evidence that that was a key aspect of her role and we accept that it was a legitimate aim of the respondent. There is evidence of the impact of failing to do so to the wider organisation and we have accepted that.

127) The time management problems that they had experienced are not shown to be linked to disability and, since their attempts to explore the impact on the claimant of her depression were unsuccessful, the respondent did not have reason to think that they were. They would have been risking a late closure on a further month end had they extended the probation or continued probation to the end of the six month. In the circumstances of this case, although the claimant did provide some more information about her disability only at the probation review meeting, we are satisfied that, objectively, it made no difference to the decision the respondents were faced with. Realistically, any other action that they took would not have achieved the legitimate aim.

Indirect Disability Discrimination

128) We move onto the indirect discrimination claim. There was a common probationary period for the claimant and non-disabled employees.

129) Put succinctly, the reason we conclude that this complaint fails is that the claimant has not shown that people with depression and anxiety generally (who are not a uniform group), are put to a disadvantage by that probationary period or would be put to a disadvantage by that probationary period. We say “depression and anxiety” since that is way the claimant’s impairment is described in the case management orders and in the claimant’s statement. The people to whom this would apply would be all new starters at the First Respondent’s organisation. One of the disadvantages asserted is that people with anxiety need more time to settle into a new job but we do not have any evidence that this is a common

experience of people with depression and anxiety. We might have expected to look for statistical information about people with conditions leaving during probation if that was available. The probationary period in the contract was six months rather than three months although there was an opportunity to extend that, for example, if sickness meant that the individual had not been present for the whole of the six month period so that they had an opportunity to show the skills in that time.

130) We have found that the training and the direction given during this probation period was not at all deficient. There was an extensive programme which the claimant did not criticise either for being too onerous or for being deficient, until the time of the probationary review meeting at which the decision was made to dismiss her. Where it is alleged that there is a disadvantage of having to follow *inaccurate*, verbal instructions, it cannot amount to a standard probation policy that the probationer should have to follow inaccurate instructions and we conclude that is not apt to be a PCP. But, overall, we do not see evidence from which we could find that people with depression generally are put to a particular disadvantage by a standard probationary period and the group disadvantage is not made out.

Breach of the duty to make reasonable adjustments

131) Turning to the reasonable adjustments claim, the first matter relied on is that of putting the claimant through a training programme which had been devised for non-disabled employees. As a matter of fact, Ms Shi has shown that the training programme involved a greater level of support than she would have included had she not had knowledge that the claimant had disclosed mild depression in forms completed when accepting the post. Ms Shi knew that she should be alert to the possibility that the claimant would experience more stress than people without mild depression.

132) If one reads this as an allegation that the training programme itself was a PCP, the claimant alleges that the substantial disadvantage is that she did not respond as well to the training and did not find it sufficiently helpful, compared with a non-disabled person. The claimant has not shown that a non-disabled person would have responded to the training programme by learning more quickly or by making fewer errors in terms of time management. She has not shown that the lack of analytical skills, poor time management and lack of attention to detail (the performance issues she displayed) were caused by or due to the effects of depression or her medication. She repeatedly told Ms Shi that, in effect, there were no issues and did not take the opportunity that she was given to be more forthcoming about her health condition. So, although she has shown in these proceedings that she took longer to carry out the tasks, that was not a disadvantage she is put to specifically by the training programme. She has not alleged that it took her longer to learn because of her disability.

133) It comes back to the point that she maintains there is nothing wrong with her analytical function; we have no reason to doubt her on that although she was not showing analytical skills at the necessary level when she was working on the Entity Pack. Our conclusion on this is that the claimant has not shown that the duty to make reasonable adjustments arose in relation to

the training programme because she has not shown the substantial disadvantage alleged.

134) Stepping back from the working of the adjustment contended for, Ms Shi did arrange training with the claimant's needs in mind, such as offering to provide guidance on a one-to-one basis if it was at too high a level, and so far as she had been told about those needs. Where the adjustment is suggested within these proceedings of "providing training which is tailored to her needs as a disabled person", we do not see what more steps the respondent should reasonably have had to do in relation to the provision of training.

135) It is also alleged that the claimant was put to a substantial disadvantage by being required to work the same hours as a non-disabled employee, namely from 9.00 AM to 5.00 PM, Monday to Friday. The claimant's case on this has changed during the hearing. She made an application to work flexibly in late January 2020 expressly on the basis to support childcare responsibilities. She does not seem to have explained what she meant by flexibly at that point and the only time that it was explained in the hearing was when she stated that her current employer allows her to work some days more hours and then fewer hours on another day. Ms Shi said, and we accept, that the claimant had never articulated that request and when she did make a request it was not put on the basis that she needed flexible working for disability related reasons. Notwithstanding that, Ms Shi gave the claimant some flexibility in terms of working from home on some occasions; leaving early when her daughter was ill and varying the start and end time. These were for different ad hoc reasons.

136) The reason that we have decided that this part of the claim fails is that, to an extent the claimant has shown that she struggles to work in the office in the mornings, she has not provided evidence of that although it seems possible that it relates to tiredness as a side effect of medication. It is absolutely clear that the respondent had no knowledge of that substantial disadvantage because the claimant concealed the reason for her flexible working request from them and when Ms Shi asked the claimant about her health conditions on 9 December, the claimant said that she was much better than before and that she used to be taking medication but was not now. The duty does not arise if the respondent does not know and could not reasonably have been expected to know that there was a substantial disadvantage. For that reason in this case, the alleged duties to make reasonable adjustments do not arise. Ms Shi made appropriate enquiries and she was not given the information that would have led to having knowledge of any disadvantage.

Victimisation

137) As far as victimisation is concerned, in reality we consider that pages 202 and 202.a. should be read together when considering whether a protected act was done by the claimant. However, on the basis of our findings, whether or not those two together amount to a protected act, we are clear that the reason for dismissal was in no sense whatever the fact of the claimant's complaint that the probation review did not take account of her mental health. If one looks at the timing, the criticism of the claimant's

performance was clear from the three month review meeting on 10 February before she withdrew her resignation, before she even resigned. She was deemed to have unsatisfactory performance and referred to a probationary review meeting before she resigned and after she withdrew her resignation she did not pass the probationary review meeting on the same basis that caused her to be referred to that meeting.

138) This provides quite strong evidence that the withdrawal made no difference. There is nothing to lead to an inference that the fact that she said her probationary review did not take account of mental health had any impact on the respondents' actions. They also made some enquiries at the probationary review meeting about mental health in order to satisfy themselves they were taking it into account and that is inconsistent with them seeking to penalise the claimant for raising it. For those reasons, we are satisfied that causation is not made out in relation to victimisation and this allegation is dismissed.

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Employment Judge George.

Date: …15 November 2023……..

Sent to the parties on: 6 December 2023

For the Tribunal Office