



EMPLOYMENT TRIBUNALS

Claimant: E

Respondent: Commissioners for His Majesty's Revenue and Customs

Heard at: Leeds **On:** 28, 29 and 30 November 2023 and 15 February 2024

Before: Employment Judge Miller
Ms J Blesic
Mr T Fox

Appearances

For the claimant: Ms Senior – counsel

For the respondent: Ms Mellor – counsel

JUDGMENT having been sent to the parties on 19 February 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim for discrimination arising from disability under section 15 of the Equality Act 2010. It concerns one alleged incident of discrimination, but a complex background. At the hearing on 28th to 30th of November 2023 we heard a great deal of evidence, some of which was obviously difficult for the claimant to give and to hear. We will make such findings as necessary about that evidence, but we will try not to repeat things which it is not necessary to. Where evidence is disputed we have made a decision as to the evidence we prefer on the balance of probabilities.

The hearing

2. The hearing was conducted in person in Leeds. We had an agreed file of documents and witness statements from the claimant and Ms W. Both witnesses attended and gave evidence.

3. As indicated, it was difficult for the claimant to give evidence. We took additional breaks and we are grateful to Ms Mellor for the sensitive way in which she questioned the claimant while still putting her client's case.
4. The issues were identified at a case management hearing on 12 May 2023 and they are attached as Appendix 1 to this judgment. Although the issues related to one allegation, because of the sensitivity and complexity of the surrounding issues we were only able to hear evidence and submissions in the time allocated and we reconvened on 15 February 2024 to give an oral judgement.
5. This judgment is subject to an order under rule 50 of the Employment Tribunal Rules of Procedure 2013 for the protection of the claimant. In anonymising witnesses and other people involved in this case, we have erred on the side of caution to limit the risk of identifying the claimant by reference to her colleagues.

Background

6. The claimant has the impairments of post-traumatic stress disorder (PTSD), severe stress and anxiety. The respondent agrees that the claimant was at the relevant time disabled by reason of these impairments. The alleged unfavourable treatment for the purposes of the claim happened on 10 November 2022. The respondent agrees that they were aware that the claimant was disabled by reason of PTSD, stress and anxiety at that time.
7. The allegation that the claimant makes is about an email Ms W sent to the claimant on 10 November 2022 about the way she had behaved during the grievance process. The claimant says that her alleged unreasonable behaviours in general and her approach to the grievance process which formed the basis of Ms W's criticism, arose in consequence of her disability.
8. The respondent does not accept that the email was unfavourable treatment, but they do agree that the alleged unreasonable behaviours referred to in the email arose in consequence of the claimant's disability. We therefore need to decide whether sending the email, which we will come to in due course, amounted to unfavourable treatment.
9. If it was not unfavourable treatment then the claimant's claim will not succeed.
10. If it is unfavourable treatment we then need to consider justification under section 15 (1)(b) of the Equality Act 2010. Specifically, we will need to consider whether sending the email was a proportionate means of achieving a legitimate aim. The respondent says that the legitimate aim was the need to maintain standards of conduct, including treating colleagues respectfully during the ongoing grievance process, and the progression of the claimant's grievance in order to bring it to a conclusion.
11. We will make findings of fact, therefore, about the chronology leading up to the email on 10 November 2022, what, briefly, that email says, and the impact the various correspondence has had on the claimant and the respondent's employees who were involved in this process.

12. We will then summarise the law to the extent that we need to before setting out our conclusions.

Findings of fact

13. The claimant was, at the relevant time and as far as we are aware remains, employed by his Majesty's Revenue and Customs (HMRC) as a digital change and small projects lead. We heard no real information about the nature of the claimant's job because it is not material to the issues we have to decide. The claimant was required to work at home at the relevant time because of the ongoing Covid 19 pandemic.
14. The claimant married a man from Pakistan in 2017. Her then husband's name was Mr X. Initially, Mr X was in Pakistan and the claimant was in the UK. In 2018 the claimant started working for the respondent as an Assistant Officer and has since then secured a number of promotions.
15. Mr X came to the UK in 2020 and obtained employment for the respondent in a department where the claimant had previously worked.
16. It is an important part of the context of this case that the claimant has reported allegations of serious domestic violence and sexual violence by Mr X against her. It is not part of our role in this case to make any findings or decisions about any aspect of the allegations of domestic and sexual abuse made against Mr X by the claimant. We must not make or accidentally be seen to make any findings of fact about those allegations because to do so could prejudice proceedings in other courts.
17. We recognise, however, that it might be difficult for the claimant to hear us refer to her reported experience as *allegations*. In doing so, we wish to make it clear that we in no way intend to minimise the claimant's experiences. We are simply being cautious not to inadvertently make any findings of fact about matters that are being considered in other courts.
18. The claimant says that she started to experience domestic violence at the hands of Mr X very shortly after he moved to the UK in 2020 and she reported those allegations to the police. Mr X and the claimant were initially living in the same house where the claimant was working from home. Mr X was arrested a number of times and, the claimant says, was released on bail in July 2021. Around that time the claimant left Mr X. The claimant obtained a non-molestation order in the family court against Mr X from 5 January 2022 and at some point filed a divorce petition that she says was contested.
19. This is a very brief summary of what the evidence suggests was a difficult and traumatic time for the claimant. It is clear that this was also a very complex situation for the claimant. She says that there were threats made to her family and the claimant's barrister referred to "honour-based abuse" suggesting that the claimant experienced additional pressure on her, potentially restricting her ability to report the allegations. The claimant has from early to mid-2021 been seeking support from her GP and then later from mental health services and domestic abuse support organisations. The

claimant was clearly very unwell from at least the middle of 2021 and she has attempted suicide on at least one occasion.

20. During the period when the claimant and Mr X were living in the same house, Mr X made covert recordings of the claimant and her sister but the claimant did not find out about these until a later hearing in the family court in January 2022.
21. Finally, in terms of context some of the claimant's family members also worked for the respondent.
22. We consider, now, our relevant findings about the issues before us.
23. In September 2021 the claimant says that she became aware that Mr X had been spreading rumours about her at work. We do not make any findings about those alleged rumours but the claimant certainly perceived that Mr X was spreading rumours that she was the perpetrator of domestic violence against him, rather than the other way round. After discussions with HR the claimant raised a formal concern on 19 September 2021.
24. To all intents and purposes this is a formal grievance and for the sake of clarity we will refer to it as the first grievance. The claimant sent her grievance to the Expert Advice Serve support (EAS) department. This is part of HR that has expertise in respect of particular HR policies.
25. In the grievance the claimant said that Mr X had been reported to the police for domestic violence and sexual assault and that he had assaulted her. She said that Mr X was currently missing and that he was threatening to damage the claimant's reputation at work and would lie about her so that she would lose her job. The claimant also alleged that Mr X had broken his own HMRC issued surface pro computer with the intention of blaming the claimant for that to get her into trouble, and that Mr X had lied to his manager about being on sick when in fact he was on bail and working on another job. The claimant said:

"I request immediate action is taken against Mr X for damaging HMRC property and not reporting to his workplace about his crimes and investigation against him. I request further investigation is carried out for giving me threats to kill and I am concerned about my safety as we work in the same workplace".
26. The claimant said in her grievance that she was going through a great deal of mental stress because of Mr X's threats and that she was concerned about her safety.
27. The claimant met with Mr B, from HR, on 4 October about her grievance. On 6 October 2021 the claimant's trade union representative, Mr D wrote to Ms Y, who was a senior manager in Mr X's line management, setting out in some detail the relevant history of the claimant and the allegations against Mr X. He specifically included detailed information about the claimant's health. At the end of that email Mr D requested a meeting with Ms Y and HR to establish next steps, timescales and to provide reassurance for the claimant that the situation was being dealt with appropriately. Ms Y declined

that invitation to the meeting on the basis that she was prohibited by data protection rules from disclosing anything about Mr X to the claimant or her trade union representative.

28. Under the respondent's grievance policy a decision manager is appointed to manage the grievance process where the grievance cannot or should not be resolved informally. The decision manager is required to understand the issues that are the subject of the grievance and they will work with EAS (HR) to agree how this will be done. There is discretion in the policy for the decision manager to decide how to progress the grievance. This could certainly encompass the production of an initial terms of reference document clarifying the scope of the grievance, but there is nothing in the policy specifically requiring that.
29. Initially, a decision manager called Ms M was appointed to consider the claimant's first grievance and the claimant met with Ms M on 27 October 2021. Mr B emailed the claimant on 12 November to explain that Ms M would confirm in writing which parts of the claimant's concerns were in scope and what were out of scope for the respondent to consider. He said there were some elements of the claimant's grievance that were private matters to the claimant that were being dealt with by the police. Mr B confirmed that the respondent would consider the claimant's concerns as much as possible from the perspective of what was considered to be a workplace matter.
30. This seems to be where the idea of a terms of reference first came from.
31. Initially, the claimant was not happy with this approach because in her view there was a very substantial overlap between what have been referred to as private matters and workplace matters.
32. By 22 November 2021 the claimant had received the draft terms of reference from Ms M and the claimant replied on the same day identifying a number of concerns that she had with the terms of reference. The claimant said in that email that she had had to escalate her concerns to Ms G, a more senior HR person, in order to obtain some support for her situation. The claimant was dissatisfied at this time with the way that her grievance was being dealt with, but her correspondence about it was clear and professional.
33. In December 2021, the claimant sent a number of emails with attachments to Ms M. The first included documents that she referred to as evidence about her case against Mr X and a timeline; the second was information about communications with Mr X's team; and the third contained information about allegations of domestic violence .
34. On 11 January 2022 the claimant attended the hearing in court about the non-molestation order she had applied for against Mr X. At that hearing Mr X disclosed that he had been recording the claimant covertly at home. This was extremely alarming for the claimant and she understood from what Mr X had said in court that there were very many, possibly even hundreds, of recordings. This is in the context that the claimant said that Mr X had

threatened her that there were explicit videos of her that he would use to blackmail her.

35. The claimant contacted Ms I in HR about this who initially suggested that the claimant should speak to Ms M (the first grievance decision manager) about it, but subsequently in an email dated 21st of January 2022 decided in fact she should speak to her line manager about raising a new concern (i.e. submitting a further grievance). Ms I was clear that if this was dealt with as a complaint about Mr X's conduct in the context of his work, it was unlikely that the claimant would be notified of the outcome because of data protection concerns.
36. The claimant did notify Ms M of her concerns - that she was being recorded while working on the respondent's business from home, and that the recordings had apparently been sent to Pakistan for transcription - initially in an email on 21 January 2022.
37. By January 2022 the terms of reference of the first grievance (from 19 September 2021) had not been agreed between Ms M and the claimant. On 25 January the claimant wrote to Ms M highlighting a number of issues she had previously discussed with Ms M that she believed ought to be included in the terms of reference, including reference to domestic violence. At that time the claimant's view remained that the allegations of domestic violence needed to be considered as part of the grievance process because they happened during working hours.
38. In that email the claimant very clearly stated that she believed she and members of her family were at risk from Mr X and that her mental health was being jeopardised as a result of the grievance process. This included dissatisfaction with the time it was taking and that she believed Mr X was getting support from the respondent. The claimant said that instead of receiving support from HR during this period of her life, she was experiencing increased stress.
39. On 26 January 2022 Ms M contacted her HR adviser, Ms J, saying that she could no longer be the grievance manager as she believed she lacked experience and that she could not dedicate the time to it that was required.
40. By 31 January 2022 the claimant had not received a response to her previous emails from Ms M and on 2 February 2022 Ms M emailed the claimant to tell her that she was stepping down as the decision manager.
41. By that stage no meaningful progress had been made on the claimant's grievance at all.
42. In the meantime on 31 January the claimant contacted Ms Angela McDonald who was the second permanent secretary and therefore a very senior person within HMRC, asking for support. In that email the claimant set out again a history of her personal circumstances and said that she did not believe her concerns had been taken seriously and that no action had been taken against Mr X to protect the claimant.

43. Ms McDonald contacted two other senior managers who we conclude were in the line management of the claimant and Mr X. Importantly Ms McDonald said
- “[the claimant] is in distress now and appears to be in a standard and very slow HR process that I worry is not really understanding what’s needed here. She is as worried that she has breached data protection as she is for her own safety. On the face of it looks like we are employing her husband while he is on bail for assaulting her”.*
44. She said in that it looked like they needed to do more. That filtered down through HR and contact was made through HR with Mr C the claimant’s then line manager, to check what support was being provided to the claimant. There were also discussions between the HR officers about the claimant’s new concerns about Mr X’s recordings and what action the respondent could take.
45. On 21 February 2022 the claimant raised the second formal grievance about the recordings that she understood Mr X had made. The process for raising this grievance is that it went to her manager initially to make the formal referral on her behalf.
46. It is not entirely clear what was happening with the claimant’s two grievances by this stage but ultimately it is not material to our decision. What did happen next was that Ms W was appointed as the new decision manager and she informed the claimant of that on 28 February 2022. Ms W had had a discussion with Ms J prior to her appointment so that she had some idea of the context of the issues.
47. The second grievance the claimant raised about the alleged covert recording by Mr X became part of the matters that Ms W was initially considering. Ms W said that the first thing that she wanted to do with the claimant on taking over the grievance was finalise the terms of reference.
48. There were some difficulties in agreeing the terms of reference. The claimant said, in an email on 3 March 2022 to Ms W that she considered the terms of reference initially produced were not complete because they did not address the claimant’s recent concerns she had raised about Mr X recording her while she was working.
49. In her reply on 8 March 2022 Ms W said that she had reviewed the recordings that the claimant had provided that the claimant believed showed Mr X had been recording her at home. Ms W told the claimant that she had referred it on to be dealt with appropriately. She said “I will be unable to provide you with updates on this from now on as it will now be a matter between HMRC and their employee”.
50. In fact the things referred to as recordings were heavily redacted transcripts of recordings that Mr X had provided to the claimant through the court process. The claimant had redacted them to avoid disclosing personal details of other people.

51. The claimant considered Ms W's response to be unclear and asked for clarification about what would happen with the complaint about Mr X. Ms W did not explicitly provide that clarification in correspondence.
52. Ms W produced the final version of the terms of reference. These were attached to the email of 8 March 2022 and recorded the matters to be considered as:
- Any alleged bullying behaviours that have occurred in work between [the claimant] and Mr X:
 - Any rumours that have been spread to colleagues and speak to named witnesses
 - Any threatening communication that breaches HMRC's standards of conduct over HMRC communication channels/devices e.g. MS Teams, Email.
 - Whether in the workplace, Mr X has blamed [the claimant] for any damage to HMRC Equipment.
 - Review standard of support/communication that [the claimant] had from HR during the times stated.
53. Although the first bullet refers to alleged bullying by Mr X, the terms of reference explicitly excluded consideration of external matters that were more appropriate for police investigation including domestic violence concerns. It was Ms W's intention not to investigate or come to a decision about any allegations of domestic violence occurring during the course of the claimant's work.
54. In summary therefore there were four areas that were in scope for investigation which were
- a. whether any rumours had been spread by Mr X about the claimant,
 - b. whether he had made any threats using the respondent's communication channels,
 - c. whether Mr X had wrongly blamed the claimant for damage to HMRC equipment (namely surface pro computers) and finally
 - d. a review of the level of support and communication that the claimant had had from HR.
55. The terms of reference also recorded that
- "the concerns raised over Mr X's conduct related to recordings and sharing of those recordings with third parties in Pakistan have been referred to be dealt with appropriately by Mr X's line management team."*
56. This last statement was the full extent of the clarification about how the second grievance would be addressed.

57. The claimant was not satisfied with this proposed course of action in respect of her complaints about Mr X recording her. In evidence Ms W explained that referring that complaint to Mr X's line management would not necessarily mean that they would be the people who would deal with it but that they would be the people who decide what to do with it. In reality, it would go to EAS first for consideration about the appropriate way for it to be considered.
58. This was never explained to the claimant by Ms W and the claimant did not get a full response to what was happening with that complaint until she received a response via the Information Commissioner in August 2022.
59. The claimant in the meantime continued to be concerned about Mr X's line management team addressing her complaints about his alleged data breaches because she perceived them as supporting Mr X over her. The claimant had a deeply held belief that Mr X's team's management were biased in favour of Mr X and against her.
60. During this period, the claimant was assisted by her trade union representative and was also receiving some support from her line manager Mr C. Mr C had been making representations about the claimant's concerns about the content of the terms of reference. These representations were clearly made on behalf of the claimant and equally as clearly they were a duplicate of what the claimant had already raised with Ms W around the same time. Mr C made it clear in his correspondence that the claimant was upset that her concerns about Mr X's line management, and the data protection concerns were not being addressed satisfactorily from her perspective.
61. On 9 March 2022 Mr C was informed by HR that he was not expected to be involved in the claimant's grievance process but was there to provide support only. It is also apparent from internal communications, and we find, that the claimant had raised the same concerns about Mr X's department and Mr X recording her in a number of places and with senior managers
62. The claimant continued to raise concerns about this issue relating to the sharing of the recordings and we find that she believed that she never received a satisfactory response. We find that the claimant also did genuinely believe that Mr X's line management would not fairly and properly investigate her concerns about Mr X.
63. We find that Ms W did not engage with the claimant's concerns about this and that her view was that her role was to make a decision about the matters set out in the final terms of reference and nothing else.
64. We find that Ms W did not explain the process about her other complaints to the claimant. Ms W effectively told the claimant that she was following the correct process and the claimant did not need to know any more than that.
65. In respect of the claimant's first grievance from September 2021, a fact-finding officer, Ms B, was appointed and the claimant met with her on 11 May 2022. This meeting was by Microsoft Teams rather than in person. It is appropriate to mention at this point that prior to this hearing before the

tribunal Ms W had never met or spoken to the claimant whether in person, by Microsoft Teams or on the telephone.

66. On 18 May 2022 the claimant sent a long email to Ms W, Ms B and two HR officers about her grievance. This included an explanation about why Mr X's line management team were biased against her and some attachments that she believed were evidence of that. In that email the claimant also made reference to the harm she felt she was suffering to her mental health and she attached a number of attachments with very detailed, very personal information about the medical support, mental health support and domestic abuse support she was receiving.
67. This email is of a different tone to previous correspondence from the claimant. She accuses Mr X's line management of fabricating evidence and conspiring with Mr X against her. The claimant is explicit in that email that she had attempted suicide.
68. The respondent has agreed that for the purposes of the Equality Act 2010 that they had knowledge of the claimant's disability by 10 November 2022. We find as a fact that Ms W had sight of detailed information about the claimant's mental ill health by 18 May 2022. In oral evidence Ms W said that she had reviewed the attachments to this email briefly but did not read them in detail. She said it was not her role to read them and take any action on them; that was a role for the claimant's line manager.
69. On 20 June 2022 the claimant sent Ms W a further email asking for confirmation of receipt of her email on 18 May. In that email the claimant said that she had attended a further court hearing with Mr X on 1 June 2022 and at that hearing Mr X had told the judge that no action was going to be taken against him in respect of the alleged data breach. We find that this email was of a yet different tone in respect of content and format. The claimant used large, bold, red text, suggesting an escalation in the claimant's upset and frustration. She expressed the view that Mr X's line management team defamed and harmed her intentionally, they are biased and that the lives of employees are in jeopardy. The claimant explicitly says that

“all those people who haven't taken my case and concerns seriously are responsible for my mental health problems and putting my life and career at risk and I have not been taken seriously by either HR or HMRC or [Mr X's department] management.”

70. Ms W replied to that email on 22 June reassuring the claimant that her concerns were being taken seriously and that the grievance that Ms W was tasked with deciding was progressing and no decision had yet been made. Despite the claimant's concerns, which are extreme, about the partiality of Mr X's line management team Ms W simply says

“I have passed your concerns about Mr X's conduct to his management team as I said I would. I have not been asked to pass those concerns to a different management team”.

71. Although Ms W accurately states the facts relating to the referral of the claimant's complaint, she does not engage with how the claimant is feeling about this and nor does she seek to provide an explanation about the detail of the process, or potential options within the process, by way of reassurance.
72. In that same email Ms W says
- "You have made multiple allegations that you believe I will act outside of the expected standards when acting as Decision manager for this case. Whilst I understand this is a difficult time and you have strong feelings about the situation I would like to remind you about Our Commitments and HMRC values when you are communicating with me. We all count on each other to follow Our Commitments, which includes being professional and showing respect"*
73. The email includes a link to the respondent's commitments document which sets out internal values which are
1. Be fair, kind and human
 2. Not create fear in others
 3. Include people regardless of difference
 4. Work together, recognising our common goal
 5. Have honest conversations, with respect
74. Ms W felt that the claimant was not abiding by the first, fourth and fifth of these values.
75. Ms W's email of 22 June 2022 does not express any concern about the claimant's well-being or signpost her to or refer her for support. Ms W said in evidence that she had signposted the claimant to support on numerous previous occasions and in any event it was Mr C's role to support the claimant and she trusted that he was doing that. Ms W did not want to appear biased in the claimant's favour. We find that Ms W did not take the surrounding circumstances, including the medical information provided by the claimant on 18 May, into account when deciding to send this email on 22 June 2022.
76. The claimant replied to Miss W on the same day, in more moderate tones, saying that she did not intend her remarks to be directed at Ms W or anybody else personally she just expressed her sincere concerns about the situation.
77. On 25 July 2022 Ms W sent an email to the claimant saying that she had received a number of unredacted recordings and transcripts from Mr X and they were taking some time for Ms B to work through so that the factfinder's report had been delayed.
78. The claimant replied almost immediately to say that she wanted to raise concerns about the transcript and recordings. She said that the respondent

and any third party could not accept those recordings without a court order or the claimant's consent because they were evidence that was currently in dispute and part of ongoing legal proceedings against Mr X in court.

79. Later that same evening the claimant sent a further email about this. We find that it is very clear from these emails that the claimant was extremely concerned about the potential use of these recordings, or even that HMRC should consider them. The claimant said that the advice she had been given by her lawyer in those proceedings was that HMRC should immediately delete and destroy the recordings and transcripts.
80. Ms W replied the next day to say that she had not yet seen the transcripts or the heard the recordings because she had not received the investigation report. She did not even know what was in them. She said that the claimant would have every opportunity to raise issues and make representations about the recordings in the concerns meeting (the grievance hearing) and she would consider that when making a decision.
81. The claimant replied again emphasising that the advice she had received was that it was unlawful for the respondent to analyse the recordings and transcripts without a court order or the claimant's consent.
82. On 29 July, Mr D also emailed Ms W requesting that the recordings were to be destroyed immediately for reasons already expressed. On the same day Ms W responded saying that she had no access to the recordings or transcripts at that time because they were kept securely by Ms B.
83. There then followed a great deal of correspondence about this issue from the claimant, her family law solicitor, Mr D, Mr C and then latterly the claimant's employment law solicitor. All were trying to persuade Ms W not to consider the recordings or transcripts at all. The claimant also contacted Ms MacDonald again and various other people.
84. The reason for the claimant's concerns were that she believed that if the respondent reviewed and made findings about the recordings, it might prejudice her legal cases. The potential content of the recordings was also extremely upsetting for the claimant. The prospect of Ms W reviewing the recordings or transcripts was making the claimant unwell and she and her advocates communicated that to Ms W on numerous occasions.
85. On 5 August, Ms W had told the claimant that she would seek legal advice and nothing would be done with the recordings until then. Some of the claimant's communications were while Ms W was waiting for the outcome of that request for legal advice.
86. On Friday 26 August at 5:35 PM Ms W sent a summary of the legal advice she had received about the use of the recordings and transcripts provided by Mr X. This was a Friday, after business hours and before a bank holiday Monday. Effectively the advice was that Ms W could use the recordings or transcripts in her investigations if they were relevant.
87. This was extremely distressing for the claimant. This can be seen by the email that she sent in reply at 11:20 that night. The email was sent to a

large number of people including Ms McDonald, an MP and a number of other senior people.

88. Again it is not proportionate to quote directly from this email but there are parts that are written in large bold type, parts that use very emotive language and the claimant says that she will commit suicide if any recordings are analysed without her permission in order to protect her reputation.
89. We conclude that this email was sent from a position of desperation and anguish. In evidence, Ms W said that she was concerned with that email. We have not seen any evidence that Ms W responded directly to the email from the claimant of 26 August but we accept Ms W's evidence that she spoke to Ms J and asked her to speak to Mr C to ensure that he was aware of this.
90. There is then correspondence between Ms W and Mr D about a way forward in respect of the recordings. In that correspondence Ms W explains the rationale about the relevance of the recordings saying that Mr X believes they support his response to the allegations the claimant has made. We remind ourselves that it is not relevant to the matters that we have to consider whether or not Ms W's opinion about the use of the transcripts or recordings or the advice that she received from HMRC lawyers about the transcripts and recordings was correct or not and we make no findings about that.
91. At the start of the hearing we heard some evidence from the claimant about what she thought about the transcripts and recordings. It was very distressing for the claimant given that evidence and we will not repeat it in detail except to say that we accept the claimant's account that she believed that the recordings and transcripts were of incidents of abuse. Once this is understood, it becomes clear why the claimant did not and does not want anybody at the respondent to read the transcripts or hear the recordings. The claimant set this out very clearly in her email of 26 August 2022.
92. On 1 September 2022 the claimant's employment solicitor wrote to Ms W setting out a number of concerns about the summary of legal advice that the claimant was sent. He sought again to persuade Ms W not to analyse the transcripts or recordings.
93. By 5 September 2022 the claimant was feeling very unwell and was affected by her perception of what the respondent was doing with the recordings and transcripts. The claimant was communicating with Mr C who was continuing to provide support but was unable to assist in her grievance process. In his communication Mr C again signposted the claimant to the employee assistance programme, the Samaritans and Mind. Although Mr C is supportive it's clear that he has no influence over any material aspect of the claimant's grievances.
94. On 7 September Ms McDonald wrote to the claimant encouraging her to continue in the grievance process so that matters could be brought to an end. She also informed the claimant that the outcome of the review into how

the claimant felt she was being treated by HR and Mr X's line management would be shared and discussed with her.

95. On 9 September 2022 the claimant's employment solicitor wrote to Ms McDonald and Ms G asking that all further correspondence be sent to him rather than the claimant because the claimant's physical and mental health were being seriously affected by the ongoing events relating to the recordings and transcripts.
96. On 3 October, the claimant sent an email to Mr C to explain that she was feeling very unwell (the claimant had been absent since 31 March 2022 through ill health) and raising again her issues of concern about the recordings. This email is 3 ½ pages long and is written in emotive terms. The claimant makes accusations including about the impact of Mr C's actions on her health, that the respondent is supporting Mr X to humiliate the claimant, that she is being treated like garbage by HMRC and even that HMRC will support Mr X in trying to kill her. We have tried not to dwell too much in the content of this email but we have given brief examples to show the tone and content.
97. Again Mr C replied sympathetically and signposted the claimant to relevant support services. He reminded the claimant that he had suggested a referral to occupational health.
98. By this time it was clear that the claimant was struggling substantially and the grievance process had been paused. On 20 October 2022 the claimant replied to Mr C, again emphasising her ill-health, explaining the benefits of communication with Ms W and Ms J being with the claimant's lawyers, and consenting to an occupational health referral.
99. This is another lengthy email from the claimant setting out again her concerns about various aspects of the process that she has previously raised. There is further correspondence from Mr C and the claimant replied on 21 October 2022 saying that his reply had caused more stress. In our view, the way the claimant writes to Mr C is offensive. She says that he is communicating with her on behalf of HR supporting them to analyse the audios and make fun of her at work. She refers to mental torture and says that he is disrespecting her, degrading her, and pressurising her to speak to Ms W.
100. Mr C replied a few days later on 3 November. He says that he is concerned for the claimant's welfare having read the email and again he encourages her to seek professional support from her GP and the respondent's in-house support service. Mr C also said:

"You have said in your email that you would like me to stop disrespecting you, degrading you, and making fun of you. I can assure you that I am not in any way disrespecting, degrading or making fun of you. Please can I ask you consider the content of your emails to me carefully in the future, as I do find these accusations to be disrespectful when what I am trying to do is support you."

I understand that you may genuinely feel HMRC wants you to resign or be found dead as you have stated in your email. I would like to reiterate what I have said in previous correspondence that neither I, or HMRC want you to be found dead or resign. As I have mentioned above, I am committed to working with you to help you return to work”.

101. He asked the claimant to be mindful to ensure that any future correspondence she sends is in line with the respondent’s values and commitments and he included some links to enable, he says, the claimant to remind herself what those values are.
102. We find that Mr C does remind the claimant of the standards of behaviour with which she is expected to comply. We also find that in that email Mr C reiterates the respondent’s instruction that the claimant should not copy her solicitors into internal correspondence.
103. Ms W had not seen this correspondence until these proceedings but she said, and we accept, that Ms J had told Ms W that Mr C had had to remind claimant of her responsibilities as an HMRC employee of the “commitments”. (Referred to above)
104. In response to this email the claimant sent an email to Ms J, Ms W and Mr C on the same day 3 November 2022. This email again sets out another version of the claimant’s concerns about all the matters that formed the subject of her grievances and the preceding year’s process. In this letter, the claimant asks very explicitly for contact to be made through her lawyers as a reasonable adjustment.
105. Again it is not necessary to go through this letter in detail but we do need to record that the claimant explained explicitly how she was assaulted by Mr X and how the ongoing process has made her feel. The email could reasonably be described as frantic and we find includes words and phrases that imply, if not explicitly state, that the recipients are responsible for inflicting further harm on the claimant.
106. On 10 November 2022 Ms W replied to the claimant. This is the email that is the basis of the claimant’s claim.
107. We make the following findings about this email. Ms W reiterated to the claimant that she will not be able to communicate with the claimant’s solicitors although in oral evidence Ms W said that she thought that that had been implemented as a reasonable adjustment by this point.
108. Ms W confirms that she will review the transcripts submitted by Mr X but that she will not be listening to recordings. Ms W again invites the claimant to come to a meeting to comment on the recordings and the transcripts. Then Ms W sets out in the numbered points in her email, responses to the numbered points in the claimant’s email. It is not necessary to consider all of those responses. The matter in dispute relates only to point number five. Paragraph 5 of the claimant’s email of 3 November 2022 includes the allegations that we have discussed above that are offensive and upsetting to Ms W and other recipients of the email.

109. It is not proportionate to recite the whole text of that email here, but we include the relevant extract in Appendix 2 to this judgment. We find that that paragraph and the relevant parts in dispute set out a criticism of the claimant's conduct over the preceding year or so. It does not provide any specific examples but lists generic criticisms of aspects of the claimant's conduct. Ms W also says, and here we do quote,

"the comments you make about the actions and intentions of myself and [Ms J] are disrespectful and offensive ..."

110. Further on, it says

"I have at times found your communication to be unreasonable and your behaviour has interfered with proper consideration of the concern..."

111. Although Ms W refers to the fact that the claimant has previously been signposted to support there is in this letter no expression of concern for the claimant's well-being. The claimant is again reminded about the "Our commitments" policy.

112. In evidence Ms W said that she had not considered the possibility of raising concerns about the way the claimant had behaved informally with claimant's line manager. She said that that would entail raising a formal concern which would have required more formal investigation. Ms W agreed that this would include consideration of medical evidence and the surrounding circumstances. It was put to Ms W in cross examination that she could have made contact through the claimant's solicitors but she did not give any meaningful answer to that suggestion.

113. Ms W also said that she was finding the process difficult as the claimant's communications and allegations were causing her a lot of stress and anxiety. We accept that evidence.

114. In respect of the specific bullet points in the email, we find that some of those observations are true. The claimant did raise numerous detailed questions insisting they were answered multiple times. The claimant has also refused to accept the decisions made - it is clear that the claimant remained unwilling to accept that the respondent had the right, or that it was proportionate, to review the transcripts and recordings. Some of the other matters could subjectively be viewed as correct from Ms W's perspective. However, we find that in deciding to send this email in the terms that it was written Ms W failed to have regard to the claimant's mental state at the time.

115. Although this email is the main point of the claimant's claim, there are few findings of fact necessary to make about it and we will discuss it more in our conclusions.

116. Coincidentally on the same day 10 November 2022 the claimant attended occupational health. The OH report says

"The most distressing element of this case for [the claimant] is that her perception is that HMRC have taken the side of her husband against her. She reports that he has produced some audios to dispute [the claimant]'s account of events. She reports that HMRC now want her to listen to these

audios to dispute his evidence. She reports that these audios were taken unbeknownst to her and are very triggering as they occurred during times when she was being assaulted.

From a medical perspective, she is very unwell with severe depression, severe anxiety, and panic attacks. She is unfit to attend work and is unfit to engage in the proceedings at work which would invariably cause a very significant worsening in her mental health by exposing her to very vivid reminders of her trauma”.

117. The occupational health doctor says that in their opinion the claimant was not fit to engage in the respondent's internal investigation at that time and may well not be in the future.
118. Ms W did not see that report the time and in fact she said that she was not aware that it was happening. The referral was made by Mr C.
119. Finally, we were referred to a further letter in March 2023 from the claimant. This is another email from the claimant to Ms W and various other recipients which again includes upsetting and offensive comments for the recipients. However, given the respondent's concession that the claimant's conduct rises in consequence of her disability, that the claimant appeared to remain very unwell around that time and that is not material to the matters before us we make no findings about it. This email does show, however, that by this time the respondent had agreed to involve the claimant's lawyers in addressing the claimant's grievance.

Law and conclusions

120. This claim is brought under section 15 Equality Act 2010.
121. Section 15 says

A person (a) discriminates against a disabled person (b) if (a) treats (b) unfavourably because of something arising in consequence of B's disability and (a) cannot show that the treatment is proportionate means of achieving a legitimate aim. It is a defence if (a) can show that they did not know and could not reasonably have been expected to know that (b) had the disability.
122. The matters in dispute in this case are whether the email amounted to unfavourable treatment and if so whether that treatment was proportionate means of achieving a legitimate aim.
123. It is agreed that the claimant was at the relevant time disabled by reason of PTSD, anxiety and severe stress, that the respondent knew about it and that the conduct giving rise to Ms W's decision to send the email on 10 November 2022 arose in consequence of the claimant's disability.
124. So we consider first unfavourable treatment. We were referred to *Williams v trustees of Swansea University pension and assurance scheme* [2018] UKSC 65).
125. Unfavourable treatment is not a comparative term, there is no need for the claimant to have been treated less favourably than another person. It is for

a tribunal to recognise when someone has been treated unfavourably. It does not require financial loss and it is not enough for the treatment to be insufficiently advantageous. There must be an objective sense in which a person could be said to have been subjected to some barrier, or demeaned in some way. Ultimately, in our view, it is a matter for our judgment having regard to normal standards and expectations and taking all the surrounding circumstances into account.

126. In most cases it is obvious whether treatment amounts to unfavourable treatment or not. The question of the *reason* for the unfavourable treatment or whether it was reasonable at all is a separate question and is not relevant to whether or not the treatment was unfavourable. We must determine objectively considering all of the circumstances of the case whether a reasonable person would say that the treatment the claimant received was unfavourable.
127. In our judgement, the tone and content of the email and particularly paragraph 5 of the email that Ms W sent to the claimant on 10 November 2022 was unfavourable treatment. It criticised the claimant and said that she was not complying with the standards to which she was expected to comply as an employee of HMRC.
128. If we disregard at this stage whether there was any justification for the treatment it can be seen that being criticised by senior manager for your conduct, however gently, is unfavourable treatment. This is a distinct question that comes before any questions as to the cause of the unfavourable treatment or its justification.
129. There is no need for a comparison, so we do not need to consider whether it might be right that any person who had acted disrespectfully or offensively to a manager might be criticised. However justifiable or unjustifiable the criticism might be, the fact of receiving criticism of ones conduct from a more senior manager in an email is unfavourable treatment.
130. In our judgement the extent and impact of the unfavourableness of the treatment on the claimant is a matter for consideration in respect only of remedy.
131. The next question is whether the conduct was a proportionate means of achieving a legitimate aim.
132. The legitimate aims relied upon are
 - a. maintaining standards of conduct including treating colleagues respectfully during the ongoing grievance process; and
 - b. the progression of the claimant's grievance in order to bring it to the conclusion.
133. Again it is a matter for the tribunal to determine whether the aims are legitimate and in our view they self-evidently are.
134. It is perfectly obvious that an employer should have the legitimate aim of maintaining standards of conduct, and an aspiration for colleagues to treat

each other respectfully. Equally as obviously, it is a legitimate aim that grievances are completed.

135. The real question is whether sending the claimant the email in the way and the terms that she did Ms W acted proportionately in seeking to meet that legitimate aim.

136. In *DWP v Boyers* UKEAT/0282/19/AT Judge Clarke in the EAT said

“the tribunal must weigh the reasonable needs of the undertaking against the discriminatory effect of the proposal. The must, in this context, be an objective balance between the discriminatory effect of the dismissal and the reasonable needs of the employer... Treatment must be an appropriate means of achieving a legitimate aim and reasonably necessary in order to do so”.

137. In the same case, at paragraph 23, Judge Clarke cited the supreme court in *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15. He said

“The Supreme Court set out a structured, four-stage approach to that balancing exercise in Akerman-Livingstone v Aster Communities Ltd [2015] UKSC 15, a case involving possession proceedings in the County Court. The enquiry should encompass the following steps: first, whether the aim is sufficiently important to justify the treatment; second, whether there is any rational connection between this aim and the less favourable treatment or disadvantage suffered; third, whether the means chosen are no more than is necessary to accomplish the aim (and whether proportionate alternative measures could have been taken without a discriminatory effect); and, fourth, whether the steps complained of strike a fair balance between the need to accomplish the aim and the detriment suffered”

138. This means that we must consider whether the email sent by Ms W on 10 November 2022 was effectively directed at meeting the two legitimate aims and, even if it was, was there something less discriminatory that could have been done instead that would have accomplished the same objective.

139. Considering first the aim of maintaining standards of conduct, it is obvious that the email was directed at that aim. It referred to the respondent’s “our commitments” policy and criticised the claimant for failing to follow it with the hope that that would encourage her to then moderate her communications.

140. In our judgment, however, as a matter of fact this was not effective in achieving that aim as the email in March 2023 demonstrates that the impact of that email was hurtful and upsetting for the claimant and did not cause her to change the nature of her communications.

141. We have found that the nature and tone of the claimant’s communications to Ms W and Mr C changed markedly from soon after the point that the claimant became aware that Ms W was going to review the transcripts.

142. The recipients of the emails on 20 October (Mr C) and 3 November (Ms W and others) were entitled to conclude that the claimant was accusing them

of harming her by their actions and we certainly accept that it would have been upsetting for Ms W to receive this email and to read the things that the claimant was saying about her actions. The tone and nature of this communication was, in our view, obviously offensive and upsetting for Ms W.

143. Conversely, however, it ought to have been equally as obvious to Ms W - just as it appeared to have been to Mr C – that the prospect of Ms W or other people at the respondent reviewing the recordings or transcripts was extraordinarily troubling for the claimant and that she believed it was having an adverse impact on her mental health. This view was supported by correspondence from her lawyers and her trade union representative.
144. Any reasonable person reading these letters from the claimant, and particularly knowing the circumstances of the claimant (which included her disability of anxiety and PTSD, her ongoing court cases and her allegations of domestic abuse) would conclude that the claimant was likely to have been motivated to communicate in this way at least in part because of her mental ill health.
145. We have explained that these emails were of a different tone to the claimant's usual previous polite and professional emails so that Ms W ought to have noticed a change in the tone and nature claimant's communication and exercised some professional curiosity about why that might be the case.
146. We consider, then, whether something less discriminatory might have been done instead. More appropriate and less discriminatory approaches would have been
 - a. to contact the claimant's lawyers instead of the claimant as the claimant had requested,
 - b. to speak to Mr C as a result of which it is likely, or at least possible, that the existence of the occupational health report would have come to light, or
 - c. to pick up the phone and speak to the claimant.
147. Any of these options had a much greater chance of achieving the goal of moderating the nature of the claimant's communication while at the same time preventing or limiting the adverse impact on the claimant of an abrupt, even very mildly aggressive, email directly criticising the claimant.
148. In terms of the aim of progressing the grievance, we could make similar comments. In fact the effect of the email of 10 November 2023 appears to have had an adverse impact on the claimant's ability to communicate calmly and rationally. This further delayed the progress of the grievance so as a matter of fact the email was not effective at achieving this aim.
149. Again a more effective and less discriminatory way to address this would have been to instead speak to the claimant's lawyers who were expressing a willingness to become involved in the claimant's case. It is, in our view and experience, likely that the claimant's employment solicitor would have

been able to act as an effective intermediary between Ms W and the claimant, reducing the impact of the process on both of them, eliminating the risk of any inappropriate direct communication from the claimant and working towards a productive and effective outcome for the grievance.

150. In our view, Ms W strictly adhered to what she believed the respondent's policies were in respect of, particularly, not talking to the claimant's lawyers and not providing a proper explanation of what was happening with the claimant's second grievance. The failure to provide a full explanation about what was happening with the second grievance materially contributed to the claimant's increasing sense of frustration and, consequently the increasingly inappropriate emails. The refusal to contact the claimant through her lawyers prevented Ms W from responding appropriately to those emails – namely, in way that did not further upset the claimant.
151. It was also submitted that a more proportionate response would have been for Ms W to raise a "concern" about the claimant's conduct.
152. We do not know whether this would have been more or less unfavourable than the email, but it would in all likelihood have at least resulted in a proper consideration of the claimant's ill health and could have resulted in alternative communication strategies. We conclude, therefore, that even if this was done and perceived as unfavourable by the claimant, in all likelihood it would have been less discriminatory as it would have been likely to have taken into account the claimant's disabilities.
153. For these reasons the claimant was treated unfavourably because of something arising in consequence of a disability. That unfavourable treatment was not a proportionate means of achieving a legitimate aim because as a matter of fact it did not achieve either of the aims but also because there were a number of other less discriminatory steps that could have been taken that would have had a least as good a chance of meeting the aims.
154. Remedy will be determined at a further hearing and we make the following findings that are likely to be relevant to the question of remedy.
155. In giving evidence, Ms W started to read out part of the email that the claimant had sent on 3 November 2022. It was obvious to all in the hearing room that it would be very difficult, if not traumatic (although we are not in a position to make a formal psychiatric assessment of that, of course) for the claimant to hear this.
156. The judge had to intervene to prevent Ms W from reading any more of the email, and even after that intervention she continued to do so. While we have already found that receipt of this email was upsetting for Ms W, having seen the claimant give evidence earlier in the proceedings and the impact of that on her we find it difficult to understand why Ms W would proceed with reading out such an upsetting part of the email in those circumstances. To continue in circumstances when she had been instructed not to is unacceptable

157. In our view, there has been a continued and manifest reluctance or inability on the part Ms W to understand the impact of her actions in respect of the recordings and transcripts on the claimant and this email was the culmination of that.

158. We recognise Ms W's view that Mr X needs to have his side of the story heard fairly but Ms W did not seem to appreciate the impact of her approach on the claimant's disability, and continued to fail to appreciate that even at the hearing.

Employment Judge **Miller**

Date 29 February 2024

Appendix 1 – list of issues

1. Disability

1.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Claimant says the relevant time is 10 November 2022. The Tribunal will decide:

1.1.1 Did she have a physical or mental impairment? The Claimant says she had PTSD, severe stress and anxiety

1.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

1.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

1.1.5.1 Did they last at least 12 months, or were they likely to last at least 12 months?

1.1.5.2 If not, were they likely to recur?

2. Discrimination arising from disability (section 15 of the Equality Act 2010)

2.1 Did the Respondent treat the Claimant unfavourably by sending her an email on 10 November 2022 criticising the way she had behaved during the grievance process as set out at paragraphs 8-9 of the grounds of claim?

2.2 Did the following things arise in consequence of the Claimant's disability?

2.2.1 The Claimant's alleged 'unreasonable' behaviours and her general approach to the grievance process;

2.2.2 Were the matters in paragraph 2.2.1 in turn caused by the Claimant's severe reaction triggered by the issues raised in the grievance; and

2.2.3 Was the severe reaction as a result of the Claimant's disability?

2.3 Was the unfavourable treatment because of any of those things?

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent say that their aim was the need to maintain standards of conduct, including treating colleagues respectfully during the ongoing grievance process, and the progression of the Claimant's grievance in order bring it to a conclusion.

2.5 The Tribunal will decide in particular:

2.5.1 was the treatment an appropriate and reasonably necessary way to achieve that aim;

2.5.2 could something less discriminatory have been done instead;

2.5.3 how should the needs of the Claimant and the Respondent be balanced?

2.6 Did the Respondent know or could they reasonably have been expected to know that the Claimant had the disability? From what date?

3. Remedy for discrimination

3.1 Should the Tribunal make a recommendation that the Respondents take steps to reduce any adverse effect on the Claimant? What should it recommend?

3.2 What financial losses has the discrimination caused the Claimant?

3.3 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

3.4 Should interest be awarded? How much?

Appendix 2 – the email

5. It is unclear what the question is but it is believed the recordings provided to HMRC have also been shared with the court.

I want to assure you that my role and intention is to support resolution of your concerns as swiftly as possible adhering to HMRC guidance and practice. The

recordings have not been analysed again and again. Those that have been listened to have been extremely difficult to hear. The fact finder has listened to them alongside the transcripts. Though in a different language she felt there were multiple English words which provided confidence the transcripts reflected the audio, though there has been no translation carried out by HMRC. I appreciate you may have comments to make at our meeting about the transcripts and I will take these into account. I have not listened to any of the recordings and am only going to review the transcripts.

Whilst I appreciate you are in a very stressful and emotional position and I have no wish to add to it, there is an overriding requirement for us all to behave respectfully. The comments you make about the actions and intentions of myself and [Ms J] are disrespectful and offensive. I have previously directed you to the Our Commitments policy and would ask that you consider what you are saying when you communicate with all HMRC colleagues. I have at times found your communication to be unreasonable and your behaviour has interfered with proper consideration of the concern when you have

- refused to accept that certain issues are not within the scope of the concern procedure
- insisted on the concern being dealt with in ways which are incompatible with good practice
- repeatedly demanded special treatment or immediate escalation to a manager
- raised unjustified concerns about employees who are trying to deal with issues
- raised numerous detailed questions, insisting they are answered multiple times
- adopted a “scatter gun” approach, pursuing parallel concerns on the same issue
- submitted repeated concerns with minor additions/variations about the same issues
- refused to accept the decisions made
- repeatedly argued points with no new evidence.

The concerns raised around the recordings and HMRC’s possession and use of them have been raised multiple times. After seeking legal advice on HMRCs position the advice provided - that it is legal, acceptable and reasonable to take the content of the recordings into account - has been shared with you. It is noted you do not agree with this position, however there is nothing more HMRC can comment on the matter and the position has not changed.

You have been informed of the wide range of support available to you, I understand your manager is supporting you and you have an allocated team member from MRSS. I recommend you continue to communicate with your line manager to ensure you have the support you need.

As already said, I am keen to progress the concern case to reach an outcome for you to move towards a resolution to your concerns. Confidentiality around the content of the recordings is being maintained. [Mr X’s department] management team are playing no role in the exploration of your concerns.