EMPLOYMENT TRIBUNALS

Claimant: Mrs K Kulasooriya

Respondent: The Secretary of State for Justice

FINAL HEARING

Heard at: Birmingham

On: 29 & 30 April & 1 to 3 May 2024

Before: Employment Judge Camp
Mr MZ Khan
Mrs DP Hill OBE

Appearances
For the Claimant: in person
For the Respondent: Mr A Tinnion, counsel

RESERVED JUDGMENT

(1) The Claimant's entire claim, consisting of complaints of breach of the duty to make reasonable adjustments for disability and of disability-related harassment, fails and is dismissed.

(2) The complaints of disability-related harassment are totally without merit.

REASONS

Introduction

1. The Claimant was employed by the Respondent as an administrative officer within HMCTS in Nottingham Justice Centre[1] from 1992 until 31 July 2022, when she left HMCTS to join HMRC. She went through early conciliation from 9 September 2022 to 21 October 2022 and presented her claim form on 19 November 2022.

2. The Claimant's claim is for breach of the duty to make reasonable adjustments and disability-related harassment. The Respondent accepts that at all relevant

[1] This case was heard in Birmingham because the Employment Tribunals in Nottingham are also based in the Nottingham Justice Centre.

times the Claimant was a disabled person under the Equality Act 2010 (EQA) because of generalised anxiety disorder (GAD). Her claim is principally about what she considered to be excessive workload, causing her stress and increased anxiety.

3. We should like to make clear from the outset that our decision in the Respondent's favour is no kind of negative criticism of the Claimant. It is deeply regrettable that the Claimant's employment should have ended after so many years in circumstances about which she felt the need to make a Tribunal claim. She was evidently a long-serving, loyal, hard-working and highly competent member of HMCTS staff. It has not been part of the Respondent's defence to her claim that she was otherwise than this. Similarly, we have not decided that the Respondent did nothing for which it could legitimately be criticised. We have simply decided that the complaints which the Claimant pursued before us fail and in particular that certain complaints have no merit at all.

Complaints & issues

4. Since the claim form was presented, including during this final hearing, the claim has been clarified and a number of complaints have been withdrawn. By closing submissions, the only claims being pursued were reasonable adjustments complaints based on five – or possibly six, depending on how they are counted – PCPs (a PCP being a "*provision, criterion or practice*" in accordance with EQA section 20). In addition, two disability-related harassment complaints were being pursued, at least ostensibly so[2]. The issues in play are set out in an attached list of issues, which is an integral part of this decision.

5. There is a small amount of controversy about the attached list of Issues. The first point of controversy is that the Respondent, through counsel, objects to the way substantial disadvantage is defined in the list in relation to the reasonable adjustments complaints.

6. The attached list of issues was drafted by us – the Tribunal. Our drafting was based on a list prepared by Respondent's counsel and on the list produced by Employment Judge Wedderspoon as part of her write-up of a preliminary hearing that took place on 4 August 2023. In defining the substantial disadvantage in the attached list, we have taken our lead from Employment Judge Wedderspoon and put it as "*exacerbating the Claimant's disability*". Respondent's counsel submits that it should be: "*stress and anxiety / additional stress and anxiety caused by the Respondent's alleged unlawful conduct.*"

7. It makes no difference which formulation we use; either way none of the claims succeed. However, for the sake of completeness, we should say that we reject the submission made on the Respondent's behalf about substantial disadvantage.

8. As is set out in Respondent counsel's "*Appendix A*" submissions, in the claim form details of claim the Claimant complains, amongst other things, of conduct "*causing* [her] *stress affecting* [her] *health*", of conduct "*which caused me stress and increased my anxiety*", and of the Respondent "*causing further stress and anxiety*". In the context, and bearing in mind that claim form details of claim are

[2] See paragraph 94 below.

not to be dissected and analysed as if they were lawyer-drafted High Court pleadings:

8.1 when the Claimant referred to the Respondent causing her stress and affecting her health, she clearly meant making her anxiety worse;

8.2 when she referred to the Respondent causing her stress and increasing her anxiety she meant that it exacerbated her GAD – anxiety being the non-technical label or shorthand for her officially diagnosed condition of GAD and something that causes "*further … anxiety*" being something that exacerbates anxiety;

8.3 we do not accept that the Claimant's references to "*anxiety*" are to be understood as references to something other than GAD, nor do we accept that causing further anxiety and increasing anxiety means anything different from exacerbating GAD.

9. One of the Respondent's objections to defining substantial disadvantage the way it is put in the attached list of issues is that if it is defined by reference to GAD, this means that the Claimant will almost inevitably succeed on the issue of substantial disadvantage, and that that can't be right in principle. We disagree with the submission. If as a matter of fact a particular PCP exacerbates the Claimant's GAD then there can be no reasonable objection to reflecting that in the list of issues. If that means the Claimant probably wins then that is just a reflection of the weakness of the Respondent's case on the point.

10. Even if the Respondent were right and the substantial disadvantage were (something like) additional stress and anxiety then the Claimant's case would be made out. The effect of stress and anxiety on someone suffering from GAD is substantially worse than that on someone not suffering from GAD. The Respondent, though counsel, argues that because the alleged PCPs would make anyone stressed and anxious, there is no comparative substantial disadvantage. We disagree. That argument is like saying there would be no comparative substantial disadvantage in a case where the relevant disability was a bad back and where the PCP was a requirement to do heavy lifting, because heavy lifting would put strain on anyone's back. If someone has an anxiety disorder, then something that causes stress and anxiety is worse for that person than for someone without an anxiety disorder, just as something that causes strain to the back is worse for someone with a back condition than for someone without one.

11. Nevertheless, we shall throughout this decision, for stylistic reasons, be quite loose in our language when referring to relevant substantial disadvantage and shall use phrases such as "*causing increased anxiety*", "*exacerbating anxiety*", and so on.

12. The second point of controversy connected with the attached list of issues is a suggestion from both sides in closing submissions that the Claimant wants to amend it. The proposed amendment is to this alleged PCP (issue 6 a.): "*14 April 2022 – R did not make C aware of a 6 month magistrates expenses claims "amnesty" that was communicated to magistrates on 14 April 2022*". What the Claimant is wanting to add to this is that when she found out about this 'amnesty' on 11 May 2022 this added "*to the work and that of other claims that were rejected*

previously, and that C worked alone on this large number of Magistrates "amnesty" expenses claims "[3]. In her written closing submissions, the Claimant stated that she wanted "*the workload created on 14 April 2022*" to be included in her list of issues.

13. This proposed amendment was discussed on 30 April 2024 (day 2 of the hearing) and we thought it had been agreed that it added nothing of substance to the Claimant's case. The position has not changed since then. We shall explain what the so-called amnesty was later in these Reasons. For present purposes, it suffices to say that the decision to grant it had a significant effect on the Claimant's work, was something the Claimant should have been told about as soon as it was granted (on or about 14 April 2022), but she wasn't told about it until 11 May 2022. The Claimant's case – what she is making this part of her claim about – is that because of the delay in notifying her of the amnesty, there was more work to do on 11 May 2022 than there would otherwise have been and some of the work she had done between 14 April 2022 and 11 May 2022 turned out to have been unnecessary. The claim is about the delay in notifying her of the amnesty; in so far as there is a valid PCP, it concerns that delay. The alleged substantial disadvantage remains: increased stress and anxiety, in this instance caused by there being more work and (possibly) also by the realisation on 11 May 2022 that some of the work she had done over the previous 4 weeks or so had been a waste of time.

14. In short, adding the words the Claimant apparently wants to add to this issue is unnecessary. The claim is and has always been about an alleged PCP of: "*R did not make C aware of a 6 month magistrates expenses claims "amnesty" that was communicated to magistrates on 14 April 2022*".

15. We note that we are not going to deal in these Reasons with every issue in the list of issues, but only those which it is necessary for us to in order to decide the claim and explain our decision.

The law

16. Our starting point on the law is the relevant legislation, reflected in the wording used in the attached list of issues, particularly the following parts of the EQA: sections 20(3), 26, 123 and 136; paragraph 20(1) of schedule 8.

17. As part of his written submissions, Respondent's counsel, Mr Tinnion, prepared a helpful summary of the law (in what was labelled "*Annex B*"), which we refer to and with gratitude adopt.

18. To add a little of our own in relation to relevant case law:

    18.1 as to the reasonable adjustments complaints, it has otherwise not been necessary for us to look much beyond paragraphs 15 to 21 and 58 to 65 of **Griffiths v Secretary of State for Work and Pensions** [2015] EWCA Civ

[3] A quotation from a version of the list of issues that incorporated proposed amendments from the Claimant, sent to the Tribunal on 30 April 2024.

1265 and, as to what a "*provision, criterion or practice*" is, **Ishola v Transport for London** [2020] ICR 1204, in particular paragraphs 37 to 39;

18.2 in relation to the harassment claim, we note **Richmond Pharmacology v Dhaliwal** [2009] ICR 724, at paragraphs 7 to 16, read in conjunction with paragraphs 86 to 90 of the judgment of Underhill LJ in **Pemberton v Inwood** [2018] EWCA Civ 564 and, as to what "*related to*" means in EQA section 26, **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** [2019] UKEAT 39_19_2211;

18.3 in relation to the discretion to extend time on a "*just and equitable*" basis in accordance with EQA section 123(1)(b), the relevant law is summarised in paragraphs 9 to 16 of the EAT's decision in **Rathakrishnan v Pizza Express (Restaurants) Ltd** [2016] ICR 283;

18.4 in relation to the burden of proof, we have applied the law as set out in paragraphs 36 to 54 of the decision of the Court of Appeal in **Ayodele v Citylink Ltd & Anor** [2017] EWCA Civ 1913.

The facts

19. We shall now outline the basic facts. We shall then go through the Claimant's complaints one by one, making further findings of fact along the way.

20. The evidence before us consisted of, first, written and oral witness evidence from the Claimant herself and, for the Respondent, from: the Claimant's line manager at the relevant time, Mrs J Moore; Mrs Moore's line manager, Mrs N Davies. The Respondent was originally proposing to call an additional witness – a Mrs Messenger, who dealt with a grievance the Claimant raised after her employment with the Respondent ended – but ultimately elected not to, possibly in response to queries from the Tribunal as to the relevance of her evidence. We also had before us a file or 'bundle' of documents of over 1100 pages.

21. The Claimant had a number of long-standing concerns about her workload and about her feeling that the job she was doing – based in Nottingham Justice Centre, dealing with Magistrates' expenses claims for the East Midlands area – should have more staffing resource devoted to it. Be that as it may, her claim is about a very narrow set of events and there are no or virtually no relevant factual disputes. A great deal of what is in the Claimant's 47-page witness statement is not relevant to the issues in the case. The overwhelming majority of documents in the bundle are of no relevance either.

22. The Respondent had for some time recognised that the Claimant had a disability, and reasonable adjustments were in place for her. These included the Claimant not being required to use the telephone.

23. From around February 2022, if not before, the Claimant was the only one dealing day-to-day with Magistrates' expenses claims in her area. In or around April 2021, a new rule or bit of guidance had been issued, to the effect that if a Magistrate made an expenses claim more than one month after the relevant sitting, the Claimant – and those doing the same job as her in other regions – should not themselves deal with the claim, but should instead refer the claim to a senior

manager: Head of Legal Operations. Apparently, making such a referral to the Head of Legal Operations was more time-consuming than the normal process followed for processing expenses claims.

24. On or around 14 April 2022, a decision was taken at a high level within HMCTS that there should be a 6-month 'amnesty' for Magistrates' expenses claims, such that (as we understand it) for a period of time, claims would be processed normally so long as they were submitted within 6 months of the sitting date. For whatever reason, this change of policy was not communicated very well or at all to those actually responsible for dealing with the expenses claims, at least not in the Claimant's area. It was not communicated to her, nor to her line manager, Mrs Moore, nor even to her line manager's line manager, Mrs Davies. All three found out about it for the first time on 11 May 2022.

25. The Claimant was due to go on annual leave from mid-May to early June 2022. Shortly after she found out about the amnesty, the Claimant emailed her managers expressing concern about the backlog of work there then was and about the prospect of returning from annual leave and finding that that backlog had increased in her absence. What she wanted was for someone to cover all of her work while she was on holiday. The Claimant worked three days a week and she expressed the view, not for the first time, that she effectively had five days work to do in those three days.

26. The Claimant went on annual leave from 17 May to 13 June 2022 and was back in work on the 14th. On her return, she found that her work hadn't been fully covered by anyone else (although some work had been done by a colleague) and that the backlog of expenses claims and unactioned emails had increased significantly.

27. Coincidentally, HMCTS had decided to centralise Magistrates' expenses on a regional basis. This would mean that if the Claimant remained with HMCTS after centralisation it would be in a new role. Three potential new roles had been identified for the Claimant. They were for: the Claimant to remain part of something called the rota team and to continue to be line-managed by Mrs Moore; the Claimant to join the Legal Admin team, where there were vacancies, with a new line manager, but still based in Nottingham Justice Centre; and for the Claimant to join the centralised expenses team, which was going to be based in Manchester, but potentially working from Nottingham Justice Centre or partly working from home and partly working from Nottingham Justice Centre.

28. The options were to be discussed with the Claimant on 16 June 2022. Unfortunately, there was poor communication to the Claimant in relation to the options and in relation to the meeting. We aren't sure precisely when, but at some stage between the 14th and the morning of the 16th [of June 2022], the Claimant was told that there was going to be a meeting about expenses, which she was led to believe would be an informal meeting. She was given no indication that it was in fact to discuss her future role. She thought it might be about providing more resource to her role, i.e. allocating additional personnel to work on Magistrates' expenses.

29. On 16 June 2022 itself, the Claimant was told that the meeting that day was in fact going to be a formal meeting. She was sent a formal meeting invite, which was

backdated to 14 June 2022 for reasons that are unclear. It was only in the formal invitation, which was sent to her about half an hour before the meeting was due to start, that there was the first hint that the meeting might have something to do with her role. It was headed "*Implementation of the Midlands Magistrates Support Structure*" and included the following, "*… you will be aware of the proposal to implement the Midlands Magistrates Supporting Structure… I am writing to invite you to attend an initial one-to-one meeting to discuss how the change might affect you and what the options are for you going forward*".

30. In fairness to the Respondent, the Claimant was before the meeting given the option of having it postponed so that she could have a trade union representative there and she was told in the meeting itself that it could be postponed. She decided to proceed with the meeting.

31. The meeting duly took place on 16 June 2022. The Claimant was told what the three options were. It appears that she wanted an absolute assurance at the meeting that in none of the three roles would she be required to use the telephone. At the meeting, none of those attending on the Respondent's behalf, which included Mrs Davies and Mrs Moore, were able to provide her with that absolute assurance.

32. In the meantime, in or around mid-May 2022, the Claimant had applied for a new job at HMRC. On 17 June 2022, she heard that she had got the job. It's clear from an email she sent to Mrs Davies on 21 June 2022 that she was accepting that offer, although she was still keeping her options open because the offer had, in the usual way, been made subject to satisfactory references and so on, and the Claimant had one or two queries about it. It wasn't until 7 July 2022 that it was firmly confirmed she would be moving to HMRC, with her last day at HMCTS being 31 July 2022.

33. Mrs Davies had incorrectly informed the Claimant and other staff that centralisation of Magistrates' expenses claims would be completed within six to eight weeks. At a video meeting on 14 July 2022, Mrs Davies told the Claimant and the others that that had been a mistake, and that in fact it might well take 12 months for the centralisation process to be completed. One of the Claimant's reasonable adjustments complaints and the Claimant's remaining harassment complaints relates to things that were said by Mrs Davies at a meeting on 14 July 2022.

34. On 26 July 2022 there was a Teams meeting involving (maybe amongst others) Mrs Davies and the Claimant. The Claimant makes a reasonable adjustments complaint about Mrs Davies allegedly requiring her [from the Claimant's witness statement] "*to go through over 300 claims and identify those referred to Glyn Plant* [a manager to whom the Head of Legal Operations had delegated certain tasks for a time] *and what the issues were with the others*".

35. After the Claimant had left the Respondent, she brought a grievance along substantially the same lines as her Tribunal claim. The Respondent followed a grievance process and there was a grievance outcome. However there is no claim about either the process or the outcome and we do no more than note that the grievance was partially upheld, partially not upheld, and that all of the Claimant's complaints of discrimination were rejected.

Decision on the Claimant's complaints – reasonable adjustments #1

36. The first reasonable adjustments complaint is based on an alleged PCP of the Respondent not making the Claimant aware of the Magistrates' expenses claims amnesty until 11 May 2022. We note that it is about the delay in telling the Claimant about the amnesty's existence and is not about the amnesty itself.

37. Unfortunately for the Claimant, this complaint, in common with all the reasonable adjustments complaints, is flawed because it is based on something that is not a PCP as a matter of law, in accordance with the **Ishola** case mentioned in "*The Law*" section of these Reasons, above.

38. The gist of this complaint is that the Respondent failed to tell the Claimant – specifically her – about a particular thing – the amnesty – on or shortly after a specific date: 14 April 2022. It would be a distortion of language and of the facts to say that the Respondent had any kind of policy or practice of failing to tell the Claimant timeously about this particular amnesty, or about amnesties or other decisions relevant to her work more generally.

39. It is not how the claim has been put, but even if the PCP were broadened out so as to become an allegation that the Respondent had a practice of delaying communicating important information to the Claimant and others in similar positions to her (or something along those lines), we would not be satisfied, on the evidence before us, that any such practice existed.

40. This was a one-off mistake or instance of poor communication by senior management – no more than that.

41. As there was no valid PCP, the claim necessarily fails. It would anyway face time limits difficulties. The Claimant is saying that the Respondent omitted to do something in mid-April 2022. Even if it were arguable that there was "*conduct extending over a period*"[4] here (and we don't think it is), the maximum duration of any such period would be 14 April to 11 May 2022, when the Claimant found out about the amnesty. Given the dates of early conciliation and the date of presentation of the claim form, any complaint about something that happened before 10 June 2022 has time limits problems.

42. For the sake of completeness, we shall nevertheless move on to the question of whether or not there was comparative substantial disadvantage, as if the PCP relied on were a valid one.

43. The amnesty meant that there was suddenly a big backlog of old claims for the Claimant to process. That was a product of the amnesty itself, however, not of the delay in communicating the fact of the amnesty to the Claimant. We also note that the Claimant disagreed with the decision to grant the amnesty at all. She would have disagreed with it, and been anxious and stressed about it, and the backlog that came with it, come what may.

44. What the delay in telling the Claimant about the amnesty did mean was that the backlog was greater than it would otherwise have been. The reason for this was

[4] EQA section 123.

that between 14 April and 11 May 2022, she had been dealing with claims that were submitted more than a month after the sitting they related to using the old system of referring them to the Head of Legal Operations. As explained above, this was more time-consuming than processing them normally. The Claimant was not, of course, just dealing with claims that were submitted between 1 month and 6 months after the relevant sittings, but there were a number of such claims during that period. If she had known about the amnesty, she could have processed those claims normally rather than having to refer them on. And as it took less time to process them normally than to do a referral, she would have got through more claims than she in fact did, which would mean that on 11 May 2022 the backlog of unprocessed claims would be less than it would otherwise have been.

45. Bearing that in mind, when assessing whether or not there was substantial disadvantage, we are weighing up two things. The first is the anxiety the Claimant suffered on and after 11 May 2022 because there was a greater backlog than there would otherwise have been (but bearing in mind there would have been a big backlog in any event) and because of her frustration at discovering that she had wasted time unnecessarily going through the laborious process of referring claims submitted between one month and six months after the sitting they related to. The second is the anxiety the Claimant would have suffered, had she been told about the amnesty on or shortly after 14 April 2022, between then and 11 May 2022 – bearing in mind that the amnesty itself caused the Claimant very significant stress and anxiety, which in this scenario she would have had to cope with for an additional 4 weeks or so.

46. We are, in short, not satisfied that the Claimant suffered more anxiety as a result of not finding out about the amnesty until 11 May 2022 than she would have suffered had she been told about it in mid-April 2022. This is mainly because it appears to us that it was the amnesty itself, and the additional work that inevitably came with it, that was the principal source of stress and anxiety for the Claimant.

47. Accordingly, even if the PCP were valid, there would be no substantial disadvantage and there could therefore have been no comparative substantial disadvantage – i.e. "*substantial disadvantage in comparison with persons who are not disabled*" in accordance with EQA section 20(3).

48. Even if the Claimant succeeded on the other elements of her claim, it would founder on the issue of whether the Respondent knew ("actual knowledge") or could reasonably have been expected to know ("constructive knowledge") that the Claimant was likely to be put to that disadvantage. Plainly, there was no actual knowledge here. This is a complaint about a failure to communicate. As best we can tell it was a careless and thoughtless omission; no one made a decision not to tell the Claimant and others about the amnesty; the communications failure was not directed at the Claimant or anyone else. Had anyone thought about it, they would have told the Claimant (and Mrs Moore and Mrs Davies). So this is not a situation where anyone said to themselves: if I don't tell the Claimant, she could well suffer increased anxiety when she finds out.

49. That brings us to the question of whether the Respondent, corporately, had constructive knowledge that the Claimant was likely to be placed at the disadvantage in question.[5]

50. We cannot answer that question without artificiality. We have, first, to imagine that there was some comparative substantial disadvantage and secondly that if someone had sat down and thought about what would happen to the Claimant if they delayed in notifying her about the amnesty, they would nevertheless have chosen not to notify her straight away. If that had happened, consistent with the decision we have already made about the lack of substantial disadvantage, we think that they would have thought that although the Claimant might suffer stress on 11 May 2022 as a result of an increased backlog (even taking into account the fact that there would have been a backlog come what may) and as a result of the realisation that she had wasted time over the previous four weeks going through an unnecessary referral process in relation to some expenses claims, that stress and anxiety would be more than counter-balanced by not having the stress and anxiety of knowing about the amnesty in the period between 14 April and 11 May 2022.

51. In conclusion, then, if there was comparative substantial disadvantage, the Respondent did not know about it and could not reasonably have been expected to know about it.

52. Even if the duty to make reasonable adjustments did arise, the claim would not succeed.

53. The main adjustment the Claimant would like the Respondent to have made was for the Respondent not to have delayed in notifying her about the amnesty in the first place, i.e. to have notified her on or shortly after 14 April 2022. The problem with that as the basis for a claim is identified in paragraph 45 of Respondent counsel's written closing submissions, to which we refer. In short: the duty to make reasonable adjustments cannot have arisen before there was substantial disadvantage; substantial disadvantage arose on 11 May 2022 at the earliest; on 11 May 2022 it was too late for this adjustment to be made as the Respondent could not travel back in time to mid-April 2022.

54. That is not, however, the end of the matter. Assuming we are wrong about everything we have decided so far in relation to this complaint, although nothing could be done about the Claimant's feelings about having wasted time doing unnecessary work, there were potentially things that could have been done in relation to the stress she felt as a result of there being an increased backlog.

55. The Claimant has, amongst other things, suggested that she could have been referred to occupational health and/or that a stress risk assessment could have been done. However, neither of those things would have done anything to "*avoid the disadvantage*" in and of themselves. It could only have been something potentially coming out of such a referral or an assessment that would actually have avoided the disadvantage, i.e. that could well have alleviated the Claimant's stress

[5] We note that the burden of proof on this issue is on the Respondent and so the question is: are we satisfied that the Respondent could not reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

and anxiety. There is, though, no evidence before us on the basis of which we could properly say that an occupational health referral or a stress risk assessment could well have led to something that would have avoided the disadvantage other than the one thing we are just about to come on to.

56. The one thing that could have been done – subject to practicability and reasonableness – was the provision of additional staffing resource to reduce the backlog.

57. A significant problem faced by a claim relying on that as the reasonable adjustment that should have been made – a problem highlighted by Respondent's counsel, Mr Tinnion, in closing submissions – is that it was not put by the Claimant to either of the Respondent's witnesses that additional resource, e.g. agency staff, could have been provided to help her in May to July 2022. It would be unfair to the Respondent for us to decide that it would have been reasonable for additional resource to have to be provided when the Respondent's witnesses were not given an opportunity to put forward any evidence about it to explain why, for example, it would not have been practicable to do that.

58. Anyway, had it been put to the Respondent's witnesses, they would almost certainly have said something along these lines: given the budgetary constraints on HMCTS – something we take judicial notice of – it was reasonable for the Respondent to set its own priorities and to prioritise other things. The following submission would be made on the Respondent's behalf on the back of such evidence:

    58.1 given those budgetary constraints, the only adjustment / step it was reasonable for the Respondent to have to make / take was to communicate to the Claimant that she was not expected to do any extra work or clear the backlog, and for the Respondent to have no requirement or expectation that she would do so;

    58.2 that is, in fact, a step that the Respondent did take.

59. The Claimant accepted during cross-examination that at no stage was she ever criticised for not getting through a particular amount of work in a particular amount of time, nor was she set targets, nor was she subjected to performance management, or anything like that. On or about 12 June 2022, when the Claimant was about to return to work from annual leave, Mrs Moore messaged her telling her, "*We can all only do what we can do*" in relation to outstanding work, something reinforced the following day by her former manager, a Mr Martin (still a manager for HMCTS), stating in a message, "*Jemma* [Mrs Moore] *is correct. You can only do your best. You shouldn't worry… you do what's right for you*". Later that day, or within a matter of days, Mr Martin also reminded the Claimant that if Magistrates complained about delays in their expenses being dealt with, or complained about anything else, those complaints should be passed on to the Claimant's line manager and that it was not her job to respond to them.

60. In support of the proposition that the Respondent **did** put her under pressure to do additional work and/or to clear the backlog, the Claimant prayed in aid an email sent to Mrs Davies and Mrs Moore on 12 May 2022 by the person providing Business Support to the Head of Legal Operations – Midlands, a Ms Beckford. It

was forwarded to the Claimant by Mrs Moore on the same day, under cover of an email simply saying, "*FYI*". In that email, Ms Beckford stated, "*I have started to send emails to the expenses team and I have more to follow, I don't want you to panic thinking they need to be processed today, they don't. I realise teams are busy so if they can be dealt with a week that is absolutely acceptable*" [sic]. We think she probably meant to write "… dealt with with**in** a week …".

61. This was a badly-worded email and perhaps it would have been wiser for Mrs Moore either not to have forwarded it to the Claimant at all or to have forwarded it to the Claimant with a covering message making clear to the Claimant, for the avoidance of doubt, that there was no expectation or requirement that she would process all of the backlog of claims in seven days. Even so, although we are sure that when she received this email, the Claimant would have been concerned, we are not satisfied that the Claimant ever believed that she was actually being expected to get through all of the backlog of claims within a week. Had she thought that, she was in regular WhatsApp contact with Mrs Moore and would undoubtedly have complained to Mrs Moore about that expectation and Mrs Moore would then undoubtedly have reassured her that she didn't need to do that. In fact, there was no such WhatsApp message from the Claimant to Mrs Moore that we are aware of.

62. Moreover, the Claimant went on annual leave on 20 May 2022 without having come close to clearing all of the old claims and no one criticised her or took her to task for that, at the time or subsequently. So even if the Claimant did think she was being required to get through all of the old claims within seven days, she could only have thought that very briefly. She certainly can't have continued to think that when she returned from annual leave in early June 2022.

63. In conclusion, this first reasonable adjustments complaint fails for multiple reasons, as set out above.

Reasonable adjustments #2

64. The second reasonable adjustments complaint is based on the following alleged PCP: "*14 June 2022 – R required C to work alone on a significant amount of work, namely 300 Magistrates expenses claims and 80 unactioned emails up until C left R's employment on or about 28 July 2022*".

65. This complaint fails for a number of reasons, but first and foremost because the Respondent had no expectation or requirement that the Claimant should carry out all this work, from 14 July 2022 or otherwise. The position as a matter of fact was that there was a lot of work to be done rather than that the Claimant had to do it all without assistance (or with just minimal assistance), which is and has consistently been the gist of her case. We agree with Mr Tinnion's submissions to the effect that the only requirement or expectation put on the Claimant was to continue working the hours and at the rate she had always done – no more than what she was reasonably able to do.

66. A second reason this complaint fails is that if it were the case that the Respondent expected / required the Claimant to get through a particularly high volume of work from 14 June 2022 onwards, that requirement or expectation would not be a valid PCP. Instead, it would be an example of a 'one-off' – of the Respondent doing a

particular thing specifically to the Claimant at a particular time; it would not be an instance of the application of some kind of more general policy or practice.

67. We have considered the significance of the Claimant being expected to work "*alone*". We do not think that this is a fundamental part of the PCP, in the sense that the gist of the Claimant's case is that she was given a large volume of work to do and wasn't provided with enough assistance to do it. We therefore disagree with the submission that appears to be being made on the Respondent's behalf that because the Claimant had some – very limited on the evidence – assistance from somebody called Ms Medley, this means that the claim based on this PCP necessarily fails because the Claimant wasn't "*alone*". However, the claim still fails for the reasons already given, namely that: the PCP relied on is not made out as a matter of fact; and that if it were made out as a matter of fact it would not be a valid PCP as a matter of law.

68. The claim is explicitly made on the basis that the Claimant was required to (or at least expected to) do a lot of work. There is no claim before the Tribunal to the effect that there was a lot of work that needed to be done and that, even though the Respondent did not expect the Claimant to do it all, her conscientiousness, coupled with her GAD, meant that she felt she ought to do it all, and the fact that she couldn't do that caused her stress and anxiety. If, however, there were a claim to that effect before the Tribunal, we would repeat the point we made earlier – that the only reasonable adjustment the Respondent ought to have made to alleviate any substantial disadvantage the Claimant suffered as a result of any such [alleged] PCP was for the Respondent to do what it actually did: to communicate to the Claimant that she was not expected to do any extra work and clear the backlog and to have no requirement or expectation that she would do so. Such a claim would therefore fail too.

Reasonable adjustments #3

69. The third reasonable adjustments complaint is based on this alleged PCP: "*16 June 2022 – R gave C only 30 mins notice that the informal meeting that day was to be a formal meeting*".

70. Manifestly, this is not a PCP as a matter of law and no reasonable adjustments complaint based on it can succeed. It cannot sensibly be argued that the Respondent had a policy or practice of giving the Claimant (or anyone else) 30 minutes notice that a particular meeting on a particular day that was to have been informal was in fact going to be a formal one. Again it's not how the case is put, but if the PCP were expanded and turned into an allegation that the Respondent had a general policy or practice of giving short notice that meetings that were to have been informal are in fact going to be formal, it would fail on the basis that there is no evidence before us that any such policy or practice existed. This complaint therefore does not get off the ground.

71. In addition, there was no relevant substantial disadvantage, let alone comparative substantial disadvantage. In practice, what the Claimant is actually complaining about is being caused stress and anxiety by what was said and what happened during the meeting. Specifically, the Claimant alleges that she thought the meeting was simply to discuss expenses claims, she wasn't told that it was in fact to discuss her existing role coming to an end and potential future roles, and when

she was told in the meeting what it was about, it came as a shock to her and caused her anxiety and stress. Her evidence to us was along these lines: with hindsight, had she known what it was about and had she been given more notice of it, she might have asked to have a trade union representative present. But even on the Claimant's own evidence, properly analysed, telling her with half an hour's notice that it was going to be formal did not in and of itself cause any additional stress and anxiety whatsoever. (By "*additional*" stress and anxiety, what we mean is stress and anxiety over and above that which would have been caused by telling her with more notice that it was going to be formal).

72. Turning to the question of knowledge of substantial disadvantage, although it is arguable that being required to attend a formal meeting that you thought was going to be an informal one could be stressful and make you anxious, given that the Claimant was not being required to attend and was in terms being given the option of putting the meeting off to another day, we don't think the Respondent knew or could reasonably have been expected to know that the late notification to the Claimant that the meeting was to be a formal one could well cause the Claimant more stress than being given a timely notification to the same effect (if it did cause more stress, which we don't think it did).

Reasonable adjustments #4

73. The next reasonable adjustments claim is based on this alleged PCP: "*16 June 2022 – R offered C roles where she would be required to use the telephone*".

74. The factual allegation on which this complaint is based is not made out. What happened at the meeting on 16 June 2022 was that the Claimant was, as explained above, told that there were three possible roles that would be available for her to do when her existing role disappeared. Evidently, she assumed that she would have to use the telephone if she took those roles. In fact, no decision had been taken about adjustments in those roles and this was a matter that would be discussed with the relevant managers, if and when the Claimant expressed an interest in a particular role. She had a so-called 'workplace adjustments passport' and the default position within HMCTS was that she would be able to carry those adjustments across into any new role. Those adjustments included her not having to use the phone. The evidence of the Respondent's witnesses – which we have no good reason to doubt, not least because the opposite was not put to any of them – was that, in practice, in none of these three roles would the Claimant be expected to use the phone.

75. In addition, these were, on the evidence, the only remotely suitable roles that were available. Even if it was the case that the Claimant might be required to use the telephone in any of them, it would in all probability have been direct disability discrimination for the Respondent **not** to have told the Claimant about them because of a fear that the Claimant might not in practice be able to do any of them. As the Claimant all-but accepted under cross-examination, it was better to tell her that there were these three possible roles even if some or all of them might not be suitable for her than to tell her there were no suitable roles for her to do.

76. Finally, yet again, this is not a PCP as a matter of law because it's about a 'one-off'. This is not a claim about the Respondent having a general policy or practice of requiring people in particular roles to use telephones. And if a claim had been

made on that basis, it would have failed on the facts because, as above, at the point in time when the meeting was taking place, no decision had been taken or could possibly have been taken as to what adjustments there would or would not be were the Claimant to have expressed an interest in any of the three roles.

Reasonable adjustments #5

77. The last of the reasonable adjustments complaints is based on this alleged PCP: "*14 July 2022, 26 July 2022 – R required C to undertake a significant amount of work alone, namely all outstanding Magistrates' expenses claims and identifying issues in each such claim*".

78. There seem to be two complaints here.

79. The first is about requiring/expecting the Claimant to undertake without assistance – or significant assistance – "*all outstanding Magistrates' expenses claims*". In so far as it is a different claim from reasonable adjustments complaint #2 (see above), it relates to a comment made by Mrs Davies at the meeting on 14 July 2022 about which the Claimant also makes a harassment claim (see below): "*N Davies asked C to now concentrate on clearing the old Magistrates expenses claims with queries as it would not be fair to leave them for others to pick up on*". The Claimant allegedly interpreted that comment as meaning that she had to clear all of the old expenses claims before the end of her employment on 31 July 2022. However, immediately after this comment was made, the Claimant's own evidence is that (paragraph 81 of her witness statement), "*I said I would do what I can as I always have and have been doing them for six months now on my own plus have things to do with my transfer over and will not be able to clear them.*" The Claimant did not suggest in her evidence that Mrs Davies 'pushed back' against that, by, for example, saying "No that's not good enough – you must clear all of the old claims before you leave", or anything like that. In light of this, if, when she came out of the meeting, the Claimant thought she was being expected to clear the backlog before she moved to HMRC, she was mistaken. There was no such requirement or expectation.

80. We repeat – see paragraphs 65 and 68 above – that at no stage did the Respondent have any requirement or expectation that the Claimant would carry out any particular amount of work within any particular time-frame.

81. This claim therefore fails on the facts. Also, as with the other reasonable adjustments claims, there is no valid PCP here. This is a one-off example of the Claimant allegedly being required or expected to do something in particular circumstances, at a particular point in time, for particular reasons that are not aspects of any discernible wider policy or practice.

82. Possibly, this part of this complaint is also about the following in an email sent by Mrs Davies to the Claimant on 26 July 2022: "*Could you please concentrate on the oldest claims over the next couple of days to try and clear as many of these as you can.*"

83. The main point to make in relation to this is that it is not the manifestation of the alleged PCP, or any valid PCP, but instead a one-off instruction specifically to the Claimant to do a specific thing. In any event, in our view, this did not impose any

new requirement on or expectation of the Claimant. It was merely a reasonable management instruction for the Claimant to focus on particular types of claim at the expense of others, and to do so with her usual diligence.

84. The second part of this complaint is about allegedly requiring, "*C to undertake a significant amount of work alone, namely… identifying issues in each such claim*". This concerns something said by Mrs Davies on 26 July 2022. It is put in the following way in the Claimant's witness statement: "*During my last few days Nichola Davies increased the pressure on me. She asked me to go through over 300 claims and identify those referred to Glyn Plant and what the issues were with the others*". (Mr Plant was the individual to whom, before the amnesty, the Head of Legal Operations had delegated responsibility for considering claims which had been submitted outside the one-month period).

85. There is a lack of clarity in the Claimant's evidence over precisely what it is that she alleges Mrs Davies asked her to do, but there doesn't seem to be any doubt that Mrs Davies did ask her to produce some kind of document identifying what the position was in relation to each outstanding claim and, in particular, to say which claims had been referred to Mr Plant and were still with him.

86. The same point arises in relation to this complaint as in relation to all the other reasonable adjustments complaints: this is not a PCP, but a one-off. In this instance it is a particular one-off instruction given to the Claimant – and only to the Claimant – at a particular time, in particular circumstances, and for particular reasons, and behind which there was no policy or practice that we have evidence of.

87. A further point is that this is referred to by the Claimant as an "*impossible work request*". In fact, the Claimant was able to respond to Mrs Davies's request on the same day, in an email sent at 17:19 hours. Mrs Davies responded to the Claimant's email with an email thanking her and containing no suggestion that what she had produced was inadequate or unsatisfactory or was otherwise not what had been required or expected. In the circumstances, it was a reasonable request for Mrs Davies to make of the Claimant, in that the Claimant had been asked to do something which she was able to do within less than one working day.

88. If this request caused the Claimant substantial disadvantage in comparison with persons who didn't have GAD and if there was knowledge of any such substantial disadvantage (and these are big 'ifs'), and therefore if the duty to make reasonable adjustments was engaged, the only step that could in practice have been taken to avoid that disadvantage would have been not to make the request in the first place. Consistent with the decision we have just made that it was a reasonable request for Mrs Davies to have made, we do not think it would have been reasonable for the Respondent to have to take the step of not making the request. It follows that if the duty to make reasonable adjustments arose – and we don't think it did – the Respondent would not have breached it.

Reasonable adjustments – conclusions

89. All the reasonable adjustments complaints fail because the Respondent had no relevant and valid PCPs. Fundamentally, the Claimant's complaint is that she was over-worked. However, the truth is that although there was a lot of work that

needed to be done, the Respondent had no expectation that the Claimant would get through it and did not require or expect her to do anything other than to work her normal hours at her normal pace and do as much work as she could during those hours and at that pace.

90. It is unfortunate that the Claimant felt stressed and anxious about there being a backlog, but even if a claim had been made on the basis of the existence of a backlog rather than on the basis of a non-existent requirement for the Claimant to get through it, that claim would have failed because it would not have been reasonable for the Respondent to use its limited resources to reduce this particular backlog to an absolute minimum, when it had other priorities and when it was content for the backlog to be there. What it could reasonably be expected to have to do was not to require or expect the Claimant to do more work than was reasonable; and that is exactly what the Respondent did.

Disability-related harassment

91. The harassment complaints both relate to things said during a meeting on 14 July 2022. The first is: "*N Davies told C to resume work processing Magistrates expenses claims in a rude manner by saying to C "*You can now go back to the claims*".*" The second is: "*N Davis asked C to now concentrate on clearing the old Magistrates expenses claims with queries as it would not be fair to leave them for others to pick up on.*"

92. A number of times during the hearing there have been discussions about the harassment complaints and in particular about the basis upon which the Claimant is alleging that Mrs Davies's comments are said to relate to the protected characteristic of disability. A considerable amount of time was spent on these discussions. The Employment Judge has explained to the Claimant (and the Claimant was cross-examined about this as well) that words or conduct which on the face of them have nothing to do with the protected characteristic of disability do not as a matter of law become related to disability simply because they exacerbate the disability. Claims to the effect that careless words or conduct caused personal injuries by causing or exacerbating a mental-health condition amounting to a disability are personal injury claims for the County or High Court, not disability discrimination claims for an Employment Tribunal[6].

93. After we had had those discussions with the Claimant, she said categorically that she was making these two harassment complaints on the basis of an allegation that not only did Mrs Davies know that her saying these things to the Claimant would exacerbate the Claimant's disabilities, but that that was Mrs Davies's intention. In other words, the Claimant was making the very serious but far-fetched allegation that Mrs Davies actively wanted to harm the Claimant by making her GAD worse.

94. By the end of the hearing, however, we found ourselves wondering whether that was really what the Claimant was alleging and – indeed – whether what she thought had happened as a matter of fact was something that could constitute disability-related harassment as a matter of law; and whether what she was

[6] Of course there are factual scenarios that could give rise to both types of claim, but the general point stands.

actually saying was no more than that Mrs Davies did things which the Claimant found upsetting, that this made her GAD worse, and that Mrs Davies should have known it would make her GAD worse.

95. One of the reasons we wondered whether the Claimant really meant to allege harassment was her marked reluctance to put her case to Mrs Davies in cross-examination. We repeatedly emphasised the need for her to do so, in fairness to the Respondent and in particular to Mrs Davies herself. The nature of the allegations was such that there would potentially be grave implications for Mrs Davies's future career with HMCTS were we to uphold them and Mrs Davies had to be given the opportunity to respond directly to them, in open Tribunal. After repeated explanations to the Claimant about this and repeated attempts to get her to put her case fully and properly failed, the Employment Judge ended up having to put it for her. This was a rather unsatisfactory state of affairs.

96. We can deal with these complaints very shortly.

97. First, in no way, shape or form did these remarks (the substance of which is admitted; and they are, on the face of them, innocuous remarks) relate to the protected characteristic of disability.

98. Secondly, on the evidence, we are not satisfied that Mrs Davies knew or ought to have known that her making these remarks would exacerbate the Claimant's condition (to the extent that they did exacerbate the Claimant's condition). We are entirely satisfied that Mrs Davies did not intend to exacerbate the Claimant's condition or otherwise upset or harm her. We note in relation to this that in notes the Claimant made for herself on 15 July 2022 about the meeting the previous day, the Claimant stated, "*Not sure if she knew how rude she had been basically dismissing me*".

99. Thirdly, Mrs Davies's purpose in making these remarks was not to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her.

100. Fourthly, so far as concerns whether the remarks had that effect, we start by looking at the Claimant's subjective state of mind. It seems to us that the Claimant felt embarrassed and upset because she felt she was being dismissed from a meeting and was being spoken to in a dismissive way in front of a colleague. But even if she did feel that what happened was sufficiently humiliating to create a "*humiliating …* [etc] *… environment*" for her, taking in to account how things were objectively, and whether it was reasonable for what was said to have that effect on the Claimant, the test in EQA section 26(1)(b) is not close to being satisfied.

101. The harassment complaints therefore fail.

Totally without merit

102. We have been asked by Mr Tinnion of counsel on the Respondent's behalf to make an explicit finding that the Claimant's complaints were totally without merit.

103. We are not sure why we're being asked to do this unless it is to support a future application for costs. If it is to support a future application for costs, it is not an

appropriate request to make. In any event, it would be a mistake for us to say anything in this decision which prejudged any future costs application: see **Oni v NHS Leicester City (formerly Leicester City Primary Care Trust)** [2013] ICR 91. There are, though, other decisions of the EAT in which Tribunals have been actively encouraged to state that a particular claim or complaint is totally without merit where that is felt to be the case. We shall therefore consider whether we think it is.

104. We are not persuaded that the reasonable adjustments complaints were totally without merit. The PCPs were framed in such a way as to mean that the complaints could not succeed, but – without for a moment suggesting that the Claimant has lost on a technicality or that she would have won if only her claim had been put slightly differently – we can see how, if the Claimant had had expert legal advice, she could have made broadly similar complaints that would have had a greater chance of success than the ones that she actually presented to the Tribunal and pursued.

105. The Claimant's harassment claim is a different matter, however. The Claimant's account of events was not substantially challenged during this hearing, meaning that the evidence came out about as favourably for the Claimant as it could have done. Fundamentally, what the Claimant was complaining about was not disability-related harassment at all, but instead that remarks had been made which caused her upset and anxiety. There truly was no merit to the two harassment complaints that the Claimant did not withdraw.

106. We should make clear that by declaring these two harassment complaints to be totally without merit, we do not in any way encourage the making by the Respondent of a costs application. We note that the test for whether costs should be awarded is different from the test for whether a claim is totally without merit. Although it might be said that a claim which is declared to be totally without merit is necessarily one which never had any reasonable prospect of success, there is always a discretion as to whether or not to award costs. If a Respondent persuades the Tribunal that the Claimant's claim, or any part of it, had no reasonable prospect of success, that would only mean that there was a discretion to award costs, not that costs should be awarded

107. If the Respondent makes a costs application, we will deal with it on its merits.

EJ Camp
28th May 2024

MIDLANDS WEST EMPLOYMENT TRIBUNAL

B E T W E E N:-

MRS. K. KULASOORIYA

Claimant

-and-

SECRETARY OF STATE FOR JUSTICE

Respondent

LIST OF ISSUES

Disability

1. R accepts that during the relevant period (14 April 2022 – 28 July 2022) C was disabled under s.6 of the Equality Act 2010 because of her impairment of general anxiety disorder (**GAD**).
2. R accepts that during the relevant period, R knew C was disabled because of this impairment.

Jurisdiction

3. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 10 June 2022 may not have been brought in time.
4. Were the Claimant's complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
    a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
    b. If not, was there conduct extending over a period?
    c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

5. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

    a. Why were the complaints not made to the Tribunal in time?

    b. In any event, is it just and equitable in all the circumstances to extend time?

Claim #1: Failure to make reasonable adjustments (ss.20-21, 39(2)(d) of Equality Act 2010)

6. Did the Respondent do the following things:

    a. 14 April 2022 – R did not make C aware of a 6 month Magistrates expenses claims "amnesty" that was communicated to Magistrates on 14 April 2022 (C will say she found out by chance of this amnesty when dealing with an email on 11 May 2022);

    b. 14 June 2022 - R required C to work alone on a significant amount of work, namely 300 Magistrates expenses claims and 80 unactioned emails up until C left R's employment on about 28 July 2022;

    c. 16 June 2022 - R gave C only 30 mins notice that the informal meeting that day was to be a formal meeting;

    d. 16 June 2022 - R offered C roles where she would be required to use the telephone [4.2.4];

    e. 14 July 2022, 26 July 2022 - R required C to undertake a significant amount of work alone, namely all outstanding Magistrates expenses claims and identifying issues in each such claim.

7. If it did, was each of them a "provision, criterion or practice" (PCP) as a matter of law?

8. Did the PCP(s) put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, by exacerbating the Claimant's disability?

9. Did R know or could R reasonably have been expected to know that the application of the relevant PCP put C to that substantial disadvantage?

10. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

11. What steps could have been taken to avoid the disadvantage? The Claimant suggests:

    a. providing C with adequate notice that C was to deal with Magistrates "amnesty" expenses claims;

    b. providing C with help and assistance to complete the Magistrates "amnesty" expenses claims and/or significant amount of work (not work alone on these tasks);

    c. ensuring that before C returned from holiday the Magistrates expenses claims and unactioned emails had been worked on or cleared;

    d. providing C with more notice that the 16 June 2022 meeting was to be formal so that C's trade union representative could attend;

    e. offering C roles in which C would not be required to use the telephone.

12. Was it reasonable for the Respondent to have to take those steps and when?

13. Did the Respondent fail to take those steps at any relevant time?

Claim #2: Harassment related to disability (ss.26, 40(1)(a) of Equality Act 2010)

14. Did the following conduct occur:

    a. at a meeting on 14 July 2022, N Davies told C to resume work processing Magistrates expenses claims in a rude manner by saying to C "*You can now go back to the claims*";

    b. at a meeting on 14 July 2022, N Davies asked C to now concentrate on clearing the old Magistrates expenses claims with queries as it would not be fair to leave them for others to pick up on.

15. If so, was that unwanted conduct?

16. Did the conduct relate to the protected characteristic of disability?

17. If it did, was the conduct unwanted by C?

18. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

19. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.