EMPLOYMENT TRIBUNALS

Claimant	v	Respondent
Mrs S Golds		**Chichester District Council**

Heard at: **Southampton Employment Tribunal**

On: 11 and 12 April 2024

Before: **Employment Judge Rayner**
Mr M Richardson
Mr K Sleeth

Appearances
For the Claimant: Ms L Millen, Counsel
For the Respondent: Mr T Perry, Counsel

JUDGMENT

1. **The claimant's claim that she was discriminated on grounds of age, contrary to section 13 Equality Act 2010does not succeed and is dismissed.**

2. **The respondent's application for costs does not succeed and is dismissed.**

Reasons

1. Judgment was given verbally at the end of the hearing and the claimant requested written reasons.

The claim

2. The background and overview of this case is as follows.

3. By claim form dated 25 April 2023 the claimant alleged that she had been discriminated against on grounds of age

4. The claimant was and remains employed as a commercial property and contract lawyer by the respondent. She started work for them on the 27 April 2011 and at the time of her claim the claimant was almost 62 years old.

5. The claimant suffered a breakdown in her mental health in 2022 and was off work on certified sickness absence for a total of 10 weeks.

6. She said and we accept that she was so unwell that at one point she was suicidal and could barely speak. She said and we accept that her sister returned from Mexico in order to live with her and keep things going for her family.

7. There were a number of causes of the claimant's breakdown in mental health, some of which were work related but some of which were related to difficult family situations which she was going through at the time and which do not need to be detailed in this judgement.

8. The claimant alleges that after being absent from work for six weeks, she was asked to attend at a first formal absence management meeting, and that the letter sent to her threatened her with a caution.

9. The claimant considered that this was harsh treatment of her and formed the view that the respondent did not believe that she was genuinely ill.

10. The claimant also considered that her employer should have carried out a welfare meeting with her, which would be an informal meeting prior to holding the first formal meeting.

11. The claimant was very unhappy about being asked to attend the meeting and believed that she might be dismissed. She did however agree to attend the meeting.

12. Following the meeting, no caution was issued to her, and no further steps were taken under the absence management policy in respect of her sickness absence. The respondent did agree a phased return to work for her and put in place some further measures which were intended to be supportive for her.

13. When the claimant returned to work, she discovered that a colleague who had been off sick for a period of 10 weeks with stress and anxiety previously, had not been required to attend any sickness disciplinary hearing whilst she was unwell. Her colleague was aged 30.

14. The claimant queried why there had been a difference in their treatment and raised a grievance suggesting that the reason why she had been treated differently was her age.

15. The respondent dismissed her grievance, and the claimant filed a claim to the ET after completing early conciliation.

16. The respondent filed an ET3 in which they denied that the claimant had been discriminated against on grounds of age.

17. The respondent asserted that they had followed their usual absence management policy and that they had not held a welfare meeting, because they understood that the claimant did not wish to have any contact with her manager or human resources during that time. The respondent relied on the absence management policy, which they say permitted them to hold a first formal absent management meeting after four weeks of absence.

18. They say that the absence management stages are applied to staff of any age, if the amount of sickness absence and other factors justify it.

19. A case management hearing took place before Employment Judge Livesey on the 25 October 2023. The respondent argued that the details of the claimant's alleged comparator were sensitive and needed to be protected from further discrimination or publication, and a rule 50 order was made.

20. The comparator was described as an individual with a mental health condition which had existed over a substantial number of years, and which constituted a disability.

21. The issues in the case were defined at that hearing.

22. The direct age discrimination claim is an allegation that the respondent required the claimant to attend a meeting during her sickness absence. This is put as a matter of less favourable treatment.

23. At this hearing the claimant gave evidence on her own behalf, by witness statement and was cross examined by Mr Perry Counsel for the respondents.

24. The respondent called Mr Radcliffe and Mr Bennet and Mrs Green. They each produced a witness statement and were each cross examined by Miss Millen, Counsel for the claimant.

25. We were provided with an agreed bundle of documents.

26. We have received written submission from both counsel, which were helpful and which we have taken into account in reaching our decisions as set out below.

Findings of fact

27. The claimant informed the respondent that she was unwell saying *I'm stressed out to the Max* on the 14 March 2022 in an e-mail to her manager Nicholas Bennett. She said *the aggravation and stress of all the cases I'm dealing with is a duplication of stress I have at home. It's just too much to face today, I don't know whether I'll feel better tomorrow but I'll let you know.*

28. Mr Bennett responded to the claimant, having taken advice from human resources, later on the same morning. In his e-mail he expressed concern for her welfare and said he had asked for some help from human resources about what they might be able to do to help with some of the pressures that she was

under. He referred her to the professional counsellors and also referred to the Wellness Action Plan. He also asked if there was anything he could do regarding the workplace stress.

29. He suggested that another team member could take on a little bit more and said that he was covering some matters, but also suggested that he would look at a locum support for her area. He asked whether there was work that might be passed on to somebody else.

30. On the 15 March 2022 the claimant told the respondent that she had been to the doctor about her anxiety and stress and had been signed off until the 28 March 2022. She subsequently sent the respondent her sickness note.

31. Her manager recorded the reason for absence as stress and depression, anxiety, mental health and fatigue, on the Council's sickness absence system.

32. On the 30 March 2022, in an e-mail exchange between Mr Bennett; Mrs Green and Mr J Ward, who was the senior director, Mr Bennett stated that he didn't have much of an idea of what the work related stress element was. He said he had spoken to her at length about her personal issues, but she hadn't raised work related stress with him. He said that nothing she had said to him had suggested that she was finding the work too much.

33. The claimant was signed off again on the 27 April 2022 with a further four week sick note. This took her up to the 23 May 2022.

34. On the 28 April 2022, Kathy Green, human resources officer said in an email that, *I guess we need to hold an AMP meeting now*, and asked Mr Bennett if he could ring or text the claimant to advise her that the respondent would be setting up an AMP meeting under the policy.

35. Mr Bennett later replied that he had tried to contact the claimant but had been unable to get through and so had left her a voicemail, saying that the letter was

coming and not to worry about it and hoping that she knows *we all send our love and are thinking of you*.

36. A letter was sent to the claimant on the 6 May 2022 headed *Absence Management Policy*. It invited the claimant to a meeting on the 12 May 2022. At the point the letter was written the claimant had been off sick since the 14 March 2022.

37. The letter referred to the levels of the claimant's sickness absence and then *said although we are totally aware of the genuineness of your sickness, due to the number of days absence you have had, you have now hit the triggers for a formal meeting.* We find that this was a true reflection of the respondent's sickness absence policy.

38. The letter goes on to say that they will discuss the claimant's current absence and talk about *any issues and help we can provide*. The meeting was to be held by teams. The letter also said *during the meeting we will offer you any help or support we can. Please note however that depending on the conclusions drawn by the interviewing officer it is possible that you may be issued with a formal caution.*

39. We find that this was a fair reflection of the provisions set out in the respondent's absence management policy and accept the evidence of Mrs Green that it was appropriate and necessary for the respondent to flag up the possibility of a formal caution being issued.

40. We also find that no one had decided that any formal caution would in fact be issued, and that no one arranged the meeting with the intention that one would be issued. We find that the only reason that the meeting was called was because the claimant had been off work for a significant period of time without any contact with the respondent.

41. The respondent needed to know how much longer the claimant was likely to be off work. They needed to know more about the nature of her condition and its impact upon her and they needed to know whether or not there was any support they could offer to the claimant. As with any absence management policy, the purpose was to obtain information from the claimant and the reason the information was necessary, was so that the respondent could manage both the claimant's absence, and the service that they were delivering and consider putting in place any additional support for the team during the course of the claimant's absence.

42. We find as fact, for example, that during the claimant's absence, Mr Bennett had taken on a locum to assist with the work of the department.

43. The meeting was initially arranged for Thursday 12 May 2022, but the claimant did not attend the meeting. She sent an e-mail to Mrs Green on the 13 May 2022 saying that she had not received a letter and *cannot do zoom meetings at the moment*. She also said that she had not been looking at her emails and asked whether Kathy wanted to schedule a phone meeting.

44. We find at this point that the claimant was so unwell that she was not checking personal emails and that because she was on sick leave, she did not consider it necessary to check her work emails.

45. We agree that it was not unreasonable for the claimant not to have checked her work emails, although we understand that this was the standard process the respondent used for contacting people on sickness absence. In any event we find that Mrs Green responded to the claimant, thanking her for getting back to her and stating that she would try and arrange a phone meeting.

46. On the 16 May 2022 Mrs Golds wrote to her trade union representative Shona, stating that she'd had a bit of a meltdown mentally and had been really struggling. She said she had been signed off since March and that the letter, which was the letter inviting her to the formal meeting, had really shaken her.

She said she didn't feel able to go back for another couple of weeks and that she would need a phased return. She also raised other concerns about the meeting. She then said she was going to ask for a postponement of the meeting as she doubted that Shona would be free at such short notice.

47. On the 16 May 2022 she wrote to Mrs Green stating she understood that an interview was required as standard, but she wasn't sure she was going to be well enough. She said she was all over the place and on medication for depression and anxiety and asked for a postponement of the meeting. She said *the threat of a caution is rather harsh given my fragile mental state but I understand its protocol and no account made of my world crashing in and my feeling suicidal but honestly it is less than helpful at this time.*

48. We find that on receipt of that e-mail Mrs Green called an urgent meeting of her manager and her managers manager. She was concerned because of the reference to suicidal ideations, and we find that it was decided that attempts would be made to contact the claimant in order to find out more about her situation.

49. However, later on the 16 May at 8:00 PM the claimant wrote to Mrs Green saying *Shona has confirmed she can make the meeting on Thursday so I'll see you then. Thanks for being understanding I am on the mend it's just taking longer than I thought it would.*

50. We find that this was a true statement of how Mrs Gold felt at the time.

51. We accept the evidence from Mrs Green that having received that e-mail and confirmation that the claimant would be attending and would be able to attend with her representative, the respondent decided to continue with the meeting. We find that this was a reasonable and fair decision in the circumstances.

52. We reject the criticisms made by the claimant of the decision to continue with the meeting and find that the only reason the respondent continued to hold the meeting, was because the claimant herself had confirmed that she was able and willing to attend. We find that had she wanted to continue with her previous application to postpone the meeting, the respondents would have agreed to that.

53. The meeting took place, and we find that it was a supportive meeting at which Mr Bennett and the human resources officers took steps to find out what they could do in order to support the claimant to return to work at some point in the future.

54. Following the meeting it was decided that no caution would in fact be issued. We find that the decision not to issue a caution, was a decision to vary the usual practice set out in the absence management policy, and was taken after taking into account the claimant's mental health and all other circumstances

55. We find that this was a positive decision resulting from the particular circumstances of the person in front of them.

56. Whilst we agree with the claimant that this was not a welfare meeting but a first formal meeting under the absence management process, we find that it was nonetheless a fully supportive meeting in which the respondent officers were primarily concerned with the claimant's welfare.

57. The claimant has complained that she should have been called to a welfare meeting under the absence management policy.

58. We have been referred to the detail of the respondent's absence management policy.

59. We find that the policy in the material parts provides for an informal welfare meeting but does not require an informal welfare meeting to be held before the first formal meeting.

60. We find that the policy anticipates a first formal meeting will be held in most cases where there has been a single instance of absence of 14 days or more in any 12-month period. We find that there is a discretion within the policy about whether and if so when, to hold the meetings and that the first formal stage meeting could be held if a staff member had four calendar weeks off sick, which would be classed as a long term absence.

61. Here, the first formal absence meeting was not considered until the claimant had been absent for six calendar weeks. We accept the respondent's assertion that this was a variation to the policy. We also accept that the policy provides that a formal caution will normally be issued, unless there are exceptional mitigating circumstances why it would be inappropriate to issue one.

62. We conclude that there was no requirement under the policy for a welfare meeting to be held in all cases. We do accept the claimant's assertion that in all the circumstances, it might have been better practice to hold one for her.

63. The policy states that the decision about whether or not a caution should be issued must be made by the manager in line in consultation with human resources. We find that in this case the manager Mr Bennett, in consultation with Human Resources decided that there were exceptional mitigating circumstances and that therefore the issue of the caution would be inappropriate.

The comparator

64. The claimant relies upon a comparator who was of a different age to her. In this case she relies upon an actual individual although we have also considered how a hypothetical comparator would be treated .Our findings below about their circumstances are relevant both to whether or not she can

properly be an actual comparator, as well as how a hypothetical comparator in the same circumstances as the claimant was or would have been treated.

65. In this case we find that the following material circumstances were the same for the claimant and her comparator.

    a. the fact that the claimant and her comparator were both suffering with a mental health condition,
    b. The fact that each of them had been off work for a similar period of time,
    c. the fact that the absence management policy applied equally to all staff, and that both of them had reached a trigger point for a first meeting to be held.

66. We also take into account at this point, the respondent's explanation that the comparator was known by the respondent to have a disability, which satisfied the definition set out within the Equality Act 2010, and that this had been disclosed to the respondent at the start of the comparator's employment, and that therefore a reasonable adjustment had been made for her, by adjusting the triggers of sickness absence.

67. The respondent asserts that they were not in the same material circumstances, because there were reasons why each was treated differently.

68. Mr Radcliffe, HR manager, told the tribunal that it had been confirmed that the claimant's comparator had a mental health disability both at the outset of her employment and at later points in respect of sickness absences. He confirmed that it had been established to his satisfaction that she had a disability because of a long-term mental health condition. We find as fact that this was the genuine conclusion reached by the respondent and that it was reached on reasonable grounds.

69. He explained that the reason why Mrs Golds was taken down the formal route and the comparator was not, was because the employer had to make a

decision about staff on the basis of the information available to them at the time.

70. Mr Radcliffe said that when considering the attendance management policy in respect of the claimant and her comparator, they had been in very different positions. He said that the respondent knew that the comparator had a long-term history of mental health problems going back over a number of years. In contrast, the evidence that he had seen about Mrs Golds, did not suggest that she had a disability. He referred to the length of time she had been absent and suffering with the impairment and the respondent's understanding that the claimant had no long-term history.

71. We accept his evidence as truthful and find as fact that the respondent genuinely and for good reason believed there to be a significant difference between the claimant and her comparator.

72. Mr Bennett, who gave evidence for the respondent, also told us that at the time he did not anticipate that the claimant's impairment would be long term, and that although it was not his call, he did not think that her absence was indicative of a disability. He acknowledged that it might take some time for her to return to a happy and healthy environment and points to the agreement between the respondent and the claimant, of changes made subsequently to her working pattern.

73. Mrs. Green, HR officer for Chichester District Council, told the tribunal that it would have been premature to consider whether the claimant had a disability at the point that she was called into the meeting. She explained the reasons why somebody would be called into an informal meeting and noted that the respondent had not been able to speak to the claimant and did not know what was going on at all other than that she was off work with stress and anxiety. We accept her evidence that the letter sent to the claimant which flagged up the possibility of a caution was not a threat but was a statement of a possible

outcome. We accept that it was appropriate for the respondent to include this in the letter, even in circumstances where it was not a probable outcome.

74. The respondent witnesses gave their evidence given under oath that this was what they believed, and this part was not challenged by the claimant. The comparator did not attend to give evidence but that was a choice of the parties, and we draw no inferences from it.

75. We find as fact that the respondent officers genuinely and for good reason considered the comparator to be a disabled person at the material times.

76. We find that a reasonable adjustment was made for the comparator who was accepted and known to be a disabled person and that the adjustment was made to the attendance management policy.

77. No similar adjustment was made in the claimant's case, although we observe that she was not required to attend a meeting within at the time frame set out within the attendance management policy but in fact within a longer period of time , because at that point the respondent did not have any reason to consider that she was a disabled person and therefore had no reason to consider whether or not they needed to make any adjustments to their policy.

78. In evidence the claimant accepted that the respondent was obliged to keep medical information confidential and also accepted that the standard trigger point in the absence management process which had been applied to her, might well have been applied differently in the case of somebody who had a stated disability.

79. The claimant very fairly accepted that she had no reason to think what the respondent had said about the comparator was untrue but did not understand why they had not simply told her that the comparator had a disability. She accepted that the reasons now given would have explained their position.

80. However, the claimant did not accept the reason given by the respondent, that the different treatment arose from the different medical circumstances of the two parties, was the only reason for the difference in treatment. In part we understand this to be because of the reluctance of the respondent to explain their reason at an earlier stage.

81. Miss Millan has suggested that the respondents called the claimant to the meeting *because* they were considering issuing her with caution and then moving towards dismissal because of her age.

82. The respondents vehemently deny this and assert that the reason they called her to a meeting was nothing to do with her age and everything to do with the steps set out under their policy.

83. The claimant subsequently filed a grievance, and in that grievance, she raised the questions of why she had been treated differently to her comparator, stating that the only reason she could see was the difference in age.

84. Her grievance was not upheld, and she filed her claim to the ET.

85. She was asked in cross examination why she thought that her age may have been a factor in her treatment, and she said that she could not understand why they treated her differently and she wanted an explanation because did not seem fair. She said, *I hoped they would investigate, and would say sorry it did not happen*. She accepted that the respondent had investigated the matter but said that it was not explained to her why discretions available to the employer had not been used and why they did not give more sympathy to the fact that she had suffered a mental health break down.

86. Part of the difficulty for the claimant was that the respondent did not explain to her, during the course of her grievance, that there was a significant difference between her circumstances and the circumstances of the person she was comparing herself to. The respondent witnesses explained to this tribunal that the reason why they did not fully explain this to the claimant was because of

concerns around confidentiality. Mr Perry, Counsel for the respondent, refers in his opening skeleton argument to the Attendance Management policy, which states that *all cases of ill health will be handled with due regard to confidentiality. Medical information will be treated in confidence.*

87. The respondent did not consider it appropriate to disclose confidential medical information or indeed any information about the fact of the comparator's disability status to the claimant.

88. The first time the claimant was aware that the comparator had a disability what when this was explained to the court and the claimant at the point of the case management hearing.

89. We accept the respondent's evidence that the reason why further information was not given to the claimant was because the respondent was concerned to protect the medical confidentiality of the comparator. Regardless of whether they could have explained matters to the claimant without breaching medical confidentiality, we accept that this was the only reason and was the real reason for not telling the claimant that they had treated her differently, because her comparator had a known disability, which she did not.

90. We also accept that the failure to provide a full explanation to the claimant at an early stage, was a key reason why the claimant continued to think that there may be some other reason for her treatment which was connected with her age.

91. Mr Radcliffe refuted that the decision to invite the claimant to attend at a formal meeting was anything to do with her age or that he was intending to manage her out of the organisation, or that she was treated the way because she was 62 and that she was therefore was treated less favourably to a 23 year old.

92. We accept Mr Radcliffe's evidence that he honestly believed that the claimant's age was not a factor for him at all, and we also accept his evidence that in any event , a caution was not usually a step that would led to termination. He told

us and we accept that many staff may have a caution on their file, although the claimant did not, which would fall away after a period of time, and they would remain in employment with the respondent for many years.

93. He told us and we accept that the respondent would not want to manage out somebody who they valued as a senior lawyer who was in a hard to recruit post and who was valued by the respondent. We find that this was a true and honest view of the claimant, held by respondent officers at the relevant times.

94. We agree with the claimant that the respondent did not provide her with a full explanation for the reason for the difference in treatment between herself and comparator following the grievance.

95. The claimant and Respondent both refer to the key legal principles in respect of discrimination in their helpful written submissions and we accept them both as a correct, all be it short statements of the relevant law.

Relevant legal tests - Direct Age discrimination

96. S. 13 of the Equality Act 2010 provides that a person is subject to direct discrimination if :

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

97. Under section 13, a comparison must be made between the treatment of the Claimant and another person, actual or hypothetical. When making that comparison, section 23(1) states

"On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case."

98. This does not mean that the circumstances must be identical. We must decide what the relevant circumstances are in this case, and then determine whether or not they are the same or not materially different.

99. Further when considering how a hypothetical other person would have been treated, we must consider the material circumstances of that hypothetical person.

100. The EHRC code of practice suggests that the relevant circumstances are those circumstances relevant to the claimant's treatment. These need to be the same or nearly the same. See para 3.23.

101. Miss Millen refers us to *Watt v Ahsan [2008] IRLR 243*, in which the House of Lords stated that it is uncommon to find a real person who qualifies as a statutory comparator, that is someone whose circumstances are not, even to a small degree, materially different from the complainants.

102. When identifying the relevant circumstances it may be necessary to identify the purpose of the comparison, or the proposition the comparison is intended to address. (see for example *Kalu v Brighton and Sussex university Hospital Trust and Ors* EAT 0609/12, per Mr Justice Langstaff)

103. In this case, the question we are considering is whether or not the Respondent discriminated against the claimant in its use of the Sickness absence management policy, by inviting her to an informal meeting.

104. When considering whether or not direct discrimination had taken place in this case, we considered and applied the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

105. In particular we remind ourselves that it is not enough for a claimant to show that they have been less favourably treated in order to show direct discrimination. The tribunal must also be able to find that the treatment happened because of the protected characteristics, Miss Millen refers to *Nikolova v M&P Enterprises London* UKEAT/0292/15Ddm in this respect.

106. In applying the test and before the reverse burden of proof is triggered, we must consider whether the facts we have found could lead to a conclusion that the prohibited factor, in this case the Claimants age, may have or could have been the reason for any of the treatment we have found to have occurred.

107. We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142, and took into account that in order to shift the burden of proof to the respondent, requiring a full explanation for any detriment or adverse treatment, the claimant must prove more than a difference in treatment between herself and any comparator, actual or hypothetical, and a difference in protected characteristic. Before the burden of proof will shift, we must make some additional factual finding from which we may draw an inference that age was causative of that treatment in some way. Unreasonable treatment alone may not be enough, unless it is connected to the protected characteristic.

108. We reminded ourselves that a successful direct discrimination claim depends on a tribunal being satisfied that the Claimant was treated less favourably than a comparator because of a protected characteristic. The Claimant bears the burden of proving both less favourable treatment and facts from which the tribunal could conclude in the absence of an explanation that the grounds for that treatment was something to do with the Claimant's race.

109. The question of whether the treatment complained of is less favourable, is a question or fact for the tribunal.

110. The principle set down in *Chief Constable of West Yorkshire Police v Khan* 2001 ICR 1065, HL even though it is a victimisation case under the RRA, and the definition of victimisation under the EqA is different and does not involve less favourable treatment, is cited by the EHRC Employment Code when it explains less favourable treatment in the context of direct discrimination: *'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated — or would have treated — another person'* — see para 3.5. 15.20

111. The question that we had to consider in this case was whether or not any of the treatment of the Claimant was capable of amounting to less favourable treatment as a matter of fact.

112. If we determine that there was less favourable treatment of the claimant compared to a comparator in the same or not materially different circumstances, we must then consider the reason why the claimant was treated as she was.

113. A complaint of direct discrimination will only succeed where the tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. In *Gould v St John's Downshire Hill 2021 ICR 1, EAT*, Mr Justice Linden explained: 'The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for

the decision… [and] the influence of the protected characteristic may be conscious or subconscious.'

114. We remind ourselves that where age is a protected characteristic, any less favourable treatment found could be justified by the employer , but in this case, the employer did not rely on any justification defense and therefore it is not addressed further.

Conclusions

115. We conclude that the claimant and her comparator had some common material circumstances. Both of them were absent from work with a mental health condition and both of them had been absent from work for a period of time which would under the policy have triggered a first informal meeting.

116. However, in this case the circumstances of the claimant and the comparator were different because the claimant was recognised as a disabled person under the Equality Act 2010, in respect of whom the respondent was required to make reasonable adjustments. In contrast, the claimant was not considered to be a disabled person under the Equality Act 2010 at the stage that she was invited to the first meeting.

117. On that basis we conclude that there was a material difference in the circumstances of the claimant and the comparator and we would therefore dismiss the claimant's claim that she was discriminated on grounds of age on this basis alone.

118. We have also considered how a hypothetical person in the same situation as the claimant but of a different age would be treated, and we have no reason to conclude other than that they would have been treated under the attendance management policy in exactly the same way as the claimant.

119. However if we are wrong about that, and if the material circumstances are limited to the fact of the absence and the length of the absences and reasons

for them, so that the claimant and her comparator were in the same material circumstances, we have considered whether we have made findings of fact from which we could conclude in the absence of an explanation that discrimination might have taken place.

120. We conclude that we have not done so. We have found a difference in treatment, and we have found a difference in the protected characteristic, but we have made no findings of fact which suggest that the different ages of the claimant and her comparator, or a hypothetical comparator, were ever a factor which influenced, either consciously or unconsciously, any decision by anybody in any of the decisions that were made.

121. The bold assertion made by Miss Millan that the respondent called the claimant into an informal meeting in order to start a process *because* they wanted to move towards dismissal and her suggestion that this is connected with age, is not supported by any direct evidence and we have not made any findings from which we could infer that this might be a factor.

122. We find that the respondent officers wanted to assist the claimant to return to work, and called the meeting as a supportive measure, to find out more about her situation her illness and any measure that may be taken to support her. We find that although the claimant experienced being called to a meeting as a stressful and potentially threatening event, it was always intended to be a supportive measure and in practise it was used by the respondent as a way of exploring with the claimant what was required to bring her back to work and as a way of putting in place supportive measures for her.

123. However, we have considered what the respondent's explanation would be if the burden of proof did shift to them, requiring a complete non-discriminatory explanation.

124. The consideration of causation requires us to consider whether or not an act is rendered discriminatory by motivation.

125. We observe that it is unusual to find direct evidence of discrimination and we accept that it would be an unusual individual who would admit any motivation based on age. We also accept that a claimant does not have to show any deliberate intention to discriminate because subconscious motivation based on a protected characteristic may be sufficient.

126. In this case, we conclude that the respondent has provided a true and complete explanation for the difference in treatment between the claimant and her comparator.

127. The comparator was treated as she was because the respondent had made reasonable adjustments for her in line with their duties under the Equality Act towards a disabled person.

128. Similar adjustments were not made for the claimant because she was not at that point, considered as or known to be a disabled person within the meaning of the Equality Act

129. Miss Millen suggests that the failure of the respondents to consider whether or not the claimant was disabled is a factor to take into account. We accept that it may be a factor, but we all agree in this case that the respondent did not consider it and that there was no particular reason why they ought to have done at that early stage. We do not conclude that the lack of consideration of the question indicative at all of any ulterior or different motive, rather we conclude that the first meeting was precisely to ask questions about the state of the claimants health and her future prognosis, and the help that might be given to her as set out above.

130. The respondent counsel, Mr. Perry reminds us that it is for the claimant to establish that she was treated less favourably than another because of a protected characteristic.

131. There is no evidence, he says, to support that and the only evidence the claimant has given is that she felt that it must be because of age because she could not see any other explanation.

132. We have no evidence before us at all of anyone from the respondent authority ever considering the age of the claimant at all either expressly or subconsciously, and we find they did not do so, in any of the decisions that they made.

133. The claimant raised age as an issue when she raised her grievance and whilst we find that the respondent was not particularly forthcoming to the claimant, in explaining why they had treated the comparator as they did.

134. In this case, the claimant was treated differently and arguably less favourably than another person of a different age.

135. We accept that the respondent focused on the reasons why they had treated the claimant as they did and focused on their assertion that none of their treatment of her was anything to do with age. They said and we accept that the policy provides a discretion for officers of the council to treat different people differently depending on their own individual circumstances.

136. We understand that the lack of information provided to the claimant at the point that the claimants grievance was dismissed, did have an impact upon her and did lead her to believe that the authority was not dealing fairly or honestly with her. even when it was explained later on in the litigation process that the claimant did not entirely trust or accept the explanation as the full or true explanation.

137. We find that since she was not provided with an explanation, it was not unreasonable for her to continue to question whether or not her age was any part of the reason why she had been treated in the way that she was.

138. Insofar as this led her to believe she had been discriminated against on grounds of age, we understand why she may have formed that view, but we conclude that she was not correct in her belief.

139. However, we accept as true, the evidence of the respondent witnesses that the real reason why the comparator was not called to a first meeting, and the claimant was , and was therefore treated differently under the policy, was because of the comparator's status as a disabled employee and the fact that reasonable ,adjustments had been made for her. This was not the case for the claimant and no adjustment to the policy was therefore made in her case.

140. We conclude that the real reason why no further information was provided until the case management hearing, was that that there were sensitivities around disclosing matters in relation to the comparators health to the claimant, and the claimant very fairly accepted this in evidence.

141. We conclude that this was the real reason for the difference in treatment and that it was nothing to do with age, or the difference in age.

142. We therefore reject the claimant's claim of age discrimination.

143. We have not therefore had to determine whether or not the claim was brought in time.

144. Miss Millen asserts that it would be just and equitable to extend time because the claimant was recovering from a mental health illness. We have heard no evidence at all about the state of her mental health in the period between her returning to work and the filing of her claim to the ET 25 April 2023 affected her . The meeting took place on the 19 May 2022. The claimant received an ACAS certificate by 14 April 2023.

145. In the absence of any evidence of why she had not been able to file her claim or approach ACAS earlier in the chronology, it is unlikely that we would

have been able to exercise our discretion to extend time, but we have not had to consider that matter.

Costs Application

146. The respondent applied for costs. Mr. Perry for the respondent asserted that the claimant had acting unreasonably in bringing proceedings or that she had pursued a claim which had no reasonable prospects of success.

147. The application was made in respect of costs incurred following on from the service of the respondent's skeleton argument on or about the 10 April 2024. At that at that point the claimant was not represented.

148. The skeleton argument set out in terms of the respondent's reasons for their treatment of the claimant and the comparator.

149. The respondent said that an attempt had been made to reach out to claimant which she had disregarded.

150. There was some lack of clarity about whether or not there had been a formal without prejudice save as to costs letter, and the respondent asserted that the claimant had raised the matter and therefore waived the cloak of privilege.

151. Miss Millen asserted that she had had a conversation about potential settlement but that it had not, as far as she was concerned, been without prejudice save as to costs, but was a without prejudice conversation.

152. Miss Millen asserted that a claimant is entitled to bring a claim if they consider they have been discriminated against and that this is what the claimant did. Miss Millen referred to the preliminary hearing and the case management hearing and reminded the tribunal that there was no mention of unreasonable behaviour. She suggested that the arguments in this case were finally balanced.

153. The tribunal unanimously rejected the application for a costs order.

154. The application was made on the basis that the claimant's conduct had been unreasonable in bringing the proceedings or that the claim had no reasonable prospects of success.

155. We find that there was no without prejudice save as to costs letter sent in advance of the case and whilst it is not necessary for a respondent to do that, where there was a litigant in person, even if the litigant is somebody who is a lawyer, it is sometimes helpful.

156. Further, the respondent has not at any point applied for a strike out of the claimant's case or indeed a deposit order in respect of any part of the claim. Whilst this does not prevent an application for costs being granted, if as the respondent now asserts, this was always a case with little or no reasonable prospects of success, that was one way of ensuring that the respondents views of the merits of the case were flagged up and discussed in advance of hearing. The respondent asserts that the claimant was unreasonable and that the claim had no reasonable prospects from the point at which the respondent skeleton argument was served. We observe that this took place a matter of days before the hearing.

157. In this case, one of the difficulties for the claimant was that the respondent was not clear and transparent at an early stage about the reason for the treatment of the comparator. The explanation in this respect was not provided until relatively late in the chronology. Whilst we have made findings about the reasons for this and whilst we accept that there was a genuine concern about breach of confidentiality, the information could we think have been provided to the claimant in a redacted form, so that the nature of the disability that the comparator was suffering would not have been disclosed.

158. We accept the explanation given by the respondents for that treatment but we accept it because we have heard sworn evidence from Mr Radcliffe. We note that in his witness statement, he still asserts that it was not reasonable or

fair to the comparator to submit her personal medical evidence or information in respect to health, to the tribunal. That was a decision made by the respondents but Mr. Perry in his skeleton argument at paragraph 5 refers to the difference of treatment of the comparator and states that the discretion was exercised in the comparators case by dispensing with the need for stage one meeting.

159. The fact that the comparator had kept the respondent informed as to her condition during her absence and did not shy away from communication assisted the exercise of Rs discretion. We note that we have no sworn evidence before us in respect of any communication between the comparator and the respondent authority and we note that the treatment of the comparator was a matter which required a factual determination by this tribunal.

160. In the absence of any documentation which might have supported the assertions being made by Mr Radcliffe in his statement, we think that the claimant was entitled to challenge the evidence. The claimant asserted that she did not accept that that was the true and valid reason. As observed by this tribunal and as submitted by Miss Millen, it is right that claimants do not always know what is in the mind of a respondent and that in a discrimination claim it is particularly difficult for a claimant to understand, in the absence of an explanation, why they have been treated as they have been.

161. Miss Millen has suggested that the question of whether something had no reasonable prospects of success is only ever met in the most obvious and plain cases in which there is no factual dispute. She referred to a case of QDOS v Swanson. We have not been able to locate it, but accept the broad proposition that where there is a factual dispute, it is unlikely to be a case with no reasonable prospects of success.

162. We agree that there was a factual dispute in this case and also refer to the case of *Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420 Court of Appeal* in which Mummery LJ, stated as follows at para 41

The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.

163. Having taken those matters into account we have considered whether we think the claimant was either unreasonable in proceeding with her claim having received the skeleton argument, or whether it could be said that there was no reasonable prospect of her case succeeding at that point.

164. Whilst we do not accept the submission made by Miss Millen that this was a finely balanced case, having heard and accepted the evidence given by Mr Radcliffe, and having found that the real reason for the treatment of the comparator and the real reason for the treatment of the claimant were nothing to do with age, that does not mean that there was no factual dispute. There was a dispute about the reason for the treatment, and there were reasons why the claimant did not accept the an explanation that we have accepted.

165. However, we observe that just because there was a central factual dispute in this case, does mean that it had reasonable prospects. We all consider that this was always a weak case, and we observe that the claimant has not been able to prove any fact which points to age as being a factor. However, we also observe that a claimant is often in a position where they are not able to prove facts until they come to the point of cross examining the witnesses in the case.

166. Had we rejected the evidence of Mr Radcliffe, the material circumstances of the parties may well have been found to be the same and the failure to

follow the strict letter of a policy and the different treatment of another person may well have been matters which would have given us a different pause for thought.

167. In these circumstances we do not consider that the claimant was unreasonable in pursuing her case and nor do we consider that it was a case that had no reasonable prospects of succeeding although we all agree that this was always a case that was a weak case and had little prospects of success.

168. For those reasons we find that the claimant was not unreasonable in pursuing her claim, and further conclude that this was not a case with o reasonable prospects of succeeding.

169. We therefore dismiss the costs application.

Employment Judge Rayner
Dated: 3 June 2024

Sent to the parties on: 21 June 2024

For the Tribunal Office:

Note: Reasons for the decision having been given orally at the hearing, written reasons will not be provided unless a written request is received from either party within 14 days of the sending of this record of the decision.