EMPLOYMENT TRIBUNALS

Claimant: Ms Michaela Smith

Respondent: The Department of Education

Heard at: **London Central Employment Tribunal (via CVP)**
On: 12th, 15th, 16th, 17th, 18th, 19th January 2024 and 22nd, 25th, 26th March 2024 (and 28th March 2024 and 8th July 2024 in Chambers)

Before: **Employment Judge Singh**
Ms G Carpenter
Mr M Cronin

Representation
Claimant: Ms Sarah Ismail (Counsel)
Respondent: Mr Max Shepherd (Counsel)

RESERVED JUDGMENT

1. The complaints of unfavourable treatment because of something arising in consequence of disability are not well-founded and are dismissed.

2. The complaints of a failure to make reasonable adjustments are well-founded and succeed.

3. The complaints of disability harassment are well-founded and succeed.

4. The claim will be listed for a further hearing on remedy.

REASONS

Introduction

1. The Claimant was employed by the Respondent, a government department, as a Teacher Development Policy and Delivery Senior Advisor from 31st January 2022. She resigned and her employment ended with effect on 31st October 2022.

2. The Claimant submitted her claims on the 23rd December 2022. Her claim form originally included claims for direct disability discrimination, indirect disability discrimination, automatic unfair dismissal and victimisation but these were withdrawn and dismissed upon withdrawal on the 24th April 2023.

3. A preliminary hearing for case management took place on the 24th April 2023 by CVP. At that hearing, the remaining claims were confirmed as

    i. Discrimination arising from disability (section 15 of the Equality Act 2010)
    ii. Failure to make reasonable adjustments (section 20 of the Equality Act 2010)
    iii. Harassment (section 26 of the Equality Act 2010)

4. The disabilities the Claimant replied upon were Complex Post-Traumatic Stress Disorder (CPTSD), Autism Spectrum Disorder (ASD), Dyslexia with traits of dyspraxia and dyscalculia and Long Covid.

5. The hearing was listed for 8 days between 10th-19th January 204. Unfortunately, due to judicial availability, the hearing could not start on the 10th January and was shortened to a 6 day hearing to begin on the 12th January 2024.

6. This was insufficient time for all the evidence to be heard and, as such, a further 3 days were required to complete the evidence, as well as short time for submissions.

7. It was not possible to deliberate and give an oral judgment in that time and so the tribunal panel met on the 28th March 2024 and 8th July 2024 for additional time to make the findings on the case.

The hearing

8. The hearing was held via CVP. Both parties were represented by Counsel.

9. The Claimant required a reasonable adjustment of more frequent breaks when giving evidence and was allowed to have her camera turned off when not giving evidence. However, this did not impact the flow of the case.

10. There were times when the tribunal asked the Claimant if she would like a break, but the Claimant declined the offer. On those occasions, the Claimant stated that stopping was not helpful to her and that she preferred to carry on and complete the questioning on a particular issue before the next break.

11. A list of issues had not been finalised at the case management hearing on the in April 2023. A draft version was presented to the tribunal at the start of the hearing and clarified and amended (in that some issues were withdrawn) by agreement of the parties. The issues are set out in the relevant section below.

12. The witnesses listed below attended to give evidence.

    For the Claimant

    - The Claimant herself

- Simon Foster (her Trade Union representative)

For the Respondent
- Freya Lock
- Lisa Ireland
- Chris Armstrong-Stacey
- Lorna Howarth
- William Brown

13. Caroline Jones was not able to attend the reconvened part of the hearing due to illness. In order to avoid the hearing having to be relisted for a further date in the future, the parties agreed between themselves that Ms Jones' witness statement would be submitted as evidence but not accepted as unchallenged by the Claimant. Instead, any issues of contention in her statement would be raised in submissions.

14. Towards the end of the 3rd day, the Claimant's representative indicated that she wanted to take instructions from the Claimant about the ASD disability and whether she wished to continue to include it as part of her claim. As the Claimant was under oath at the time, Counsel was given permission to discuss this and only this with the Claimant. Counsel was trusted to act within their professional boundaries.

15. At the start of the 4th day, the Claimant's representative confirmed that the ASD disability was now no longer being relied upon.

16. On day 6, the Claimant's representative made an application to amend the claim. They wished to amend the wording of one of the "arising from disability" claims so that it was expanded. The tribunal panel heard from both representatives about the application.

17. The Claimant's representative accepted that the application was very late in the proceedings, given that we were already into the Respondent's evidence, but stated that this was purely their fault for not spotting the point earlier.

18. Ms Ismail stated that the nature of the amendment was relatively small as it was only the adding of a word to the List of Issues. She argued that the Claimant's Scott Schedule had made reference to the issue and that allowing the amendment would not cause hardship to the Respondent as the they had had time to prepare to address it. They had also already asked questions about the issue in her evidence, so the matter had been properly ventilated.

19. In contrast Mr Shepherd did not agree that the matter had been properly dealt with during the Claimant's cross examination. His questions had been prepared based on the previously agreed list of issues and he would have added more if the amendment had been made before the start of the hearing.

20. Mr Shepherd argued that the additional word broadened the claim significantly and significant prejudice would be suffered by the Respondent if it was allowed. The Claimant would need to be recalled to give evidence and time would be needed to prepare, prolonging the length of the hearing.

21. After considering the weight or hardship and prejudice on each party if the amendment was allowed or not, it was decided by the panel that the application would not be

allowed. It was felt that the hardship on the Respondent far outweighed that on the Claimant. Mr Shepherd's grounds were persuasive in that respect. It was also felt that allowing such a late amendment was not in the interests of justice. Parties should arrive at the hearing confident that they know what the issues are and what will be argued. Allowing claims to be reshaped as the hearing goes on creates uncertainty and risks unfairness as parties may be unprepared.

The issues

Disability

22. The Respondent accepted that the Claimant had the disability of CPTSD.

23. In relation to the remaining disability of Dyslexia with traits of dyspraxia and dyscalculia, the Respondent conceded that the Claimant had this impairment but did not accept that this met the definition of disability under the Equality Act 2010.

24. For that impairment the tribunal needed to determine whether the impairment had a long-term substantial adverse effect on the Claimant's ability to carry out day to day activities?

25. For both conditions, the Respondent denied that it had knowledge for the entirety of the relevant period.

Discrimination arising from disability

26. Did the Respondent treat the Claimant unfavourably by;

    i. Extending her probation on 5th July 2022 by 3 months?
    ii. Refusing to grant her disability leave which resulted in her receiving half pay for 19 days whilst on sickness absence and being subject to the managing unsatisfactory attendance policy?

27. Was the reason for the treatment the following things?

    i. In relation to the extension of the probation period, the Claimant contends that she relies upon the Respondent's view that the Claimant was underperforming in funding, asked too many questions about funding and was not an 'expert' in funding as the "something arising in consequence" of her disability
    ii. In relation to the refusal of disability leave, the Claimant relies upon the Claimant's need to take time off work whilst reasonable adjustments were implemented as the "something arising in consequence".

28. Did those things arise in consequence of her disabilities?

    i. In relation to the probation allegation, the Claimant contends that she struggled with numbers because of her traits of dyscalculia, dyspraxia and dyslexia and the exacerbation of her CPTSD and that she required support and training as a result of these disabilities.
    ii. In relation to the disability leave allegation, the Claimant claims that she required reasonable adjustments due to the exacerbation of her CPTSD,

which was caused by the Claimant working in an environment that was not psychologically/emotionally safe.

29. If so, was the treatment a proportionate means of achieving a legitimate aim?

    i. In respect of the probation period claim, the Respondent contends that the legitimate aim was that of establishing that an employee was able to perform the requirements of the post in which they are employed
    ii. In respect of the disability leave claim, the Respondent contends that that the legitimate aim was the aim of ensuring the appropriate and efficient use of financial resources to support disabled employees in circumstances where disability necessitates absence from work when an employee is actually fit for work.

30. The Tribunal will decide in particular:

    a. was the treatment an appropriate and reasonably necessary way to achieve those aims.
    b. could something less discriminatory have been done instead.
    c. how should the needs of the claimant and the respondent be balanced?

31. At the times that the Claimant was subjected to that treatment, did the Respondent have knowledge, or ought to have knowledge that the Claimant had the disabilities of CPTSD and/or dyslexia with traits of dyscalculia and dyspraxia?

<u>Failure to make reasonable adjustments</u>

32. Did the Respondent know, or could it reasonably have been expected to know that the claimant had the disability of CPTSD? If so, from what date?

33. The Respondent accepts that it had the following provisions, criteria or practices (PCPs)

    i. The requirement that the Claimant take sickness absence when sick?
    ii. The requirement that the Claimant work in her team (the ECF Policy Unit)

34. Did the PCPs put the Claimant at the following disadvantages, compared to someone without the Claimant's disability?

    i. The Claimant's CPTSD was exacerbated due to the stress of being on Sickness Leave rather than Disability Leave.
    ii. The Claimant was more likely to be subject to the Respondent's 'managing unsatisfactory attendance' policy and the 'effect of sickness absence on pay' policy due to her need for adjustments.
    iii. The Claimant was working in an environment that was not psychologically/emotionally safe for her.

35. Were they substantial disadvantages?

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

37. What steps could have been taken to avoid the disadvantage? The claimant suggests:

a. To allow her to take disability leave rather than sickness absence.
b. A workplace needs assessment.
c. Managed move to a different team within the Department for Education.
d. To be redeployed or placed on paid leave.

38. Was it reasonable for the Respondent to have to take those steps?

39. If so, did the Respondent fail to take those steps?

<u>Harassment</u>

40. Did the Respondent engage in the following conduct?

    i. A Teams message from Chris Armstrong-Stacey to Lisa Ireland on 27 September 2022 stating "A MH organization championing her?! WTaF." The initials "MH" refer to "Mental Health" and the initials "WTaF" were confirmed to have meant "what the actual fuck". This message was obtained by the Claimant in a Subject Access Request in December 2022.
    ii. A Teams message from Michelle Hindmarch to William Brown on 27 September which states "But basically it will be a polite piss off. She sent a letter from a rape counsellor in last week." This message was obtained by the Claimant in a Subject Access Request in December 2022.

41. If so, was this unwanted conduct?

42. Did it relate to the Claimant's disabilities?

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

44. Was it reasonable for the conduct to have that effect, taking into consideration the Claimant's perception and the other circumstances of the case?

<u>The Law</u>

The Relevant law is as follows

<u>Discrimination arising from disability</u>

45. Section 15 of the Equality Act 2010 states that it is unlawful for an employer or other person to treat a disabled person unfavourably because of something which arises from, or in consequence of the person's disability. That treatment will be unlawful unless the employer can justify the treatment as a proportionate means of achieving a legitimate aim.

46. Knowledge, or constructive knowledge of the disability is essential as the employer must have this to be liable.

47. In ***Secretary of State for Justice and anor v Dunn EAT 0234/16*** the EAT identified the following four elements that must be made out in order for the claimant to succeed in a <u>S.15</u> claim:

a. there must be unfavourable treatment
b. there must be something that arises in consequence of the claimant's disability
c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and
d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

48. Given that the claim is about "unfavourable" treatment, rather than "less favourable treatment", there is no requirement for the Claimant to rely upon a comparator.

49. In ***T-Systems Ltd v Lewis EAT 0042/15*** the EAT thought that the phrase 'something arising in consequence of' the disability should be given its ordinary and natural meaning.

50. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT**, Mr Justice Langstaff, explained that there is a need to identify two separate causative steps for a claim under S.15 EqA to be made out.

a. the disability had the consequence of 'something', and
b. the claimant was treated unfavourably because of that 'something'.

51. In ***Pnaiser v NHS England and anor 2016 IRLR 170, EAT***, Mrs Justice Simler summarised the proper approach to establishing causation under S.15.

52. First, the tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.

53. Mrs Justice Simler made clear in ***Sheikholeslami v University of Edinburgh*** that the question of whether the 'something' arose in consequence of the disability is a question of objective fact for an employment tribunal to decide in light of the evidence presented to them.

54. If it is found that the Claimant suffered unfavourable treatment because of something arising from their disability, the employer can defend their actions if they can show they were a proportionate means of achieving a legitimate aim.

55. The employer must first identify an aim that is legitimate, and the treatment of the Claimant must be a proportionate way of achieving that aim.

Duty to make reasonable adjustments.

56. Section 20(3) of the 2010 Act provides that the duty to make adjustments arises where an employer's PCP (that is a provision, criterion or practice- a workplace rule or policy or procedure) "puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled". A one-off act can be a PCP for the purposes of a section 20 claim.

57. It is for the disabled claimant to identify the provision, criterion or practice ("PCP") of the respondent on which she relies and to demonstrate the substantial disadvantage to which she was put by that PCP.

58. It is also for the disabled claimant to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; he need not necessarily in every case identify the step(s) in detail but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable.

59. There must be before the tribunal facts from which, in the absence of any innocent explanation, it could be inferred that a particular adjustment could have been made: **Project Management Institute v Latif [2007] IRLR 579**.

60. A Tribunal must first identify the PCP that the respondent is said to have applied: **Environment Agency v Rowan [2008] IRLR 20.**

61. There must be a causal connection between the PCP and the substantial disadvantage contended for: as was said in the decision in **Nottingham City Transport Ltd v Harvey UKEAT/0032/12,**

"It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(i) of the Disability Discrimination Act 1995 provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP."

62. The test of reasonableness is an objective one: **Saveraux v Churchills Stairlifts plc [2006] ICR 524, CA.**

63. Making a reasonable adjustment may necessarily involve treating a disabled employee more favourably than the employer's non-disabled workforce.

64. "Steps" for the purposes of section 20 of the 2010 Act encompasses any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP

65. It is important to identify precisely what constituted the "step" which could remove the substantial disadvantage complained of: **General Dynamics Information Technology Ltd v Carranza [2015] ICR 169.**

66. It can be a reasonable adjustment if there is a prospect that the adjustment would prevent the claimant from being at the relevant substantial disadvantage without there needing to be a good or real prospect: **Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10.**

67. Thus, it is not for the claimant to prove that the suggested adjustment will remove the substantial disadvantage, it is sufficient if the adjustment might give the claimant a chance that the disadvantage would be removed and not that it would have been completely effective or that it would have removed the disadvantage in its entirety: see

Griffiths and South Staffordshire and Shropshire Healthcare NH Foundation Trust v Billingsley UKEAT/0341/15 in which it is stated as follows:

"Thus the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under Section 15(1) of the 2010 Act."

68. Notwithstanding the above, in **Romec Ltd v Rudham [2007] UKEAT 0069/07/1307** it was held that the essential question for an employment tribunal is whether the adjustment would have removed the disadvantage experienced by the claimant. In that case, in remitting the issue to the same tribunal, the EAT directed that if the tribunal concluded that there was no prospect of the suggested adjustment succeeding, it would not be a reasonable adjustment: if, however, the tribunal found a real prospect of the adjustment succeeding it might be reasonable to expect the employer to take that course of action.

69. Thus, an employer can lawfully avoid making a proposed adjustment if it would not be a reasonable step to take **Royal Bank of Scotland v Ashton [2011] ICR 632.** Similarly, the Code, at paragraph 6.28, provides that one of the factors that might be taken into account when deciding what is a reasonable step for an employer to take is, "whether taking any particular steps would be effective in preventing the substantial disadvantage".

70. Once a potential reasonable adjustment is identified, the onus is cast on the respondent to show that it would not have been reasonable in the circumstances to have had to take the step: **Latif.**

71. The question of whether it was reasonable for the respondent to have to take the step depends on all relevant circumstances, which will include the following:

i. the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

ii. the extent to which it is practicable to take the step;

iii. the financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of the respondent's activities;

iv. the extent of the respondent's financial and other resources;

v. the availability to it of financial or other assistance with respect to taking the step;

vi. the nature of its activities and the size of its undertaking.

72. If a Tribunal finds that there has been a breach of the duty, it should identify clearly the PCP, the disadvantage suffered as a consequence of the PCP and the step

that the respondent should have taken.

Harassment

73. Section 26(1) of the Equality Act 2010 states that a person harasses another if

    a. A engages in unwanted conduct related to a relevant protected characteristic, and
    b. The conduct has the purpose or effect of-
        i. Violating B's dignity, or
        ii. Crating an intimidating, hostile, degrading, humiliating or offensive environment for B.

74. Section 26(4) states that "in deciding whether the conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-

    a. The perception of B
    b. The other circumstances of the case
    c. Whether it is reasonable for the conduct to have that effect."

75. Mr Justice Underhill in the case of ***Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT*** stated that it would be "healthy discipline" for a tribunal to consider 3 essential elements when considering a claim for harassment. They were whether there was unwanted conduct, whether that had the proscribed purpose or effect and whether it related to the relevant protected characteristic.

76. The ECHR's Code of Practice on Employment notes that unwanted conduct can include a wide range of behaviour, including "*spoken or written words or abuse, imager, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour"*

77. The conduct can be blatant or subtle and an omission or failure to act can constitute conduct as well.

78. In ***Reed and anor v Stedman*** the EAT held that the word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited'. The EAT in ***Thomas Sanderson Blinds Ltd v English EAT 0316/10*** pointed out that *unwanted conduct* means conduct that is unwanted *by the employee*.

79. The two strands of the definition regarding the purpose or effect of the conduct are disjunctive. A claimant only has to show that the conduct had the purpose or effect *either* of violating dignity *or* of creating the proscribed environment — the claimant does not have to show both.

80. In ***Hartley v Foreign and Commonwealth Office Services 2016 ICR D17, EAT*** the EAT stated that a tribunal considering the question posed by S.26(1)(a) must evaluate the evidence in the round, recognising that witnesses 'will not readily volunteer' that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic 'cannot be conclusive of that question'. The EHRC Employment Code adopts a similarly broad interpretation of the term 'related

to'.

Findings

Disability

81. In relation to the Claimant's neurodivergent condition- that is dyslexia with traits of dyspraxia and dyscalculia, it was the tribunal's finding that this was a disability within the definition in the Equality Act 2010.

82. The bundle of documents included a Lexxic report (page 566) which looked specifically at neurodiversity. The Claimant attended assessments on the 9th and 16th August 2022 which were carried out by a qualified psychologist. The Report was commissioned by the Respondent. The report therefore carried out significant evidential weight in our opinion.

83. The report diagnosed the Claimant with a specific learning difficulty of dyslexia with significant traits of dyspraxia and dyscalculia.

84. The test for disability is not a medical test but a legal one, and a diagnosis alone is not sufficient. The tribunal took into account the findings of the report which detailed the impact the condition had on the Claimant's day-to-day life, as well as the Claimant's own evidence on this.

85. The report identified that the Claimant had difficulty taking in verbal information and particularly so when that is verbal information containing numerical values. The tribunal accepted that this would be a hinderance in day-to-day life. She was also stated as having difficult taking in written text which contained numerical values and spotting mistakes relating to numerical values.

86. The Claimant stated that she confuses left from right, struggled to read maps and follow directions and cannot ride a bike. She never learned to ride a bike. If she had to carry a tray of food or drinks, she would most likely drop or spill them. She is dependant on her husband to carry out day to day tasks such as unloading the dishwasher, washing up and doing the ironing because of accidents she has whilst doing them.

87. She stated that she struggled with mental maths and used a calculator or relied upon family and friends for everyday maths.

88. The report identified a significant weakness in the Claimant's working memory and processing speed.

89. In her oral evidence the Claimant explained that she would have difficulties looking at documents with numbers. She relayed an incident where she was asked to look at a spreadsheet and it was a jumble of numbers.

90. She reported an incident of playing games with her 8-year-old child and her memory being so poor that she could not hold the names of 4 colours and their meanings in her head. She stated that she regularly forgets things in shops and when cooking. She stated she did not understand bank statements.

91. Although the Respondent highlighted parts of the report and the Claimant's own evidence where she states that some of intellectual abilities are higher than average, we recognised that neurodiversity conditions are complex to unpick. As the Claimant stated by way of analogy, her brain functioned like a stove where if one ring was on full heat, the others were significantly weaker. We understood that there was an interplay of the aspects of her neurodivergence with each other and it was almost impossible to unpick and separate them out. The Claimant may have presented at times as articulate and intelligent but this would not mean that she could not have difficulties at other times or in other aspects of her life.

92. Taking into account the test for disability which requires us to decide whether the Claimant's impairment has a substantial (that is, more than trivial) impact on her ability to carry out normal day to day activities, we were satisfied that it did from the examples the Claimant had given to us and the in the Lexxic report. We were also satisfied that this condition was long term. We accepted the Claimant's evidence that she had suffered from the manifestations of these conditions for a number of years, going back to her childhood at school.

93. On that basis we found that the Claimant's neurodivergent condition of dyslexia with traits of dyspraxia and dyscalculia did amount to a disability under the Equality Act 2010.

<u>Discrimination arising from disability</u>

I) Extending the probation period on 5th July 2022

94. On the 5th July 2022, Lisa Ireland notified the Claimant that her 6-month probation period, which was due to end on the 30th July 2022, would be extended by three months to 30th October 2022.

95. Prior to that decision, a number of performance issues had arisen about the Claimant's work. These issues were raised by task managers and fed back to the Claimant's line manager at the time, Robyn Leonard.

96. From the start of her employment, there were no significant issues for the first 3 months, however there were areas identified for improvement. More serious concerns were picked up from June 2022.

97. A copy of the review meeting from that month (ABLE meeting in the Respondent's parlance) was provided at page 268. In it, Ms Leonard identified that the Claimant had not improved on the areas that had previously been raised with her and there were now larger issues.

98. For example, the Respondent considered that documents were submitted by the Claimant which missed key sections and the Claimant required a lot of support to correct this. While the Respondent recognised that this was the Claimant's first role outside the teaching profession, they felt that she was still underperforming compared to their expectations There were errors in other documents, and it was clear there was a lack of attention to detail in drafting. The Respondent felt that the Claimant hadn't stepped up to the role of knowledge lead for her area as expected.

99. The Claimant replied to that feedback and explained more about her CPTSD and how it

affected her in the workplace. She explained that she sometimes felt unsafe and vulnerable at work, and this led to her avoiding asking questions for fear of being perceived stupid.

100. In Ms Ireland’s email, she stated that the probation would be extended so that the Claimant had sufficient time to respond to the feedback on her work and improve on the areas of underperformance that had been identified.

101. The Claimant claims that this was an act of discrimination arising from disability. The Claimant claims that it was unfavourable treatment to extend her probation and instead the Respondent should have paused it. The Claimant claims that the reason for her underperformance was because she was being asked to carry out a role which required a lot of numeracy, and this was something that she struggled with because of her disability. She also claimed that her CPTSD had affected her performance at work.

<u>Were the acts unfavourable treatment?</u>

102. The Respondent disputed that both acts were unfavourable treatment.

103. In relation to both, the tribunal was satisfied that they were unfavourable treatment.

104. In relation to extending the Claimant’s probation, the tribunal accepted the Claimant’s submission that this was an act of unfavourable treatment. As explained by the Claimant’s representative, there was an earlier trigger point for attendance management for employees on probation and they had a smaller pro-rata annual leave entitlement. We also accepted that employees in probation are subject to greater scrutiny and review in their work. It is almost certain that an employee would feel under a greater degree of stress and pressure knowing that they are at risk of termination if they fail their probation.

<u>Was the unfavourable treatment because of something arising in consequence of the Claimant's disability?</u>

105. As set out above, the Claimant alleged the reason her probation was extended was because the Respondent viewed her as under performing the funding aspect of her work, that she asked too many questions about funding and was not an expert in that area.

106. The Claimant claimed that this was something that arose in consequence of her disability was because she struggled with numbers due to her neurodivergent condition and the exacerbation of her CPTSD.

107. We first considered whether the Claimant’s underperformance at work was something that arose in consequence of her disability. It was our opinion that it did.

108. The Respondent’s position was that the Claimant’s role was not a numbers role but one where she would be the department representative on a project which related to funding. The Respondent argued that other members of the project team would be carrying out the numerical work and therefore any disability the Claimant had that impacted her mathematical skills would have little or no impact on her ability to carry out her role.

109. However, we took into account an email from Robyn Leonard on the 29th June 2022 to the Claimant (page 264). In that email, Ms Leonard went through the failings identified in the last review meeting with the Claimant. We noted that in that email Ms Leonard states to the Claimant

"…*but it remains the fact that you are the teams funding lead and should have a secure understanding of this area".*

110. Even though the Claimant may not have had to carry out calculations, she was expected to be able to understand the work that she was looking at and taking in numerical data, which was one the specific weaknesses identified as being caused by her condition.

111. A further example was the duplicated payment which the Claimant approved to schools. This was clearly an error by the Claimant and one which was identified as a performance issue by the Respondent. The Claimant explained that she had been asked to look at a spreadsheet with lots of number on it which she found difficult. Again, this is one of the aspects of her neurodivergent condition.

112. The Claimant also gave evidence that she responded badly to her interactions with Ms Leonard which were exacerbated by her CPTSD.

113. The Claimant felt that she wasn't getting the support she needed to get to grips with a new area of work for her and this caused the symptoms of her CPTSD to be exacerbated.

114. The Claimant's submissions drew our attention to the case **Baldeh v Churches Housing Association of Dudley & District Ltd** which was authority for the principle that the "something arising" need not be the only reason for the unfavourable treatment, it only needs to have a significant influence on it.

115. It was our finding therefore that the Claimant's performance issues did arise in consequence of her disability. Although we accept that anyone starting in a new field would have had teething problems, it is clear the Claimant's struggles were beyond this and were more in-depth and it is our finding that the Claimant's CPTSD and neurodivergent conditions were the more significant reason she was making mistakes and underperforming.

Was the treatment a proportionate means of achieving a legitimate aim?

116. The Respondent submitted that the legitimate aim in relation to the probation was that of establishing that an employee is able to perform the requirements of the post in which they are employed.

117. The tribunal accepted that this was a legitimate aim. Any employer will want to ensure that a new employee can do the work they are assigned and this is of benefit to the employer, the employer and any stakeholders or clients.

118. We then considered whether it was a proportionate means of achieving that aim to extend the probation as the Respondent did. In order to consider that we looked at the

options that were available to the Respondent at the time.

119. It was accepted that the Claimant was struggling with her work and had performance issues. Towards the end of the probation period, the Respondent had, in our opinion, 3 options available to them. They could either pass the Claimant's probation, fail her probation (and dismiss her) or extend it.

120. In relation to the first option, the evidence from the Respondent was that if they were going to pass her probation, that would be a conditional pass. She would not be passed and just be allowed to continue working. Instead, she would be placed under performance measures which would have meant deep scrutiny of the Claimant's work and regular performance meetings.

121. We do not accept that it would have been reasonable for the Respondent to simply pass the Claimant. She was not performing to a standard that would allow her to continue in her employment unchecked.

122. In comparison to the two other options available to the Respondent (to dismiss the Claimant or pass her probation and then place her on performance measures) we found that the option that the Respondent took, to extend the Claimant's probation was the most reasonable and least harsh.

123. We accepted the evidence of Freya Locke who stated that the purpose of the probation extension was to provide additional time for the Claimant to show she was meeting the required standard and, in that time, for recommendations from Occupational Health (OH) to be received and implemented as was reasonable.

124. The passing of the probation and placing on a performance management process may have had a similar result but it is our finding that this would have been considered to be a more punitive measure with negative connotations.

125. The Claimant argued that suspending probation would have been a more reasonable option. Whilst we accept that the Respondent had the option to suspend probation, we did not consider that the Claimant met the criteria for suspension of her probation. It was clear from the Respondent's policy that probation suspension was to be used if an employee had a long period of absence from work (such as maternity leave or sickness absence). It was not the Claimant's position that the Respondent was unable to assess her suitability because she hadn't been at work for a sufficient period of time. The Claimant had been at work but had been underperforming. As such, we do not consider that this is an option the Respondent should have taken.

126. Even if this was a possible option for the Respondent, the test we had to consider is whether the Respondent's actions were proportionate. An employer can act proportionately even if they don't take the least stringent option. In the circumstances we found that the Respondent's actions in extending the probation was a proportionate means of achieving a legitimate aim and, as such, this claim fails.

127. As we found that the claim fell at this hurdle, we did not go on to consider knowledge of the disability.

II) <u>Refusing to grant disability leave.</u>

128. The Claimant attended a further meeting to discuss her performance on the 17th August 2022. Between the extension of probation meeting to this one, there had been further issues with the Claimant's work raised.

129. Following that meeting, she submitted a request for disability leave for the next 2 days. In her email (page 616) the Claimant said that her health was being significantly impacted by work related stress and she needed time to recover.

130. Initially, Ms Ireland granted the request, but after discussing it with HR, advised the Claimant that the request was refused as the Claimant's situation did not meet the criteria for which disability leave is granted. The Claimant was advised that if she was to be absent, that would be classed as an ordinary sickness absence policy.

Was it unfavourable treatment?

131. As above, we found that refusing to grant disability leave was an act of unfavourable treatment. We considered the Respondent's disability leave policy. The effect of disability leave was that employees would be able to take off time with full pay. That time off would not count as sickness absence and this would mean that period would not count towards any trigger point for attendance management, nor would it impact any entitlement to sick pay which the Respondent only pays for 1 month. The Claimant explained that, when her request for disability leave was refused, the uncertainty regarding both things caused her distress.

Was the unfavourable treatment because of something arising in consequence of the Claimant's disability?

132. In relation to this act, the Claimant alleged that the "something arising in consequence of" was that she needed to take time off work whilst reasonable adjustments were implemented and that that arose in consequence of her disability of CPTSD as she required reasonable adjustments due to the exacerbation of her condition which was caused by having to work in an environment that was not physiologically or emotionally safe for her.

133. The Respondent's witnesses gave evidence as to why the Claimant's request for Disability Leave was refused. From their evidence, the tribunal concluded that it was not the case that the Claimant was refused the leave because of the something arising from, but actually the opposite.

134. The request for leave was first made to Lisa Ireland on 17th August 2022. The Claimant requested 2 days as she said her health was being significantly impacted by work related stress and she needed time to recover. Ms Ireland initially replied the same day to say that she agreed that this was a good idea.

135. However, just over an hour later, Ms Ireland emailed the Claimant again to say that she had made an error. She explained that HR direct was that Disability Leave did not apply to the Claimant's situation and that her absence should fall under the sickness absence policy.

136. Ms Ireland quoted the policy which states that

"Disability leave does not apply to cover:

- Periods of sickness absence, regardless of whether the ill-health is directly related to the disability."

137. Ms Ireland was questioned on what had happened in the hour. She explained that she had spoken to William Brown from HR. Mr Brown was asked to explain the reason for advising Ms Ireland to change her decision.

138. A copy of the policy was also reproduced in the bundle at page 1620. It stated that

Employees with a disability can apply for disability leave if they are fit for work but need time off to attend appointments for treatment, rehabilitation, assessment or in exceptional circumstances, if they are notable to work safely or effectively until new or improved workplace adjustments are put in place.

139. Mr Brown explained that the Claimant had tried to rely on the policy in the exceptional circumstances situation. This was not a case where the Claimant needed time off to attend an appointment or rehabilitation or assessment.

140. He said that his interpretation of the policy was that a disabled employee who had been assessed as requiring a reasonable adjustment but was waiting for that adjustment to be put in place would be entitled to be placed on disability leave in the interim, until it was put in place. He gave an analogous example of a visually impaired employee for whom a screen reader has been identified as a required reasonable adjustment but is waiting for the reader to be installed.

141. He stated that he did not believe that this situation applied to the Claimant. The Claimant had not had any reasonable adjustments identified that she was waiting for and therefore Disability Leave did not apply.

142. The situation was reviewed later by Chris Armstrong-Stacey who gave a similar reasoning for rejecting the Claimants request for a longer period of Disability Leave. He explained that he read the policy as only applying if someone was not able to work safely until agreed adjustments had been put in place. Again, he did not believe that this situation applied to the Claimant. He accepted that she had provided a sick note saying she was not fit for work but said that he would have required an Occupational Health Report identifying clearly specific adjustments that needed to be implemented before the Claimant could return. Only then would Disability Leave be appropriate in his opinion. It was a constant theme of the Respondent that they would say they would review matters once the OH report had been provided, but ignored the fact that adjustments might have been necessary and identifiable even before then.

143. It was clear then to the tribunal then that the reason the Respondent hadn't allowed the Claimant to take Disability Leave was because they did not believe that the policy applied to her. Specifically, they did not consider that she was "awaiting" adjustments to be implemented and that her absence was a sickness absence, which the policy specifically excludes.

144. The Claimant's claim is that the Disability Leave was refused because of her need to take time off work whilst adjustments were implemented. This was not the case at all. If

the Respondent did not believe the Claimant was waiting for further adjustments to be implemented, this cannot have been the reason for them refusing her Disability Leave.

145. As the tribunal could not find that the alleged "something arising" was the reason for the unfavourable treatment, this claim therefore failed. The tribunal did not consider it necessary to determine whether the treatment was a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

PCP 1: The requirement that the Claimant take sickness absence when sick

146. This complaint overlapped with the above discrimination arising from disability claim.

147. The Claimant alleged that the requirement to take sickness absence when sick placed her at a substantial disadvantage and that the Respondent should have made the reasonable adjustment of allowing her take time off as Disability Leave instead.

Knowledge

148. The primary issue we considered is whether or not the Respondent had actual or constructive knowledge of the Claimant's disability. The duty to make adjustments does not arise if the Respondent did not know of the CPTSD or could be expected to know about it during the relevant period.

149. In this case, the Claimant stated that she completed a pre-employment questionnaire that she had CPTSD and that she had a health-related absence for a full school term in 2021. She stated she was willing to discuss it with Occupational Health at the Respondent if needed.

150. The Respondent's witnesses stated that although this form was completed before the Claimant started it was not passed on to any of her managers. The only people who would see it would be those in HR.

151. The Claimant's Counsel submitted that there is actual knowledge as information shared with one person at the Respondent should be deemed as being shared with the Respondent as a whole.

152. We were persuaded by this reasoning. The Claimant could not be expected to declare to every person she came into contact with what her medical conditions were, especially when they are sensitive. She had done what she needed to do by disclosing this information in the pre-employment questionnaire when requested.

153. The Claimant made reference to a pre-existing medical condition with Ms Leonard on the 7th April 2022. Ms Leonard could have made further enquiries with HR at that point and found out the details. Ms Leonard certainly knew the details of the CPTSD from 17th June 2022 as she informs her superiors that the Claimant had CPTSD on that date.

154. We found therefore that the Respondent had actual knowledge of the CPTSD from the start of the Claimant's employment and therefore during the relevant period for the claims for failure to make reasonable adjustments.

Did the Respondent apply the PCP of requiring the Claimant to take sickness absence when sick?

155. The Respondent accepts that this was a PCP that they applied to all staff.

Did the PCP put the Claimant at a substantial disadvantage, compared to someone without the Claimant's disability?

156. The Claimant argued that she had suffered the following disadvantages in relation to the PCP of being required to only take sick leave instead of Disability Leave.

    i. The Claimant's CPTSD was exacerbated due to the stress of being on Sickness Leave rather than Disability Leave.
    ii. The Claimant was more likely to be subject to the Respondent's 'managing unsatisfactory attendance' policy and the 'effect of sickness absence on pay' policy due to her need for adjustments.

157. We found that the Claimant would have been placed at these disadvantages compared to someone without her disability and that they would have been substantial disadvantages.

158. In relation to the attendance and pay policies the Respondent confirmed that these policies would apply for the Claimant's absence on sick leave. No exception was being made for her. Someone without her disability would be less likely to be absent and require time off under sick leave. No exception was made for the Claimant.

159. The Claimant gave evidence as to how she was distressed knowing that her absences under sick leave would be accumulating when her request for Disability Leave was not agreed and that she would likely eventually hit the triggers for half or zero pay. She was also worried that she may eventually hit the triggers for formal attendance management procedures which could lead to dismissal.

160. The Claimant states in her email of the 17th August 2022 (page 613) that taking sick leave will exacerbate her anxiety and stress around work.

161. The Respondent sought to argue that this was not connected with the Claimant's disability due to the fact anyone going through performance management procedures would be stressed at that time. However, we decided that the Respondent was ignoring the fact of the Claimant's disability and the nature of it. It is almost certain in our opinion that the Claimant would be more acutely affected by stress because of her CPTSD.

162. In her email of the 30th June 2022, the Claimant gives details about the CPTSD she suffers from and how it manifests "mostly in a lack of a basic sense of safety, lack of confidence, anxiety and emotional flashbacks." She goes on to say, "A person with CPTSD might react to events in the present as if they are causing these feelings…."

163. It was our finding, based on this explanation and the Claimant's evidence about how she reacted to the treatment she was being subjected to at work, that her absence was linked to her disability. She did not feel safe at work and did not wish to attend until the situation had been addressed.

164. Further, we found that this explanation gave the Respondent knowledge of the disadvantage.

Was it reasonable for the Respondent to have to take the following steps suggested by the claimant?

a. To allow her to take disability leave rather than sickness absence.

165. The timeline of events is that after the Claimant's request for disability leave was initially rejected on the 17th August 2022, she wrote on the 18th August 2022 setting out concerns about how she had been treated. This was treated as a grievance by the Respondent and Caroline Jones appointed to investigate and make a decision on it.

166. In her email of the 18th August 2022 (page 665), Ms Lock stated that although Disability Leave was deemed not appropriate at that time, the Respondent would reconsider the position once an OH assessment was received. If it did identify "something relevant" Ms Lock states that the Respondent can consider backdating the Disability Leave.

167. Following the complaints the Claimant had raised, which were partially against Ms Lock and Ms Ireland, Chris Armstrong-Stacey stepped in to engage with the Claimant. He had a "informal review conversation" with her on the 2nd September 2022. In that meeting the Claimant asks for 2 adjustments- a move to a different team/department and for her probation to be suspended. She did not appear to have renewed her request for Disability Leave to Mr Armstrong-Stacey at that time.

168. Nevertheless, he spent a great deal of his witness evidence on this and why he did not consider it appropriate. His position was that he did not consider the Disability Leave (DL) policy to apply as the Claimant was not at that point waiting for an agreed adjustment to be put in place.

169. Mr Armstrong-Stacey was challenged on this. It was put to him that identifying the appropriate adjustment for mental health conditions would usually be more difficult than for a physical impairment and the very act of waiting for the adjustments to be identified through an OH assessment is part of the process putting those adjustments in place, which is in scope of the DL policy. Mr Armstrong-Stacey rejected that suggested and stated he had applied the policy in the "spirit in which it was written".

170. On the 9th September 2022, the Claimant sends to the Respondent the Lexxic report and renews her request to be granted DL (page 960). The report diagnoses her Neurodivergent conditions but does not make a specific recommendation in relation to moving teams or being placed on DL.

171. In response, Ms Ireland states that the decision about DL cannot be reviewed before a further OH report about CPTSD is received.

172. In an email to Mr Armstrong-Stacey dated 13th September 2022 (page 969), Ms Ireland confirms that the Claimant's absence is still classed as sick leave. She acknowledges that there is a sick note that says the Claimant can work with adjustments made (that is

to move the Claimant to another team). However, she says that as the Respondent does not consider that they can make that adjustment, they consider the Claimant's status to be "not fit to work".

173. The adjustment being referred to is a move to another team. In the meeting on the 2nd September 2022, and in his witness evidence, Mr Armstrong-Stacey confirmed that he had rejected the idea of a move to a different team or department as he felt moving the Claimant would make it difficult for her to demonstrate her ability to work to a required standard in the remaining time she had in her probation.

174. He also stated that he decided not to move the Claimant because he didn't have a role within the division so the move would be to a completely different area. He stated that would be potentially unsuitable for the Claimant. When asked about how many roles he was aware of, Mr Armstrong-Stacey stated that they occasionally cross his desk, and he could not recall seeing an appropriate vacancy at the time of the Claimant's request.

175. The tribunal were not convinced that Mr Armstrong-Stacey had done a thorough search for suitable available vacancies at that time. He was asked if he spoke to other managers about vacancies they might have had in their teams or know of, but he stated that he knew about the teams under him and he felt that was enough. We did not think it would have been difficult or onerous of him to email some colleagues to ask them.

176. He also stated in witness evidence that he thought about creating an alternative role but wasn't sure he could put together enough work for her. The fact that, based on his knowledge at that moment in time, it would only be temporary until the OH report confirmed what adjustments were necessary, he did not think this option was practical.

177. It was not clear when exactly Mr Armstrong-Stacey had carried out this search and when he had decided that at that time the option of a move was not appropriate, but it must have been prior to the 2nd September 2022 meeting when he confirms to her that he is not going to agree to her request.

178. The tribunal found that this was evidence that an adjustment was being considered, however. Mr Armstrong-Stacey's evidence was not that he did not agree to the Claimant's move because he did not consider it an adjustment. He only rejected it because he could not implement it practically.

179. On that basis, it appeared to the Tribunal that at least from the 2nd September 2022, there was a situation where the Claimant did meet the criteria of the DL policy, in that she was not able to "work safely or effectively until new or improved workplace adjustments are put in place". The Claimant's situation appeared to the tribunal to be one which was in the spirit of the DL, in that she was not able to return to work because of the Respondent not being able to accommodate her requested adjustments, rather than because she was incapacitated through sickness.

180. It was the Tribunal's finding therefore that from the 2nd September 2022, it was reasonable for the Respondent to place the Claimant on DL as an adjustment to prevent the substantial disadvantage that she was being placed under.

181. The OH report of the 29th September 2022 (page 1102) also confirms that the Respondent should offer a move to a different team as an adjustment for the disadvantages being suffered from her CPTSD. From this date, the Respondent is

placed on even clearer notice about the move and the need to reclassify her sickness absence as DL. Although the report does not specifically state that the move should be backdated (because this is not a normal practical option), it discusses the issues that occurred up to the date the Claimant was last at work (17th August 2022) and that they are the reason a team move is required. It is logical to reason then that the move was an adjustment necessary from the date the Claimant went off sick and that from that date, the Respondent should have considered her to meet the criteria for the DL policy.

182. This is relevant as the Respondent did backdate DL from the 29th September 2022, which was the date of the report. However, we find that they should have backdated to the 17th August 2022 as a reasonable adjustment.

183. As the Respondent failed to make the adjustment, the Claimant's claim succeeds.

<u>Moving the Claimant to a different team</u>

184. Again this overlaps with some of the factual findings in the above section.

<u>Was there a PCP for the Claimant to work in her team (the ECF Policy Unit)?</u>

185. The Respondent accepts that this was a PCP.

<u>Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?</u>

186. The Claimant claims that the PCP to work in her team meant that she was working in an environment that was not safe for her.

187. Again the OH report dated 29th September 2022 confirmed that this was an adjustment that the Respondent should consider. The report states

"Her psychological symptoms are related to long standing PTSD and appear to have been aggravated by her perspectives of her role/her current team".

188. It goes on to say

"…Michaela's experiences of her post/her employer this year have triggered deterioration in her psychological symptoms given their resonance to her previous experiences."

189. Finally of relevance is the paragraph that states

"In the circumstances where it is considered that there has been an irretrievable breakdown between an employee and the employer/other members of the team obviously an option would be mediation. The other option would be to consider a move to a different team."

190. It is clear to the Tribunal that the OH assessor has determined that problems the Claimant is having at work is causing her CPTSD to be exacerbated. The Claimant's evidence is that these were inextricably linked to the team she was working in and the

management she was under.

191. As the Claimant was solely relying on her CPTSD for the reasonable adjustments claim, it was necessary for the tribunal to determine whether her problems with working in her role in her team were linked to that or not. The Claimant had argued that she had difficulty carrying out aspects of her role due to the dyslexia and dyscalculia traits but we had to focus solely on the CPTSD.

192. In her witness evidence, the Claimant stated

"The way I was treated by management was triggering my CPTSD, and meant I was more affected by their behaviour and communication styles…For example, I was denied a break from a meeting in which I was crying and visibly distressed and made to feel unsafe…leaving me with physical and psychological symptoms, including heart palpations and severe emotional dysregulation".

193. The Claimant's oral evidence was consistent with this position. The Claimant maintained that the way she was treated by her line managers exacerbated her CPTSD. We found the Claimant to be credible on this point. It was clear to us that she had been distressed by the interactions with her line managers.

194. We looked at the situation prior to this in order to gain context. Ms Ireland accepted in her evidence that there had been a meeting where the Claimant had been visibly distressed but denied that the Claimant had been crying. We noted that Ms Ireland had not been present at the meeting being referred to and was hearing the information anecdotally. In any event, the fact that the Claimant was "visibly distressed" we find should have alerted to the Respondent that the Claimant was not coping with how she was being spoken to, particularly in light of the fact she suffered from CPTSD.

195. It was our finding therefore that the Claimant's CPTSD had been exacerbated by the Respondent's treatment of her, particularly the treatment by her line managers. The Claimant submitted a grievance about this.

196. On the 25th August 2022, the Claimant asked for a team move as an alternative to be placed on Disability Leave. The Claimant says in her email to Mr Armstrong-Stacey of that date that she feels she is in an environment that is not safe. The tribunal acknowledged that it was difficult to fully see the impact of mental impairments as easily as you could physical impairments. We are reliant more on how the individual describes what impact things are having on her. However, what she was saying about feeling unsafe at work was not inconsistent with what we knew of her CPTSD condition.

197. The Claimant says in her email that her therapist at the Rape and Sexual Abuse Support Centre suggests that continuing to work with her current team whilst the investigation is ongoing may be "re-traumatising" her. This adds credibility in our opinion to the Claimant's assertion that the workplace was not a safe environment for her.

198. Mr Armstrong-Stacey replied the next day to refuse the Claimant's request. He says that it would not be reasonable to move the Claimant as he felt this would be detrimental to her probation period. He felt moving the Claimant to a different team would "be a barrier" to the Claimant being able to demonstrate her suitability to post and grade.

199. On the 26th August 2022, the Claimant receives a sick note saying that the Claimant

"may be fit for work taking account of the following advice".

200. The advice is "Consideration of moving teams within the organisation until formal investigations complete and reasonable adjustments have been put in place". The tribunal interpreted this as a temporary reasonable adjustment being proposed by the Claimant's GP.

201. When sending this to Mr Armstrong-Stacey, the Claimant reiterates that she feels she cannot work safely with the managers that she has pursued complaints again. Again, this has to be taken into the context of her disability. Although most employees may say that they find it difficult to work with someone they have complained against, the nature of the Claimant's condition means that (as supported by the later OH report), that her symptoms would be exacerbated if she is asked to work with these managers.

202. The Claimant attends a meeting with Mr Armstrong-Stacey on the 2nd September 2022. In that meeting she again repeats her request for a reassignment. It is clear that this is something at the forefront of the Claimant's mind.

203. Mr Armstrong-Stacey again refuses but says in his email that he will reconsider the request for a move upon receipt of the OH report. It was clear from the oral evidence of Mr Armstrong-Stacey that the Respondent was treating the OH report as paramount. This was not a reasonable approach in the Tribunal's view. A reasonable employer would have looked at the reality of what was going on at the time rather than wait for the OH report to take any action. It may be too late to make the adjustment at the time of the OH report if the damage has been done.

204. On the basis of the Claimant's comments in her emails about how the situation was affecting her, together with the sick note of the 26th August 2022 and the later OH report, we found that the PCP of having to work in her team did place the Claimant at a substantial disadvantage compared to someone without her disability. The requirement to work in her team with people she had complained about was exacerbating her condition.

<u>Did the Respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?</u>

205. It was our finding that the Respondent was placed on notice when the Claimant explained the impact of work-related stress on her health on the 18th August 2022. Although the Claimant did not make it explicit that she meant the impact on her CPTSD, she states that her health is being affected. Based on what the Respondent knew about the Claimant's health conditions at the time, a reasonable employer would have determined that the impact she was referring to was on her CPTSD.

206. Further, the Claimant sets out the impact of the situation on her condition in her emails on the 25th and 26th August and submits a sick note on the 26th. We found therefore that the Respondent had knowledge from the 26th August 2022 at the very latest.

<u>What steps could have been taken to avoid the disadvantage? The claimant suggests:</u>

<u>c. Managed move to a different team within the Department for Education.</u>

d. To be redeployed

Was it reasonable for the Respondent to have to take those steps? If so, did the Respondent fail to take those steps?

207. Given the fact that the work-environment was causing distress to the Claimant and exacerbating her condition, we find that moving the Claimant to a different team or department would have prevented the PCP from placing the Claimant at a substantial disadvantage.

208. The Respondent's witnesses gave evidence about the practicality of the Claimant moving teams. Chris Armstrong-Stacey stated that he did not believe it was practicable to move the Claimant. In his email, referenced above, he says that moving the Claimant would have had a negative effect on her ability to complete her probation.

209. However, Caroline Jones carried out an investigation into the Claimant's complaints and makes recommendations as part of that. Her recommendation, sent on the 5th October 2022, includes one that the Claimant will have a 4-month extension to her probation period and a move to a different team. This would combat the issues that Mr Armstrong-Stacey said would make it not in the Claimant's best interests to move. She is being moved and given more time to complete her probation, seemingly so that the issues that would come with being moved to a new team and having to acclimatise would be minimised.

210. We found therefore that Mr Armstrong-Stacey was too rigid in his approach and that he could therefore have moved the Claimant on or after the 26th August 2022.

211. Mr Armstrong-Stacey said in his evidence that the Claimant could also not have been moved because he was not aware of any vacancies that were available at the time. However, the tribunal found that he had not made sufficient investigation into whether any vacancies were available. When asked how he knew about what jobs were available, he said any vacancies would normally pass through his desk. The tribunal found that Mr Armstrong-Stacey had not made any active enquiries and that if he had done so, an available post might have bene discovered, as Ms Jones found.

212. On that basis, the tribunal found that it was reasonable for the Respondent to make the adjustment of moving the Claimant to a different team or department from the 26th August 2022 and that they failed to do so.

Harassment

a. A Teams message from Chris Armstrong-Stacey to Lisa Ireland on 27 September 2022 stating "A MH organization championing her?! WTaF."

Did the Respondent engage in unwanted conduct?

213. The Teams message was not denied by the Respondent. Further, the tribunal found that, given the negative connotations of the phrase "What the actual fuck" that this was unwanted conduct.

If so, was this unwanted conduct that had the purpose or effect of violating the Claimant's

dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

214. The tribunal found that the email did have the effect of violating the Claimant's dignity. The Claimant expressed that she found the comment distressing and that it reflected the dismissive attitude of the Respondent towards her and her condition.

215. Mr Armstrong-Stacey was asked about the comment and accepted that it was not an appropriate choice of words.

Was it reasonable for the conduct to have that effect, taking into consideration the Claimant's perception and the other circumstances of the case?

216. The tribunal found that it was reasonable for the conduct to have the effect. The Respondent was fully aware of the Claimant's difficulties and how she was struggling with the effects of her disability and the tribunal found that any reasonable person would agree that belittling her condition in this way would have the effect of violating her dignity or creating a degrading, humiliating or offensive environment.

Did it relate to the Claimant's disabilities?

217. The Respondent, in Ms Ireland's evidence, suggested that the comment wasn't related to the Claimant's disability but was about the fact that there was another piece of correspondence to deal with from her. However, the tribunal did not accept this. We made a finding of fact it was clear that the comment related to the Claimant's mental health disabilities given the phrase "MH" was used.

218. Given each of the above findings, the Claimant's claim for harassment in relation to this comment succeeded.

Harassment

b. A Teams message from Michelle Hindmarch to William Brown on 27 September which states "But basically it will be a polite piss off. She sent a letter from a rape counsellor in last week."

Did the Respondent engage in unwanted conduct?

219. Again, the Respondent did not deny that this was a message that had been sent by one of their members of staff. Again, the tribunal found that this was unwanted conduct, given that the Respondent was using derogatory language in response to a letter having been received from the Claimant's counsellor.

If so, was this unwanted conduct that had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

220. Similar to the above, the Claimant expressed how when she saw the comment, how distressed it made her and how it made her feel that this was indicative of the environment that she faced at work where her condition was not being accommodated for and the effects on her being dismissed by the Respondent.

Was it reasonable for the conduct to have that effect, taking into consideration the

Claimant's perception and the other circumstances of the case?

221. Again, the tribunal found that it was reasonable for the conduct to have that effect. The Claimant had clearly been through a distressing situation which necessitated counselling from a specialist dealing with sexual assault survivors and the Respondent's response to this was to be dismissive and belittling.

Did it relate to the Claimant's disabilities?

222. Although there was no explicit mention of the Claimant's condition in the comment, the tribunal found that the comment did relate to the Claimant's disabilities. Although the Respondent did not know the exact details of the traumatic event that caused her CPTSD, it would be reasonable for them to deduce that the purpose of her counselling was to alleviate the effects of her condition and that therefore any comment about the counselling would relate to her condition.

223. On that basis, the tribunal found that the Claimant's claim for harassment in relation to this comment was successful.

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Employment Judge **Singh**

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Date 22 July 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

25 July 2024

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FOR THE TRIBUNAL OFFICE